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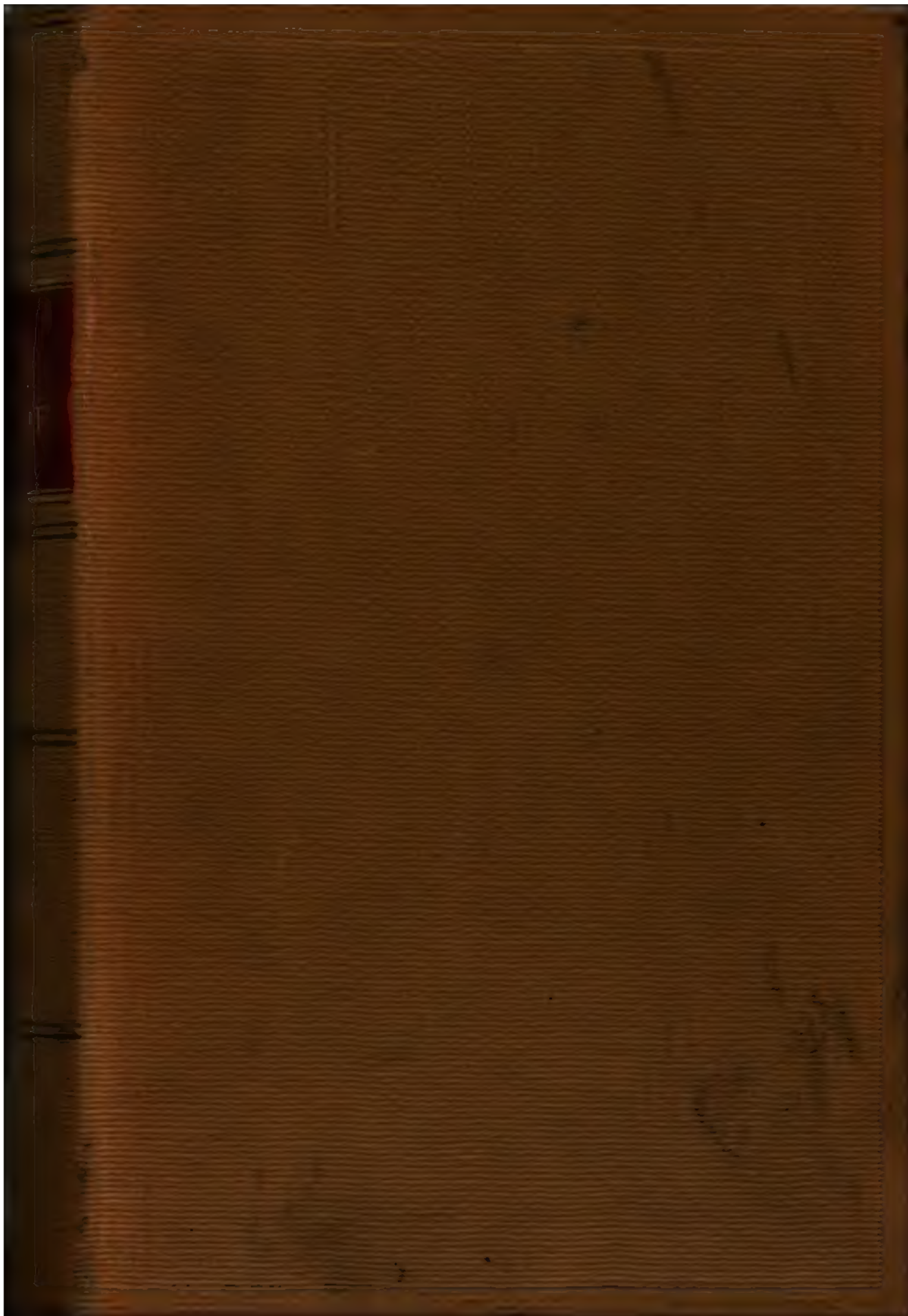
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Chicago*

PRACTICE OF THE LAW

IN

ALL ITS DEPARTMENTS;

WITH A VIEW OF

RIGHTS, INJURIES, AND REMEDIES,

AS AMELIORATED BY RECENT STATUTES, RULES, AND DECISIONS;

SHOWING

THE BEST MODES OF CREATING, PERFECTING, SECURING, AND TRANSFERRING RIGHTS;

AND

THE BEST REMEDIES FOR EVERY INJURY, AS WELL BY ACTS OF PARTIES THEMSELVES,
AS BY LEGAL PROCEEDINGS; AND EITHER TO PREVENT OR REMOVE INJURIES; OR
TO ENFORCE SPECIFIC RELIEF, OR PERFORMANCE, OR COMPENSATION.

AND SHOWING

THE PRACTICE

IN ARBITRATIONS; BEFORE JUSTICES; IN COURTS OF COMMON LAW;
EQUITY; ECCLESIASTICAL AND SPIRITUAL; ADMIRALTY; AND
COURTS OF APPEAL.

WITH NEW PRACTICAL FORMS.

INTENDED AS

A COURT AND CIRCUIT COMPANION.

IN TWO VOLUMES.

VOL. I.—PART I.

BY J. CHITTY, ESQ.

OF THE MIDDLE TEMPLE, BARRISTER.

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MDCCCXXXIII.

L O N D O N :
C. ROWORTH AND SONS, BELL YARD,
TEMPLE BAR.

TO
THE RIGHT HONOURABLE
SIR THOMAS DENMAN, KNT.

Lord Chief Justice of England,

&c. &c. &c.

THIS WORK IS DEDICATED,

WITH

THE DEEPEST RESPECT

FOR THOSE

AMiable QUALIFICATIONS AND THAT INDEPENDENT

PUBLIC CONDUCT

WHICH SO EMINENTLY DISTINGUISHED HIM

AS

AN ADVOCATE,

AND

ULTIMATELY RAISED HIM

TO

THE HIGH JUDICIAL SITUATION

HE NOW FILLS

WITH NO LESS HONOUR TO HIMSELF

THAN

BENEFIT TO THE COMMUNITY.

ADVERTISEMENT.

THIS WORK will be published in *four Parts*, with distinct Indexes to each, and 'the last containing a general Index of the whole, so that each Part will be complete in itself. This (the *first*) Part is *now* published. The *second* will be published in Easter Term next. The *third* and *fourth* (with all the improvements of the present Sessions) before next Michaelmas Term.

The object of this Work is to give a *practical* view of the present *improved law* relating to *Private Rights*, and the *best Remedies* for *Injuries*, so as to enable *all legal Practitioners* in every department not only to adopt the *best* means of creating, perfecting, securing, and transferring *Rights*, but also to select the *best* of several *Remedies*, and pursue the *most judicious* legal course, whether on behalf of a *claimant* or of a *defendant*: and whether by *preventing*, *abating*, or *removing* an Injury by his *own act*, or by *legal proceedings*, or to compel *specific relief* or *performance*, or enforce *compensation* for every description of Injury, as well by his own act, as by arbitration, or summary proceedings before a Judge, or before Justices of the Peace, or in Courts of Common Law, Equity, Ecclesiastical, or Admiralty; showing the modern and improved *Practice* in each. The Work is offered to the Public as a compact Summary of the Law as improved by modern Legislation;

and it is hoped that it may not only assist *Students*, but also be found useful to *Legal Practitioners* in every department. One principal novelty in the undertaking is the collection and consideration of all the *different precautionary measures* to be observed, not only in *creating Rights*, but in *preventing* Injuries, and in the suggestion of the steps to be observed by all members of society, as well to prevent risk or loss, and preserve a right, or secure a defence. Several distinct chapters are therefore devoted to those important subjects; and as most of the Books of Practice hitherto published are confined to the proceedings of a *particular* court or courts, without giving a comparative view of the Jurisdiction and Practice of others, or suggesting *which* of *several* Remedies may be *preferable*, it has been the object of the Author to endeavour, in the following pages, to supply those obvious defects.

February 25, 1833.

PREFACE.

I HAVE attempted in the following work to give a concise but *practical* view of the principal *legal* and *equitable rights* of individuals ; of the *injuries* and *offences* affecting the same ; and the *best remedies* and *punishments* for such injuries, whether by acts of the parties themselves, or by the intervention of legal proceedings ; and as well to prevent or remove the injury as to enforce *specific relief*, or *performance*, or *compensation*, or *punishment* ; and as each proceeding has been improved by recent enactments, rules, and decisions. One object has been to assist *Students* by affording them a compact view of the present law nearly in the same arrangement as adopted by Blackstone, and so as to form a *practical continuation* of that admirable work. But the chief object has been to assist *Practitioners* in every branch of the law, so that every individual, although practising principally in *one department* or in a particular court, may be enabled at once to observe

the general rules and practice affecting the *whole*, and thereby be enabled to suggest to his client the *best remedy*, though in a different course to that which he has usually adopted.

The principal novelty in this undertaking will be found in the *practical suggestions* interspersed relative to the *improvements* to be introduced in creating, perfecting, transferring, and securing *rights*, and in the *precautionary measures* to be observed as well antecedent to as pending litigation, and in the *choice* of the *best* of several remedies,—matters which will be found most essentially to influence the result. In the early part of the work I have considered the maxim, “Laws for *prevention* of injuries are preferable to those for punishment, or even compensation,” as a text well worthy of examination, comment, and arrangement; and from the very able and admirable work of Sir E. B. Sugden, respecting Vendors and Purchasers, (a) I have derived most valuable suggestions upon the great importance of *precautionary measures* in general, and have arranged a class of rules calculated to assist in most of the difficult or ordinary transactions of life, so as to place the party observing them on the *vantage* ground in case of subsequent litigation. The mode in which I have treated the subject may perhaps be considered by some as tending to diminish litigation. But if it were so, I can anticipate that the work would be the more acceptable to the practitioners of a high and honourable profession. The observance of the rules will, however, rather affect the *manner* of litigation than the *quantity*.

I have throughout the work considered not only

(a) Sugden, Vendors and Purchasers, 8 ed. Introd., and *per tot.*

injuries and offences to *individuals*, which are remediable by *action* or *civil* remedies, but also all OFFENCES which more particularly affect an individual and his private right, and the appropriate *punishments*, and when it may be preferable to enforce the *latter*, than to proceed by *action*, so that *every species* of proceeding are submitted for consideration and selection.

The *first* volume relates principally to matters *antecedent* to the commencement of any suit. The *second* volume states in detail the *practical modes* of conducting every proceeding which can be termed litigation; as before *Arbitrators*, whether compulsory or voluntary; before Justices of the Peace; in all the Courts of Common Law; in Courts of Equity; in Ecclesiastical and Spiritual Courts; in the Court of Admiralty and Prize Court; and in the Courts of Appeal from each of those tribunals.

In considering the *practice* of each of these courts I have attempted to follow the same scientific and admirable plans adopted by Mr. Tidd, as regards Courts of *Law*, and some others, as respects *other* courts, in their very valuable works; and every modern rule of court and decision will be found incorporated. I beg, as an instance, attention to the head *Brief* in particular. I have there attempted to suggest, (it is hoped usefully,) some rules to be observed in preparing the same and the evidence, and the different parts of the Brief, as well at law as in equity, so as most advantageously to try an action at law or obtain a hearing in equity. Some *forms*, not previously in print, will be found interspersed, so as to elucidate or assist on emergencies.

An *Analytical* Table of rights, injuries, and remedies, precedes the first chapter of the first volume, and in which I have attempted to show the injuries which

usually affect each right, and the several remedies for each, whether for prevention, compensation, or punishment; and the subscribed notes will show the authorities in proof of each position. Parties themselves and their professional advisers will thereby at one view perceive the different remedies afforded in each case, and be enabled, by very little further inquiry and consideration, to adopt the best.

The *first* chapter of this part is *introductory*, and not so immediately practical as the following; but I have considered it important for the student, as for all practitioners, to state the *general* rules affecting *all* rights, injuries, and remedies, whether public or private, with some principal rules for the selection of the best of several remedies.

At the head of each subsequent chapter will be found an analysis of its contents, and in general referring to each page of the work where the subject is discussed.

The *second* chapter relates to rights affecting the *Person*, whether absolute or relative, and the *injuries* and *offences* and *remedies* and *punishments* affecting or applicable to the same.

The *third* chapter relates to Rights to *Personal Property*, and the injuries, offences, and remedies and punishments affecting or applicable to the same.

The *fourth* chapter relates to *Real Property*, whether corporeal or incorporeal, and Chattels Real, and the rights, injuries, offences, and remedies and punishments relating to the same. To this chapter in particular I invite attention, as an attempt to compress and take a practical view of the law upon the subject, and which may, it is hoped, assist as a collection of most of the *modern* rules and decisions on the subject. An attempt has also been made to arrange all the recent enactments and decisions relating to malicious and other

injuries to real property, with their proper remedies and punishments.

The *fifth, sixth, seventh, and eighth* chapters principally relate to the *precautionary and other measures* to *defend, resist, prevent, abate or remove* injuries of every description, whether by acts of parties themselves and others, or by the intervention of legal authority.

The *fifth* chapter in particular states the rules to be observed to *perfect rights* and *prevent* injuries, before even the *inception* of the latter, and as well in the absence of any contract as in cases of contract. The analysis at the head of that chapter will more fully show its contents.

The *sixth* chapter supposes that an *injury* has been *in part* committed, or *is continuing*, and that still *before* litigation some precautionary measure should be adopted, either in the absence of contract, or where the injury would constitute a breach of contract.

The *seventh* chapter contains rules, the knowledge of which is essential to every member of society, if he wish to travel safely through life, and the nonobservance of which occasions so much loss and expense. It states all the remedies, by defence, resistance, or prevention of injuries to the person, personal property, and real property; when a party may, and how resist illegal process or imprisonment; when relations or strangers may interfere; when and how offenders may be apprehended by private individuals without warrant or process; when nuisances or other injuries may be removed or abated, and the consequences of excess in all the modes of defence, resistance, arrest, abatement, or removal of a nuisance; when recaption, or obtaining restoration of the person, or that of a relation, or of personal or real property may be obtained without any legal assistance; and when satisfaction of rent, or for trespasses or debts, may be enforced by distress, or set-off, or retainer.

The *eighth* chapter supposes the necessity for the intervention of *legal proceedings* to *prevent* or *remove* an injury. Here the practice of obtaining a judge's warrant to prevent a *Duel*; the interference of justices to prevent a fight, or other breach of the peace; *security for keeping the peace*, is fully considered; the practice in obtaining release from imprisonment by writ of *habeas corpus*, or discharge on a more summary proceeding; and lastly, the extensive jurisdiction, for the *prevention* of injuries, by the *injunction of a Court of Equity*, in cases of attempted or actually commenced injury, whether to the person, personal property, or real property. The practice is fully considered in obtaining *injunctions* in certain cases for the protection of the *person*, or to prevent injuries to *personal property*, occasioned by frauds of partners or agents, or to restrain the negociation of bills, or have deeds delivered up, or to have proper security given, or to prevent breaches of trust, or of contracts, or other loss; and to prevent the sailing of ships, or piracy of copyrights; and as respects *real property*, to prevent wasteful trespasses, to quiet possession, to prevent waste or nuisances, whether private or public, and to prevent improper litigation; or attempts to evade justice, as to restrain actions, bills of interpleader, and motions at law under the recent act; writs *ne exeat regno*, and bills to perpetuate testimony, &c.

The *ninth* chapter contains a practical view of the *Statutes of Limitation*, and those limitations in modern acts of proceedings against justices and other persons acting officially, or in exercise of the powers of a particular act. The operation, of these acts, as well at *law* as in *Courts of Equity*, and in *Ecclesiastical Courts*, &c. are stated; and then are considered some consequences of delay in other respects, which either

absolutely bar or prejudice legal or equitable proceedings.

The *tenth* chapter shows the remedies, as well summary as more formal, at law and in equity, to compel *specific relief or performance*, and when proceedings can only be had for compensation in damages, or for punishment. The proceedings by *mandamus* and otherwise, to compel the *performance* of specific acts, or by replevin, or action of detinue, to recover a specific chattel, are considered: and then the extent of the jurisdiction of Courts of Equity on bills *for specific performance* are practically examined. Proceedings of a like nature for restitution of conjugal and other rights in courts ecclesiastical and spiritual, and in courts of admiralty, are lastly considered, and which concludes the first volume of this work.

The *second* volume supposes an injury to have been complete, and that no statute of limitations or other circumstance has completely barred a proceeding for redress; and then the *eleventh* chapter considers the retainers and rights and duties of attorneys, solicitors, proctors, and every agent connected with legal proceedings: then follow the details of every description of proceeding to obtain redress, from its commencement to its conclusion, and the particulars of which will be enumerated at the commencement of the second volume.

Each part contains a *temporary index*, for *facility* of reference, and when the whole work has been printed a general table of contents will be prefixed, and at the end of the second volume will be found a very full index.

J. C.

*Chambers, '6, Chancery Lane,
25th Feb. 1833.*

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ANALYTICAL TABLE

OF

RIGHTS, INJURIES, AND REMEDIES.

Res per divisionem melius aperiuntur.

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(a) 30, 33. When life is in immediate danger may kill assailant. 1 East, P. C. 279 ; 9 G. 4, c. 31, s. 10.
(b) 33. May break outer door to prevent. 2 Bos. & Pul. 260.
(c) 33. 39 & 40 G. 3, c. 94, s. 3 ; 7 B. & C. 669.
(d) 33. Post, c. viii.
(e) Ibid.
(f) 33. Appeal taken away, 59 G. 3, c. 46. Civil remedy merged.
(g) 33. 6 G. 4, c. 108, s. 61 ; 7 G. 4, c. 64, s. 30.
(h) 33. 9 G. 4, c. 31, s. 2 to 14 ; 2 & 3 W. 4, c. 75, s. 16. Indictment for murder, when malicious ; when not, for manslaughter.
(i) Id. Ibid.
(k) Is so in necessary defence of life, or to prevent a forcible felony. 1 East's P. C. 271, 279 ; 9 G. 4, c. 31, s. 10.

(l) 10. After acquittal. 12 East, 409.
(m) 34. 9 G. 4, c. 31, s. 9. What is grievous bodily harm, Holt, C. N. P. 469.
(n) 34.
(o) 35. 9 G. 4, c. 31, s. 13.
(p) 35. 9 G. 4, c. 31, s. 14. Quære, if child still born, Id. Res v. Southern, 1 Burn's J., 26 ed. 611. Indictment not to be for murder unless evidence of killing be clear.
(q) 36. 4 G. 4, c. 54, s. 3.
(r) 36.
(s) 36. Post, c. viii.
(t) Id. Ibid.
(u) Id. Ibid.
(x) 36. 1 Burr. R. 316 ; 3 East's R. 581 ; 6 East, 464, 471 ; 2 B. & Ald. 462.
(y) 36.

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(c) 38. With force, not using dangerous weapons, 2 Rol. Ab. 546; 2 Saund. 5; c. vii.
(d) 38. With force, by husband, wife, parent, child, apprentice or servant. 2 Rol. Ab. 546; Owen, 151, c. vii.
(e) *Moliter manus*, 2 Stra. 954; c. vii.
(f) 38. c. viii.
(g) *Id.* *Ibid.*
(h) 39 & 40 Geo. 3, c. 94, s. 3; 7 B. & C. 609.
(i) 38. When common, under 5*l.* damages. 9 Geo. 4, c. 31, s. 27 to 29, 33 to 35; 1 B. & Adol. 382.

(k) 26, 27, 38. *Restrained* as to costs, if no special plea nor judge's certificate, and damages under 40*s.*
(l) 38. *Common*, at common law, 3 Bla. C. 121; or *special*, 9 Geo. 4, c. 31, s. 27 to 29.
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(n) 38. *Ibid.* s. 23 to 29.
(o) 7 & 8 Geo. 4, c. 29, s. 29.
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(q) 11. After trial of indictment, 12 East, 409.
(r) 38. 9 Geo. 4, c. 31, s. 11, 12, 25.
(s) 38. 41. *Ibid.* s. 12.
(t) 38. 9 Geo. 4, c. 31, s. 15, 18, 21.
(u) 38. 7 & 8 Geo. 4, c. 29, s. 6, a misdemeanor at common law, Burn's J. Threats.

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(x) 38. 9 Geo. 4, c. 31, s. 25.
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(a) 39. 7 & 8 Geo. 4, c. 18, s. 1; 4 Bing. 643.
(b) 39. With force, 2 Rol. Ab. 546; 2 Saund. 5;
if by stranger, mol. man., 2 Stra. 954.
(c) 30. 39 & 40 Geo. 3, c. 94, s. 3; 7 B. & Cres.
669. Burn's J. Lunatics.
(d) 39. Ch. viii.
(e) Id. Ibid.
(f) 39. Trespass, 2 Lutw. 1428; Regist. 104;
Co. Lit. 161; 6 East, 126, 133; 3 Bla. C. 120.
(g) 39. 6 East, 126; Threat to servants, 5 Geo. 4;
Burn's J. Threat. Servant, post.
(h) 39. 4 Geo. 4, c. 54, s. 3.
(i) 39. Ibid.
(j) 7 & 8 Geo. 4, c. 18, s. 1.
(k) 4 Bing. 643; 8 B. & Ald. 304.

(l) 39. 1 Hale, 485, may even kill aggressor.
(m) 39. With force.
(n) 39. 9 Geo. 4, c. 31, s. 16 to 18, sufficient to
prove penetration.
(o) 39. When not inception of rape.
(p) 40. 9 Geo. 4, c. 31, s. 17, 18.
(q) 40.
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(t) 40. Ibid. s. 20.
(u) 41. Ibid. s. 22. 1 East, P. C. 464 to 472.
(v) 41. After conviction. MS. decision.
(x) 41. 3 Ves. & B. 175.
(y) 41. 54. 55. Marriage Acts, 4 Geo. 4, c. 76,
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(z) 41. 9 Geo. 4, c. 31, s. 15, 18.
(a) 38. 41. 9 Geo. 4, c. 31, s. 25.

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(b) 41. 3 Campb. 398, 403; 5 B. & Cres. 519; 4 Taunt. 649; 4 Campb. 262; 4 Car. & P. 262.
(c) 41. 4 Car. & P. 297; 5 Car. & P. 1; Com. Dig. Action, Negligence, A. 5.; post, c. vii.
(d) Indictment lies for letting a dangerous animal go at large, Burn's J. Nuisance, II.
(e) 41. Driving carriages, 4 B. & Cres. 223; 1 Car. & P. 636; when not, 4 M. & S. 27; not duly keeping a loaded gun, 5 M. & S. 198; 1 Stark. R. 287.
(f) 41. 1 & 2 Geo. 4, c. 41, s. 1.
(g) 41. 42. When preferable to indict or sue.
(h) 42. C. vii. Not unless it be already a nuisance, 12 Mod. 510; but see 4 M. & S. 73.
(i) 42. C. viii.; 1 Mad. Ch. 157 to 165; 2 Chan. Cas. 110.
(k) 42. C. vii.; 2 Smith, 9.
(l) 42. 9 Coke, R. 55, 58, b.
(m) To abate the nuisance, 3 Bla. C. 220, now

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(n) A sure remedy to prostrate, 3 Bla. C. 221, 222; F. N. B. 124; 5 Coke, 100. Now obsolete.
(o) 42. C. vii.
(p) 42. C. viii.
(q) C. vii.; 2 Salk. 458; 2 Smith, 9. Less care is required than in removing a private nuisance; but see Burn's J. Nuisance, Public, III.
(r) On his own view, 1 Mod. 76.
(s) 3 Bla. C. 219, 220, note b., Burn's J. Nuisance, V.; 16 East, 196.
(t) 43. Burn's J. Nuisance, II.; 1 Burr. 333; 5 Esp. R. 217; 2 Car. & P. 485; Peake, 93; 4 Maule & Sel. 272; 8 T. R. 142. Judgment to prostrate.
(u) 6 Geo. 4, c. 78; 4 T. R. 202; Burn's J. Quarantine.
(x) 42. 3 B. & Adolp. 43. Bad flour and bread may be seized, 31 Geo. 2, c. 29, s. 29, 30. Bad meat.

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(y) 42. 1 Rol. Ab. 90, pl. 1; 2 East, 314.

(z) 42.

(a) 42. Bad flour may be seized; punishment of millers for adulterating flour, 31 Geo. 2, c. 29, s. 29, 30; 1 Burn's J. Bread and Mill. Bakers using alum in bread, 3 M. & S. 11. Selling any bad food, 2 East's P. C. 822; 6 East, 133; 1 Burn's J. Bread, 406, note (a); Bad meat, Burn's J. Butcher; 1 Stark. Slander, 143. As to bad butter, see 36 Geo. 3, c. 86, s. 4. If a conspiracy, it is indictable at common law, 2 Ld. Raym. 1179.

(b) 42. Penalty on millers, 31 Geo. 2, c. 29, s. 29, 30. Butcher, bad meat, Burn's J. Butcher; and see *supra*, note (a).

(c) 43. 3 Bla. C. 122, note 10.

(d) 43. Ibid.; 2 Wils. 359; 8 East, 348.

(e) 43. Com. Dig. tit. Physician; Vin. Ab. tit. Physician.

(f) 43. 40.

(g) 43. Frightening by semblance of ghost, an indictable misdemeanor, 4 Bla. C. 197, 201, note 25; 1 Hale, 429; Smith's Foren. Med. 37 to 39; 1 Paris & Fonb. 351, 352.

(h) 43. Defined, 9 B. & Cres. 172, 403.

(i) Chap. vi. May explain facts and suspend public opinion, and state intent to sue. Defendant's answer when admissible to clear up ambiguity, *Re v. Tucker*,

R. & M. C. C. 134; Car. C. L.; Burn's J. Threats, II.

(k) 44. Must not cross libel, 2 Stark. R. 93.

(l) 44. When may destroy a libel, as a picture, &c. 5 Coke's R. 125, b.; 2 Campb. 511; 2 Bar. & Cres. 311.

(m) 44, note (s). Chit. Eq. Dig. 655; *post*, chap. viii.

(n) Chap. viii. Injunction lies to restrain publication of letters only upon the ground of *property*, and not directly as to *prevent* a libel, 2 Swans. 413; 2 Bla. C. 407, note 14; excepting in a pending proceeding, Chit. Eq. Dig. 655.

(o) 44. Hob. 53; 11 Mod. 99.

(p) 44. 5 Coke's R. 125.

(q) 1 Bla. Rep. 294; 5 B. & Ald. 595; Dougl. 284, 387.

(r) 44. What words actionable or not; *suggested improvements* in remedies, *post*, 23, note (d). *Malice* when essential, 45, 46. *Costs in*, 45.

(s) 45. 3 Bla. C. 123, 125, note 13.

(t) 45. Only for words of a justice in office, 2 Stra. 617; Burn's J. Justices of Peace, VI.

(u) *Post*, 23, note (d).

(v) 45. *Post*, vol. 2. Charge of a spiritual offence, 2 Salk, 692; 2 Stra. 946; 1 Lev. 49. *Aliter*, if temporal slander as well as spiritual, 2 T. R. 473; 3 Bla. C. 123, b., in notes. Must sue in spiritual court within six calendar months, 27 Geo. 3, c. 44.

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(x) 45, 46.
(y) 46.
(z) 47.
(a) 47, 48.
(b) 47. 7 & 8 Geo. 4, c. 29, s. 7.
(c) 47. Ibid. s. 6.
(d) Ibid. s. 8.
(e) 47. 6 East, 126; Burn's J. Threats.
(f) 9 Geo. 4, c. 31.
(g) 47. Defined.
(h) 49. Chap. vii. Definition of imprisonment. Illegal imprisonment is *without process* or under *illegal process*, and may be resisted, or party may escape or be rescued, or even break prison, 5 East, 304; 6 T. R. 236; 1 East's P. C. 310, 325, 329; 1 Leach's C. L. 206; 2 Stra. 1226; Hawk. B. 2, c. 19, s. 1 & 2. But

these are hazardous, and it is always safer to obtain habeas corpus, as *post*, chap. viii. At all events the mode of resistance, escape or rescue, must be proportioned to the necessity, and killing the assailant would at least be manslaughter, *Rex v. Stockley*, 1 East's P. C. 310; Fost. Ch. 312; *Rex v. Nestor*, *post*, chap. vii.
(i) 49. 31 Car. 2, c. 2; 56 Geo. 3, c. 100; 1 Chit. C. L. 118 to 129; 13 East, 196; 2 M. & S. 428; 6 M. & S. 108; 5 B. & Ald. 791; chap. viii.
(k) 49. Id. *ibid*.
(l) 49. Lies when illegal imprisonment, not under process, or under void or misapplied process, 6 T. R. 234. *Aliter*, if against magistrate after conviction quashed, 43 Geo. 3, c. 141, s. 1; 5 Taunt. 580; or if process regular, though no crime or no debt, then the action must be *case*, 3 T. R. 185.

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| I. THE PERSON. 1. Own | 2. Personal liberty (continued.) | 1. False imprisonment without legal process (continued.) 2. By leaving seamen abroad 3. Malicious prosecution of a regular criminal proceeding(p) 4. Malicious arrest or commission of bankruptcy | 3. Punishment. 1. Indictment.(m) 2. Information.(m) 1. Compensation. Action.(n) 2. Punishment. Indictment, misdemeanor.(o) Information.(o) 1. Prevention. 1. Explanation.(q) 2. Not recriminate.(q) 3. Not resistance or escape, nor rescue nor prison breaking.(r) 4. Habeas corpus and bailing.(s) 2. Compensation. Action on case.(t) 3. Punishment. Indictment.(u) 1. Prevention. 1. Bailing and habeas.(s) 2. Not escape, &c.(y) 2. Compensation. Action on case.(s) Recovery of costs.(a) 3. Indictment. 1. Perjury.(b) 2. Conspiracy.(c) |
| | 3. Burial(d) | Refusal to bury Stealing body | Mandamus.(e) Indictment.(f) Indictment, misdemeanor.(g) |

(m) 50. 4 Bla. C. 218, 219; 3 Chit. C. L. 835; or indictment for conspiracy, if several concerned, 2 Burr. 993.

(n) 49. Action on contract, 2 East, 145, or trespass or case, according to circumstances.

(o) 49. An indictable misdemeanor, punishable with imprisonment, 9 Geo. 4, c. 31, s. 30. Indictment or prosecution in name of Attorney-General.

(p) 48. Defined, and distinguished from false imprisonment.

(q) Post, chap. vi.

(r) 49. Chap. vii. When the imprisonment is lawful in form, though the party be innocent, resistance, escape, rescue or prison breaking, are punishable by different statutes, post.

(s) 48. Chap. viii. Habeas lies to bring up party to be bailed, when offence bailable.

(t) 48. Action on case lies after acquittal of a prosecution malicious and without probable cause, Blackford v. Dodd, 2 B. & Adolp. 179; 3 Bla. C. 126, note 20.

(u) 50. Indictment for conspiracy, 2 Burr. 993; 1 Salk. 174; 1 Stra. 193.

(x) Chap. vii.

(y) 49. If civil process be regular, and party imprisoned were intended to be sued, no escape is legal, though no debt be due, and defendant must put in bail and try the debt, chap. vii.

(z) 50. On proof of malice and want of probable cause, 3 B. & Cres. 139; 1 B. & Adolp. 128; 2 B. & Adolp. 695; 2 Wils. 307; 3 Bla. C. 126, note 20.

(a) 50. 43 Geo. 3, c. 48, s. 3; 4 B. & Cres. 26.

(b) Perjury, false swearing to debt, 1 Peak's C. N. P. 112; 2 Chit. Crim. L. 318 to 330.

(c) 2 Burr. 993.

(d) 50, 51. Rights to, and to a vault or monument in general, Id. ibid.

(e) 50, 51. To bury generally, but not in a particular manner or place.

(f) 52. For obstructing funeral or stealing body, &c.

(g) 52. 1 Russ. Crim. 415, 2 ed.; Anatomy Bill, 2 & 3 Wm. 4, c. 5.

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(h) 53 to 61. Enactment and decisions as to marriages. 56, 57. Promises to marry, when binding. 57, 58. Settlements. 58. Deeds of separation illegal. 59. Protection of wife, &c.
(i) 59. 2 Bos. & Pul. 260; 2 Rol. Ab. 546; 3 Bla. C. 3.
(k) 39 & 40 Geo. 3, c. 94, s. 3; 7 Bar. & C. 669; Burn's J. Lunatic.
(l) Burn's J. Surety, Peace.
(m) Ante, xvii. note (f); Styles, 347; 1 Lev. 247; Yelv. 89; 1 Ld. Raym. 339. But for temporary loss and expense before death, action lies, 1 Campb. 193.
(n) 9 Geo. 4, c. 31.
(o) With force, 2 Rol. Ab. 546; 3 Bla. C. 3.
(p) Per quod consortium. &c. 3 Bla. C. 140.
(q) For injury to her, 3 Bla. C. 140.
(r) 3 Inst. 134; Hal. Anal. 46; 3 Bla. C. 4.

(s) Post, chap. viii.
(t) Fitz. N. B. 89; 3 Bla. C. 139, note 27.
(u) 59. After demand, Willes, 578 to 580; 6 T. R. 221; 3 Bla. C. 139, note 27.
(x) If person killed in act of adultery, it is only manslaughter, 1 Hale, 486; T. Raym. 212.
(y) 2 M. & S. 436; 2 New R. 482; but *semble* may be in case, 6 East, 251, 387. And should be so if a count for harbouring will be material.
(z) Stra. 647, 706; 1 B. & Adolp. 227; 1 Lev. 4; 7 T. R. 603.
(a) 59. 1 Bla. C. 441; 1 Ought. 317; 11 Ves. jun. 536.
(b) 59. 1 T. R. 6; 3 Bla. C. 64, 65.
(c) 59. 3 Stat. Trials, 519; Burn's J. Conspiracy, I.
(d) 59. 3 Bla. C. 94.
(e) 2 Bla. R. 1237, 1239; 1 Salk. 114; 9 East, 472.

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(f) 33, 39, 59, note (c). 1 Hale, 485.

(g) 8 T. R. 545; 2 B. & Cres. 555; 3 B. & Cres. 291.

(h) Chit. Eq. Dig. 497.

(i) 9 East, 471.

(k) 60. In equity, 1 Jac. & W. 348; at law, 3 Campb. 326; 1 P. Wms. 482; 1 M'Clell. & Y. 269.

(l) 60. 1 Jac. & W. 348.

(m) Court of equity will only bind husband to good behaviour, not remove wife from him, Ambl. 334; 2 Ves. 578.

(n) 59, note (m), 60. Divorce, 11 Ves. J. 536.

(o) Indictment at common law for battery, &c., wife a witness against husband, 1 Stra. 633; 1 East's P. C. 455; Burn's J. Evidence, IV. s. 4.

(p) 60. 13 East, 173; when not, 1 Chit. R. 674; 1 Jac. & W. 94; Prec. Ch. 492.

(q) 3 Bla. C. 94; Phil. Ec. C.

(r) 3 Bla. C. 94, note (14).

(s) With force, 2 Rol. Ab. 546; 3 Bla. C. 3, note 2; ante, xvii., note (a).

(t) Appeal, when may, 69 Geo. 3, c. 45. Compensation to widows in some cases, 7 Geo. 4, c. 64, s. 30, and ante, xvii., note (g).

(u) Ante, xvii., notes (h), (i), (k).

(x) Forfeited by adultery, 5 B. & Adol. 227; so dower: but *semble* not jointure, 2 B. & Cres. 547; 1 Taunt. 417; 8 Bing. 256.

(y) 60. 1 Salk. 118; 2 Ld. Raym. 1006; 2 Stra. 1214; 3 Taunt. 421. *Aliter*, if wife voluntarily leave husband and tradesman has notice, 2 Stra. 1214; 2 Stark. R. 87; or wife guilty of adultery, 1 B. & Adol. 227.

(z) 60. 1 Bla. C. 441; 3 Bla. C. 94; 1 B. & Adol. 60, 61; 3 Bing. 550.

(a) 58, 59, 60. But *semble*, not on deed of separation, which is void. 58. *Westmeath v. Westmeath*, 1 Dow's Rep. New S. 519.

(b) 60. 5 Geo. 4, c. 83, s. 3, but not if wife guilty of adultery, 1 B. & Adol. 227.

(c) 61. How far a wife may be liable on her contract.

(d) 61. When and how a wife may have separate property and sue in equity.

(e) 60. When wife may have a habeas corpus to enable her to dispose of her separate property.

(f) 63. 365. How a wife may appoint, devise, or surrender her copyhold, &c.

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(g) 61 to 69. Child when or not *legitimate*, and distinctions, 61, 62. *Registers* and entries in bibles of births, &c. 62. 8 B. & Cres. 813; 1 Phil. Ecc. Cas. 315; 8 Dowl. & Ryl. 325. *Controul* over children, and parents' right, 64; 10 Ves. 58, 61; 2 Russ. R. 1; 2 Bligh's R. New S. 124; 1 Dow, N. S. 124; *Compelling maintenance*, 65. *Donations* to children, 65. *Family arrangements*, 67, Chit. Eq. Dig. 1230; and child's property, 68.

(h) *Ante*, xvii.

(i) 63. With force, 2 Rol. Ab. 546; Cro. J. 296.

(k) *Ante*, xvii., notes (c), (d), (e).

(l) 63. Action of trespass, if *per quod servitium*, father sustains any damage or expense, but not otherwise, 63, n. (o); Sir T. Raym. 259; 3 Bla. C. 143; MS. note, 30; *Ibid.* *Hall v. Holland*, 4 B. & Cres. 660. But action of trespass in child's name is always sustainable for a battery.

(m) 9 Geo. 4, c. 31, s. 24 to 29, 33 to 35.

(n) Indictment at common law, 3 Bla. C. 121.

(o) 63. 3 Bla. C. 3, 4. May stop clothes to prevent illegal absence, 1 Car. & P. 101.

(p) 63. 3 Bla. C. 4; 3 Inst. 134; Hal. Anal. s. 4, 6. How in equity, 3 P. Wms. 152; Chit. Eq. Dig. 731.

(q) 63. 4 Moore, 366; 7 East, 579.

(r) To have access to child, 3 P. Wms. 62; Chit. Eq. Dig. 731.

(s) 64. When parents' conduct improper, &c. 2 Russ. R. 1. *Wellesley v. Wellesley*, 2 Bligh's Rep.

New S. 124; 1 Dow, N. S. 124; 2 Sim. 35; 1 Jac. R. 226, 245, 251; 10 Ves. J. 52, 58.

(t) 63. Cro. Eliz. 770; 23 Vin. Ab. 451; F. N. B. 90; 2 P. Wms. 116; 3 Co. 38; 5 East, 221; Andrews, 312; Sir T. Raym. 474; 1 Bla. C. 541, note 12; 3 Bla. C. 140, note 28, 143, note 30; but a parent usually sues as *master per quod*, &c.

(u) 63. 9 Geo. 4, c. 31, s. 19, 20. Indictment for conspiracy to marry and get fortune, 3 Ves. & B. 173. Abduction of any children by any sinister means, as violence, deceit, conspiracy, intoxication, &c. for purpose of marrying them, an offence at common law, 1 East's P. C. 459.

(x) 63. 2 Stra. 1107, 1108; And. 310; 1 East's P. C. 460; Hawk. B. 2, c. 26, s. 1 to 9; Sir T. Raym. 474.

(y) 9 Geo. 4, c. 31, s. 20.

(z) *Semble*, see note (l); but parent usually sues as *master per quod*, &c. 5 T. R. 360, 361; 3 Bla. C. 142, note 30. *Demand* of child, *post*, c. v. & vi.

(a) 9 Geo. 4, c. 31, s. 21.

(b) 63. Parent must prove some service and damage, and can only sue as *master* for loss of service, 5 East, 45; 6 East, 391; 11 East, 23; Sir T. Raym. 259; 3 Bla. C. 142, note 30.

(c) 63. Trespass, when also an illegal entry of parent's house, 2 T. R. 166.

(d) 63. 3 Bla. C. 64, 65.

(e) Burn's J. Bastard.

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| 2. Parent & child. | | | |
| 1. Parent's right (continued.) | 2. To services of child (continued.) | 5. Solicitation chastity | Suit, ecclesiastical. (f) |
| | 3. To obedience, and to educate child | Disobedience | Indictment, conspiracy. (g) |
| | | | Information, K. B. (h) |
| | 4. To earnings of child | Nonpayment of | Correction. (i) |
| | 5. To controul marriage of infant child or ward | Disobedience | Bill, equity. (k) |
| | | | Bill to restrain parent. (l) |
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| II. Rights of child | 1. To his own personal security | Same injuries as any other individual | Bill in equity. (n) |
| | 2. To person of parent. | Homicide, battery, &c. (p) | Same Remedies. (o) |
| | 3. His own maintenance | Withholding | Defence. (q) |
| | | | No action unless contract. (r) |
| | 4. Education, when or not compelled (x) . . | Improper education (x) | By bill in equity. (s) |
| | 5. His own property (y) | Securing same | By justices. (t) |
| III. Guardian and ward. | | | Indictment. (u) |
| 1. Guardian's right | Same rights as parent. (a) | | Bill, equity. (x) |
| | 1. In person of ward (a) | Abduction of | Bill in equity. (z) |
| | | | 1. Prevention. (b) |
| | | | 2. Stopping elopement. (b) |
| | | | 3. Habeas corpus. (c) |
| | | | 4. Indictment. (d) |
| | 1. In education and controul | Disobedience | Chancellor's interference. (e) |
| | 2. In marriage of | Marrying without consent of guardian | Information. (f) |
| | | | Indictment. (f) |
| | | | Imprisonment, contempt. (g) |

(f) 63.
(g) 3 State Tr. 519. Burn's J. Conspiracy, I.
(h) Id. Ibid.
(i) 64. Hawk. P. C. 130; 1 Bla. C. 452. ' Must be moderate, 10 Ves. 58, 6.
(k) 64. 68, 69, note (y). To compel son to continue at a particular university, 1 Stra. 167; 3 Atk. 721; 3 P. Wms. 51.
(l) 64, 65. 2 Russ. R. 1; 2 Bligh's Rep. New S. 124; 1 Dow, New S. 154.
(m) Parent's right is only to earnings from labour, and not to any other property, 3 B. & Ald. 548; 2 Car. & P. 578; 1 Bla. C. 452, 453. Parent not entitled to infant's property except for maintenance of child when parent unable, Chit. Eq. Dig. 733. See post, Guardian and Ward.
(n) 68. Only when a ward of chancery, 2 Atk. 535, 539. See Indictment for Conspiracy, &c. ante, xxvi., note (u); Guardian and Ward, Chit. Eq. Dig. 736. See as to consent of parents, post, 68 to 55.
(o) Ante, xvii. to xx., and notes; Chit. Eq. Dig. 739.
(p) Ante, xvii., &c.
(q) 68. Defence with force but no action, 2 Rol. Ab. 546; 3 Bla. C. 3, 4, 142, 143.
(r) 68. 4 East, 84; 6 Esp. R. 131; 1 Car. & P. 1, 5; 2 Car. & P. 82; 7 Dowl. & R. 612. How to

secure property for infant's benefit, 65, 66.
(s) 3 Atk. 60; Chit. Eq. Dig. 730, 733.
(t) 43. Eliz. c. 2, s. 7; 7 Jac. 1, c. 4, s. 8; 59 Geo. 3, c. 12, s. 31, 32; 5 Geo. 4, c. 88, s. 3; 4 Burn's J. Poor.
(u) 65, 68. Starving child of tender years, Russ. C. C. 20; 2 Campb. 650, post, 34.
(x) 1 Bla. C. 450, 451; 10 Ves. 67.
(y) 63. By gift from father when old enough, 2 Car. & P. 578; 3 Bla. 453. Other property, note (h).
(z) 1 Bla. C. 462, note 11; 1 P. Wms. 702; 2 P. Wms. 117; 4 Bro. C. C. 101, 102; 2 Fonbl. 5th edit. 232; 11 Ves. jun.; 2 Bligh, N. S. 124.
(a) 69, 70. Father's power to appoint guardian under 12 Car. 2, c. 24. In general, guardian has same powers as parent during guardianship, 1 Bla. C. 460 to 467, and notes; and whilst funds in court, 70; 2 Sim. & Stu. 123.
(b) 69. May stop clothes of ward to prevent elopement, 1 Car. & P. 101.
(c) 63. Note (l), *semble*.
(d) If by conspiracy, 1 East's P. C. 459.
(e) 69. Ibid. note.
(f) 69, note (a). If by conspiracy, indictable at common law, 1 East's P. C. 469; 1 Bla. C. 462 to 467.
(g) 69. Notes (b), (c), (d), (e). 3 P. Wms. 116;
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| IV. Master and apprentice. (p) 1. Master's rights | 1. In person of apprentice 2. In services of 3. In obedience of | Battery Other injuries (q) Abduction Harbouring Absenting Breach of indenture Debauching daughter per quod Disobedience | 1. Prevention. 1. Defence of. (r) 2. Compensation. Action, trespass per quod. (s) 3. Punishment. 1. Justices. (t) 2. Indictment. (u) Recaption. (r) Habeas corpus, when not. (y) Chief justice's warrant. (z) Justice's warrant. (a) Justices. (b) Trespass per quod. (c) Action, case. (c) Indictment, when. (d) Action, covenant. (e) Action per quod. (f) Correction. (g) Justices. (h) |

5 Ves. 15 ; 6 Ves. 572 ; 16 Ves. 259 ; may be imprisoned in Fleet, 8 Ves. 74 ; how to clear contempt by making proper settlement, 1 Ves. jun. 154 ; but not of course, 8 Ves. 74 ; nor appearance by attorney allowed, 4 Ves. 386.

(h) 69, 70. 1 Bla. C. 463 to 466 ; how to obtain proportion for maintenance of infant, 69, 70.

(i) Id. Ibid.

(k) 69. When guardian removable, 1 Bla. C. 462, note 8. When not, id. note 11 ; 2 P. Wms. 561.

(l) 69, 70. Id. ibid. 1 Bla. C. 463, note ; Chit. Eq. Dig. 729, 730 ; 2 Chan. Rep. 237 ; 2 Lev. 128 ; 1 P. Wms. 704, 705 ; 3 Bro. P. C. 341.

(m) 2 Chan. Rep. 237 ; 2 Lev. 128 ; 1 Bla. C. 463, note (g).

(n) 70. When or not may be obtained on petition without bill ; and see p. 68 ; 1 Bla C. 463, note ; 3 Bro. C. C. 88, 387 ; 4 Id. 101 ; 12 Ves. 492 ; 4 Ves. 362 ; 11 Ves. 1 ; 2 P. Wms. 117.

(o) 1 Blac. 462 to 467.

(p) 70 to 72. Suggested stipulations.

(q) See " Child," ante, xxvi.

(r) 70. With force, 2 Rol. Ab. 546.

(s) 70.

(t) See case of common assaults and battery, 9 Geo. 4, c. 31.

(u) Indictment at common law.

(x) 70. 3 Inst. 134 ; post, c. vii.

(v) 70. Statute 31 Car. 2, c. 2 ; 56 Geo. 3, c. 100 ; only on behalf of apprentice, 6 T. R. 497 ; 5 East. 38 ; 7 T. R. 745 ; post, c. viii.

(z) 70, 71. May be issued on application of master, when, 7 T. R. 745 ; 1 Leach, C. L. 233 ; post, c. viii.

(a) 73. Particular acts relating to apprentices, Burn's J. Apprentice, 183 to 193. Justice's warrant to apprehend apprentice, 5 Eliz. c. 4, s. 47 ; 7 T. R. 745 ; stat. 6 Geo. 3, c. 25, compels apprentice to serve out his absent time. 16 East, 13.

(b) 73. Burn's J. Apprentice.

(c) Trespass only when taken by force, 1 Salk. 380 ; 3 Salk. 391. Case, when preferable, 1 Salk. 68 ; 4 Moore, 12 ; 6 T. R. 652 ; 7 T. R. 310, 314.

(d) 6 Mod. 182 ; Burn's J. Apprentice, VI. (5), aliter, if conspiracy, 2 Stark. R. 489.

(e) Dougl. 518 ; Cro. Car. 179 ; 3 B. & A. 59 ; 6 B. & Cres. 686.

(f) 70. Case or trespass, 3 Wils. 18 ; 2 New R. 476 ; 2 T. R. 176 ; 6 East, 577.

(g) 71. By master, 1 B. & Cres. 469 ; Cro. Car. 179 ; 2 Shower, 289 ; 1 Bla. C. 428 ; F. N. B. ; Burn's J. Apprentice, VI. (6), (7) ; Correction by Justices, Burn's J. Apprentice ; but master must not delegate, 9 Coke, 76.

(h) 71. Burn's J. Apprentice. When may discharge apprentice, 71, note (g).

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| I. THE PERSON. | | | |
| II. Relative rights. | | | |
| IV. Master and apprentice. | | | |
| 1. Master's rights .. | 4. His personal earnings | Withholding | Action for. (i) |
| 2. Rights of apprentice | 1. In person of master | Battery, &c. | Defence of. (k) |
| (continued.) | 2. Maintenance | Withholding of | Justices. (l) |
| | | | Action, indenture. (m) |
| | | | Indictment, when. (n) |
| | 3. Care and treatment.. | Cruelty | Indictment. (o) |
| | Instruction | Withholding | Magistrate. (p) |
| | | | Action, indenture. (q) |
| | Return premium .. | Withholding | Magistrates. (r) |
| | | | Equity suit. (s) |
| V. Master and servant or clerk. (t) | | | |
| 1. Right of master.... | 1. To person of servant | Homicide | 1. Prevention. (u) |
| | | | 2. No action. (x) |
| | | | 3. Punishment, indictment. (y) |
| | 2. To services of | 1. Injuries by third person with force, as | |
| | | 1. Menace | 1. Prevention. (z) |
| | | 2. Assault. | 1. Defence of. (z) |
| | | 3. Battery. | 2. Compensation. |
| | | 4. Wounding. | 1. Action, trespass. (a) |
| | | 5. Mayhem. | 3. Punishment. |
| | | 6. Imprisonment. | 1. Justices, summary proceedings. (b) |
| | | 7. Assault on seamen and servants in trade. | 2. Justices, common assaults. (c) |
| | | | 3. Indictment, special assaults. (d) |
| | | 2. Injuries without force. | |
| | | 1. Abduction | 1. Recaption. (e) |
| | | 2. Harboursing | 2. Habeas corpus. (f) |
| | | | 3. Action. (g) |
| | | | 4. Punishment. (h) |
| | | | Indictment, conspiracy. (h) |

(i) 71. When master may sue in *assumpsit* or case, 1 Taunt. 112; 3 M. & S. 191; 4 Taunt. 876.

(k) 71. With force, Rol. Ab. 546.

(l) 71. 34, 35, 43. 20 Geo. 2, c. 19; 4 Geo. 4, c. 29; Burn's J. Apprentice, VI. (7), IX. p. 183 to 193.

(m) 71. Burn's J. Apprentice, VI. (2), (3), (7).

(n) 71. 34, 35, 43. 2 Campb. 650; Russ. & R. C.C. 20; 1 Russ. 16. Not against a married woman for neglecting to provide proper food, 72, note (h).

(o) 71, 72. 34, 35, 43.

(p) 71. *Supra*, note (b).

(q) 71. Burn's J. Apprentice, VI. Though apprentice absent himself, master must continue to instruct him on his return, 1 B. & Cres. 460. 2 Dowl. & R. 465.

(r) 71.

(s) 71, note (g).

(t) See *Rights* in general, 72 to 83; *Liabilities* of Master, 79, 80.

(u) 79. Prevention by any one, 2 Bos. & Pul. 260. Master may defend with force, 79, n. (l).

(x) 79. No action *per quod*, Styles, 347; 1 Lev. 247; Yelv. 89; 1 Ld. Raym. 339. *Sed quære* for temporary loss of service; where *manslaughter*, 1 Camp. 193.

(y) 9 Geo. 4, c. 31.

(z) 79. With force, 2 Rol. Ab. 546, D. pl. 2; Owen, 151; Lofft, 215; 1 Hale, 484; Hawk. B. 2,

c. 60, s. 24; Bac. Ab. Master and Servant, P.; 1 Bla. C. 429; 3 Bla. C. 3; 1 Burn's J. 270; 5 Burn's J. 428; denying, 1 Salk. 407; 1 Ld. Raym. 62; Bul. N. P. 18.

(a) 79. Action must be *per quod*, but he must be a servant, not a performer at a theatre, 1 Esp. R. 386.

(b) 74. Menacing journeymen, workmen, and servants in trade, 5 Geo. 4, c. 96; 6 Geo. 4, c. 129, s. 3. Imprisonment, three calendar months, 5 Burn's J. Servants, 423.

(c) 74. Journeymen in trade, common assault, 9 Geo. 4, c. 31, s. 27, or indictment at common law.

(d) 74. 9 Geo. 4, c. 31, s. 16 & 26; Burn's J. Servants.

(e) 8 Inst. 134; 3 Bla. C. 4; 1 Bla. C. 428, note 13; what master may do after recaption.

(f) *Semle*, not unless on application of servant impressed, &c. 70, notes (t), (u).

(g) 79, note (y). Action *case*, or if an illegal entry to house, *trespass*. 79, note (c). Or if contrary to indenture, action of *covenant* thereon. Where an abduction has been by force, then *trespass* is best form of proceeding, 1 Salk. 380; but *case* for enticing and harbouring is in general preferable, F. N. B. 167; Winch. 51; 2 Lev. 63; 1 Lev. 240; 6 T. R. 221; Cowp. 54; 2 Bar. & C. 448. Action may be against servant or third person, but not both, 3 Burr. 1345.

(h) 79. 2 Stark. R. 489.

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| I. THE PERSON. II. Relative rights. V. Master and servant or clerk. 1. Right of master (continued.) | 2. To services of. (continued.) | 3. Debauching female servant. . . . 4. Solicitation chastity 5. Solicitation to rob, &c. 3. Misconduct by servant.(m) 1. & 2. Servants in husbandry or trades 3. Misconduct of menial servants 4. Misconduct of clerks (t) | Action per quad.(i) Trespass, when.(i) Suit in ecclesiastical court.(k) Indictment, misdemeanor.(l) Discharge.(n) Not correction.(o) Arbitration.(p) Justices.(q) Action.(r) Indictment.(s) Discharge.(n) Not correction.(o) Action.(r) Discharge.(u) Not correction.(r) Action, covenant.(y) Action, case.(z) Same as any individual, ante, xvii. May depart.(b) Action, trespass. Indictment, 9 Geo. 4, c. 31, s. 30. Prevention.(c) But no action.(d) |
| 2. Right of servant(a) . . . | 1. Servant's own person 2. In person of master.. | 1. Same injuries 2. By master, battery .. 3. Leaving seamen abroad Battery of master. | |

(i) 79, note (b). Case or trespass, if an illegal entry to house, 2 T. R. 166.
(k) Burn's Ecc. L.
(l) 2 East, 5, 17; 6 East, 141, 464. Any attempt or solicitation to commit a felony or indictable misdemeanor, although unsuccessful, is indictable as a misdemeanor at common law, Id. ibid.; 4 Harg. Stat. Tri. 759; Russ. & R. C. C. 107.
(m) 72 to 88. Rights and duties in general of servants in husbandry, menial servants and clerks; and see 1 Bla. C. 424, 425; 3 Bla. C. 428; Burn's J. Servants.
(n) 75 to 78. For what misconduct and when servant has no right to clothes, 75, note (m).
(o) 78, 75. Must not correct servant in husbandry or trade, or menial servant, 1 Bar. & C. 469. What correction of a sailor or soldier allowed, 78, 74. Liability of captain of a ship for excess in correction, 3 Campb. 42; 1 Stra. 595; 2 Stra. 944; 2 Car. & P. 148; Bul. N. P. 19.
(p) 72, 76. 5 Geo. 4, c. 96, to what labourers.
(q) 72 to 74. When or not justices have jurisdiction, 20 Geo. 2, c. 19; 4 Geo. 4, c. 34; 9 Bar. & C. 603, 628. Combinations of servants in trade, 6 Geo. 4, c. 129; 9 Geo. 4, c. 31, s. 25. Justices have no juris-

diction over menial servants.
(r) Action on express or implied contract.
(s) 74. Assaults to raise wages indictable, 9 Geo. 4, c. 31, s. 25. Indictment for conspiracy to raise wages at common law. The 5 Geo. 4, c. 96, and 6 Geo. 4, c. 129, repealed statute of punishments against conspiracies, and only punish violence, threats, or intimidation.
(t) 80 to 83. Duties and rights of. 80, 81. Covenants by, 6 Bing. 354, 82. Offences of larceny, embezzlement, &c. 82, 83. Liability of a surety, and precautions to be observed by him, 2 Vern. 518; Chit. Eq. Dig. 264.
(u) 81. For what cause may discharge.
(z) 73 to 75.
(y) 6 Bing. 354.
(s) Action on case.
(a) 72. When he acquires a settlement. 72. When may stipulate against it, 6 Bing. 163. 82. Right to solicit customers.
(b) Fit. N. B. 168; Bro. Labourer, 51; Trespass, 349; 1 Bla. C. 428.
(c) 2 Rol. Ab. 546.
(d) 3 Bla. C. 142, 143.

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| I. THE PERSON. II. Relative rights. V. Master and servant or clerk. 2. Right of servant (continued.) | 3. To maintenance, &c. 4. Not to medical care. (h) 5. Not to clothes.(i) 6. Right to wages 7. As to character(m) . . | Withholding Withholding of. 1. Menial servant 2. Other servants . . False character. 1. False bad character. 1. Libel 2. Verbal 2. False good character | Departure.(e) Action.(f) Indictment.(g) Action.(k) Justices.(l) Action.(m) Action.(m) Penalty, 32 Geo. 3, c. 56. Action on case.(m) |
| II. PERSONAL PROPERTY.(n) . . | 1. Tangible property. 1. In actual possession | 1. Illegal takings. 1. Not criminal . . | 1. Prevention. 1. Resistance.(o) 2. Stoppage in transitu.(p) 3. Recaption.(q) 4. Seizing of game.(r) 5. Replevin, action of.(s) 6. Detinue.(t) 7. Bill in equity.(u) 2. Compensation, damages. 1. Action, trover.(x) 2. Action, trespass.(y) 3. Justices, summary.(z) |

(e) 3 Bla. C. 142, 143.
(f) On contract express or implied.
(g) 84. Indictment, when servant of tender years starved or ill used. 2 Camp. 650; Russ. & R. C. 20; 1 Leach, 137; 1 Bla. C. 428, note 13.
(h) 77, n. (c). 3 Bos. & Pul. 247; Cald. 527; 4 Burn's J. Poor, 26 ed., 239. *Aliter*, if contract.
(i) 75, n. (m).
(k) 78. When recoverable, 1 Bla. C. 425, notes 5, 6, 428, note 16; 5 Bing. 135. When forfeited, 2 Stark. R. 256; Burn's J. tit. Servants, III.
(l) 72, 77, 78. When entitled, Burn's J. Servant, IV.; 4 Geo. 4, c. 34; 5 Geo. 4, c. 95; 6 Geo. 4, c. 129. And when justices can act, Burn's J. Servants, IV.; 9 Bar. & C. 603, 608.
(m) 78, 79. No action lies for refusal to give character, 3 Esp. R. 201. *Aliter*, for maliciously giving a false bad character, 3 Bos. & Pul. 587; 8 Bar. & C. 578. Liability for giving a false favourable character, 32 Geo. 3, c. 56; also action at common law, Burn's J. Servants, XXXI.; *Foster v. Charles*, 6 Bing. 396; 7 Bing. 105.
(n) 84 to 145. I. The nature of personalty, and several kinds are stated and divided into those, First, Tangible and in possession, such as, 1. Animals, birds, and fish; 2. Moveables and ships; 3. Growing plants and emblements; 4. Fixtures; 5. Things mixed of realty and personalty; 6. Stock and funds; 7. Se-

curities; Secondly, Things in possession but not tangible, such as copyrights; Thirdly, Choses in action. II. Then is considered the extent of interest. III. Time of enjoyment. IV. Number of owners. V. Modes of acquiring titles, of which fourteen are enumerated. VI. Contracts are considered in general and in particular as regards Sales and Guarantees. Then from page 130 to 140, injuries, and offences, and remedies, and punishments, are considered, and are stated in the above Analysis.
For the particular civil and criminal injuries or offences, as they vary according to the nature of the thing, see the enumeration of each in pages 84 to 145; the above Analysis only states the general rules.
(o) 130, 131. Resistance by force, but not using a dangerous instrument, *Id.* note (y), *post*, chap. vii.
(p) 131, note (b). *Stopping in transitu*.
(q) 130. Recaption with force, 1 B. & C. 514; 8 B. & C. 269; 9 B. & C. 59, 60; 7 Bing 661. When illegal to enter another's land to retake, 8 Bing. 186; *post*, chap. vii.
(r) 131, note (k). *Seizure, game*. 405, 406.
(s) 131, note (d). *Replevin*.
(t) 131, note (e). *Detinue*.
(u) 131, note (f). *Specific delivery of chattel*.
(x) 131, note (g). *Trover*.
(y) 131, note (h). *Trespass*.
(z) 131, n. (i). 7 & 8 Geo. 4, c. 29, and c. 30, s. 24.

| 1. Subject-matter. | 2. Rights. | 3. Injuries and Offences. | 4. Remedies and Punishments. |
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| II. PERSONAL PROPERTY (continued.) | 1. Tangible property. 1. In actual posses- sion (continued.) | 2. Criminal takings (a) 1. Feloniously | 1. Prevention. 1. Resistance.(b) 2. Recaption.(c) 3. Search warrant. 2. Compensation. 1. Justices, summary.(d) 2. Restit. after conviction.(c) 3. Action, when.(e) 3. Punishment. 1. Summary.(d) 2. Indictment.(f) |
| | | 2. Embezzlements | Recaption.(g) Action.(h) Indictment.(i) |
| | | 3. False pretences | Recaption.(k) Action.(l) Indictment.(m) |
| | | 4. Threats. 1. Extorting mo- ney by threats or duress | Indictment, misdemeanor. (n) |
| | | 2. Assaults with intent to rob.. | Indictment, felony. (o) |
| | | 3. Menaces or for- cible demand with intent to steal | Indictment, felony. (p) |

(a) 130 to 132. What not a felonious taking, *Rex v. Alexander*, Burn's J. Horses, I.
(b) 132. What resistance, see chap. vii.
(c) 132, chap. vii. *Recaption after felonious taking*; when may retake, 3 Bla. C. 4, note 3. May retake thing stolen, unless duly sold in market overt, 2 Bla. C. 449, 450; Burn's J. Horses, II. Pawnbroker's shop not a market overt, and trover always lies against pawnbroker after demand, 2 Stra. 1187; 1 Stark, R. 472; 2 Campb. 336; 1 Wils. 8. If sale in market overt, still after conviction the owner is entitled to retake or recover from person then in possession, 2 T. R. 750; and 7 & 8 Geo. 4, c. 29, s. 57, directs award of restitution, unless bill of exchange or note bona fide negotiated. *Horses*, particular law, 2 & 3 Ph. & M. c. 7; 31 Eliz c. 12. If no sale in market overt, owner may retake, s. 5; Burn's J. Horses, II.; 2 Bla. C. 451. But after regular sale, the original owner cannot maintain trover till after conviction, 2 Car. & P. 41, 43. Must not advertise reward for return, 7 & 8 Geo. 4, c. 29, s. 59.
(d) 133. Justices' SUMMARY interference in case of felonious taking, is confined to horses, 2 & 3 Ph. & M. c. 7; 31 Eliz c. 12; Burn's J. Horses, II.; and to horses stolen, and not when obtained by false pretences, 2 Stark. R. 76. Does not extend to other chattels whereof felony has been committed, see 7 & 8 Geo. 4, c. 29. As to hares and rabbits, dogs, confined beasts or birds, pigeons, fish, certain trees and shrubs, underwood, fences, posts and rails. fruit, roots, &c. not larceny; but justices have jurisdiction, Id. s. 30.

(e) 133. Action in general, in case of felony, not allowed till after prosecution, 2 T. R. 750; 2 Car. & P. 41, 43. In case of horses may sue in detinue or replevin, unless sale in market overt, 2 & 3 Ph. & M. c. 7, s. 5. So action not taken away if will or writings stolen, 7 & 8 Geo. 4, c. 29, s. 24. 133, 134. Criminal embezzlements do not take away action, Id. s. 52.
(f) 131. Indictment, larceny, 7 & 8 Geo. 4, c. 29; Burn's J. Larceny. Particular animals and chattels, particular provisions, Id. ibid. 84 to 101.
(g) 130, 133. *Recaption*, post, chap. vii.
(h) 133. Action expressly reserved by 7 & 8 Geo. 4, c. 29, s. 52.
(i) 133, 134. Indictment, 7 & 8 Geo. 4, c. 29, s. 46 to 52. .
(k) 130, 131, 134, post, chap. vii. *Recaption*; no property passes in goods obtained by false pretences, and they may be rescued or retaken, 1 Bar. & C. 514; 2 Dowl. & R. 755; 7 Taunt. 59.
(l) 134. Action of trover or case, or assumpsit against deceiver, 1 Stark. R. 20; but if credit be not expired, then in case, 9 Bar. & C. 59.
(m) Indictment on 7 & 8 Geo. 4, c. 29, s. 53; Burn's J. Cheat. Even against a minor pretending to be of age, Id. 1. For obtaining enlisting money, 10 Geo. 4, c. 6. At common law for conspiracy, 3 T. R. 98; 5 Dowl. & R. 611; not otherwise, 1 Stark. R. 402.
(n) 134. At common law, Burn's J. Threats.
(o) 134. 7 & 8 Geo. 4, c. 29, s. 6.
(p) 134. Ibid.

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| II. PERSONAL PROPERTY. 1. Tangible property .. (continued.) | 1. In actual possession .. (continued.) | 4. Threats (continued.) 4. Any menace or threat to impute infamous crime with intent to extort.. 5. Letter or writing, demanding with menaces any chattel or to accuse with intent to steal . 6. Threat to destroy corn, hay, or straw 2. Illegal detentions. 1. Civil 2. Criminal embezzlements 3. Damaging. 1. When not criminal. (c) 1. Injuries by bailees 2. By others. Malfeasance Misfeasance Negligence . 2. When criminal or malicious. (g) 1. In general, in nature of felony 2. Malicious, various acts | Indictment, felony. (q) Indictment, felony. (r) Indictment, felony. (s) Recaption. (t) Replevin, action. (u) Detinue, action. (x) Trover, action. (y) Bill in equity. (z) Seizure, heriot. (a) Seizure for tolls. (b) Remedies, ante, xxxii. Case, action of. (d) Action on contract. (d) Trespass. (e) Case. (e) Case. (f) Indictment, or summarily before justices. (h) Indictment, or justices summarily. (i) Action against hundred. (k) |

(q) 134. 7 & 8 Geo. 4, c. 29, s. 7.
(r) 134. Ibid. s. 8.
(s) 135. 4 Geo. 4, c. 54, s. 3.
(t) 135. Recaption, 1 B. & Cres. 514; 7 T. R. 59. When cannot enter stranger's land to retake, 8 Bing. 186; 1 B. & Adol. 394; post, Recaption, c. vii.
(u) 135. Replevin, 1 Chit. Pl. 188; 2 Stark. 288.
(z) 135. Detinue, 1 Chit. Pl. 139.
(y) 135. 3 Bla. C. 152; 1 Chit. Pl. 176.
(s) 135. Bill lies to restore specific chattel, post, c. x.
(a) 135. 2 Saund. 168, note I.; 3 Bla. C. 15.
(b) 135. Post, c. vii.
(c) 135, 136.
(d) 135. Against bailees case or *assumpsit*, 1 Chit.

Pl. 153 to 159.
(e) 135. Against *third persons*, trespass or case, according to the nature of the injury, whether *direct* or only *consequential*, and whether the chattel was in possession of an owner or a *third person*, 1 Chit. Pl. 193 to 200. If consequential only, as firing *near* a decoy, *case*, 2 B. & Cres. 934; 11 East, 571.
(f) 135. Case for mere *negligence* or *nonfeasance* or the consequences of a public nuisance, 1 Chit. Pl. 153 to 159; 3 Bla. C. 153, 154.
(g) 136, 137.
(h) 136. 7 & Geo. 4, c. 29; Burn's J. Larceny.
(i) 136, 137. Ibid. c. 30; Burn's J. Malicious Injuries.
(k) 137. Ibid. c. 31; action against hundred where furniture, &c., destroyed with building.

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| II. PERSONAL PROPERTY. | | | |
| 1. Tangible property. (continued.) | 1. In actual possession.. (continued.) | 3. Damaging(continued.) 3. Petty malicious injuries not exceeding 5 <i>l.</i> .. 4. Cruelty to animals..... 5. Poisoning game or eggs, &c. 6. Slaughtering Horses 7. Injury, British plate glass .. 8. Injuries, English linen company 9. Conspiracy .. 10. Threats to destroy corn, grain, hay, or straw | Justices summarily. (l) Justices summarily. (m) Justices summarily. (n) Justices summarily. (o) Indictment, felony. (p) Indictment, felony. (q) Indictment. (r) Action. (s) Indictment.(t) |
| | 2. Rights to, but without actual possession.(u) | Same injuries | Same remedies.(u) |
| | 3. Rights in remainder or reversion. (x) .. | Same injuries.(x)..... | Prevention.(y) Justices.(z) Indictment.(a) Case.(x) Bill in equity.(b) |
| | 4. Right in joint tenancy, &c. (c) | Same injuries..... | Same remedies.(c) |
| 2. Not tangible. (d).... | In possession, or in remainder or reversion. | | |
| 1. Copyright in books & music.(e) | | | |
| 2. Busts and sculptures.(f) | | | |

(l) 137. Justices summarily, 7 & 8 Geo. 4, c. 30, s. 24; Burn's J. Malicious Injuries.

(m) 137. 3 Geo. 4, c. 71; Burn's J. Cattle.

(n) 137. 1 & 2 W. 4, c. 32, s. 3, 24. *Poisoning poultry* actionable at common law, 137.

(o) 137. 26 Geo. 3, c. 71; Burn's J. Horses.

(p) 137. 13 Geo. 3, c. 38; Burn's J. Malicious Injuries.

(q) 137. 4 Geo. 3, c. 37, s. 16; Burn's J. Malicious Injuries.

(r) 137. Not if merely to take game, 13 East, 228.

(s) 10, 11. When the criminal act is declared a *felony*, in general no action lies until after conclusion of prosecution, but sometimes it is enacted otherwise. When the injury is only a *misdemeanor* then action immediately lies, 10, note (a), 11, note (g).

(t) 137. 4 Geo. 4, c. 54, s. 3; Burn's J. Threats.

(u) 137. *Prevention*, see 130, 131. Remedy, case for injury to reversion, 7 T. R. 9.

(x) 137, 138. Case, not trover or trespass, 7 T. R. 9; 1 Ry. and Mood. 99; 5 Bar. & Ald. 826. When may sue in trespass or trover, 2 Campb. 464; 3 Id. 187; 5 Esp. R. 35. When a remainder-man may

sue in trover, 2 T. R. 376.

(y) 130, 131, 137, 138. *Preventions*.

(z) *Semble*. 7 & 8 Geo. 4, c. 30, s. 24, gives *summary remedy* for malicious injury to a remainder-man or reversion in personal property.

(a) 138, 139. Against a lodger for larceny, 7 & 8 Geo. 4, c. 29, s. 45.

(b) 139. To protect remainder-man, Chit. Eq. Dig. Chattels Personal and Estate, IX., *post*, ch. viii.

(c) 139. All to join, and when not, 7 T. R. 279; 5 East, 407; 1 Chit. Pl. 74, 75. Case against co-tenant, 8 T. R. 145. When trespass for destroying, 8 Bar. & Cres. 257.

(d) 139—98. See division, *ante*, xxxi, as to such property, and injuries to same in general, 139, 140.

(e) *Books and Music*, 8 Ann, c. 19; 12 Geo. 2, c. 36; 15 Geo. 3, c. 53; 41 Geo. 3, c. 107; 54 Geo. 3, c. 156; decisions, Chitty's Col. Stat. 181; 2 Chit. Commercial Law, 198 to 205; 4 Bing. 540; 2 Young & J. 166; Godson on Patents.

(f) 98. *Busts and Sculptures*, 38 Geo. 3, c. 71, virtually repealed by 54 Geo. 3, c. 36; decisions, Chit. Col. Stat. 190.

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| II. PERSONAL PROPERTY... 2. Not Tangible. (continued.) 3. Engravings and prints.(g) 4. In patterns for linen, &c.(h) 5. Patents in general(i) | | | |
| | | Piracies | Action, case.(k) Action, covenant.(l) Injunction, equity.(m) |
| 5. Choses in action.(n) | 1. On Contracts. 1. Of Record. 1. Judgments... 2. Recognizances 2. By specialty. 1. To pay money. 2. To perform other act... 3. To omit..... 3. By simple contract. 1. To pay money. | 1. Nonpayment of money..... 2. Nonperformance of other act..... Nonpayment..... Breach, nonobservance. Breach, commission.... Nonpayment..... | 1. Set-off.(o) 2. Action of debt.(p) 3. Scire facias.(q) 1. Set-off.(o) 2. Distress, when.(r) 3. Action, debt.(s) 4. Covenant.(t) Specific performance.(u) Action, covenant.(x) 1. Injunction.(y) 2. Entry for forfeiture.(z) 3. Action, covenant.(a) 1. Set-off.(b) 2. Rent, distress.(c) 3. Action, assumpsit.(d) 4. Action, debt.(e) |

(g) 98. *Engravings and Prints*, 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57; decisions, Chit. Col. Stat. 192; 4 Bing. 234.
(h) 98. *Patterns on Linen, &c.* 27 Geo. 3, c. 38; 34 Geo. 3, c. 23; decisions, Chit. Col. Stat. 195.
(i) 98. *Patents*, 21 Jac. 1, c. 3; Godson on Patents; 3 Chit. Col. Stat. 197.
(k) 139. Some of these statutes expressly prescribe the remedy, as 54 Geo. 3, c. 156, s. 4; Id. c. 56, s. 3; 8 Geo. 2, c. 13, s. 1; 17 Geo. 3, c. 57, s. 1; 27 Geo. 3, c. 38, s. 2. The penalties are not recoverable unless the requisites of the statute have been complied with, 1 Bla. R. 333; 7 T. R. 620. But it is otherwise as to an action on the case, 7 T. R. 620. See 2 Chit. Pl. 760 to 768.
(l) 2 Sim. & Stu. 1.
(m) 140. *Post*, ch. viii.; 3 Meriv. 624; 2 Ves. & B. 218; 3 Ves. & B. 17; 17 Ves. 422; 1 Jac. & W. 481; 1 Madd. Ch. Prac. 157 to 165; 2 Bla. C. 407, note 14; 3 Id. 427, note 1; 3 Chit. Com. L. 622; 3 Chit. Eq. Dig. Injunction, 1054.
(n) Constitute a right to receive money or to the performance of some contract.
(o) 140. ch. vii. *Set-off by plea* or notice; 2 G. 2, c. 22, s. 13; 8 Id. c. 24, s. 4. But not to judgments or records if set-off be due on simple contract. See 6 Taunt. 176; 8 Bing. 202; 7 Id. 29, 61. May be by

motion to Court to set off one judgment against the other, 8 Bing. 202; and even to stay execution till the latter can be effected, 7 Bing. 435. In bankruptcy, 6 Geo. 4, c. 16, s. 50; 8 B. & Cres. 105.
(p) 140, 141. Gilb. Debt, 391, 392; 1 Chit. Pl. 126.
(q) Tidd's Prac. 9 ed. 1122, 23; 2 Saund. R. 72.
(r) See note (o), *supra*. Always by plea, 8 Geo. 2, c. 24, s. 4. 140. ch. vii. For rent, or rent charge, or annuity, when, 4 Geo. 2, c. 28, s. 5.
(s) 141. Com. Dig. Debt, A. 1.
(t) 141. 2 Ld. Raym. 1536. Com. Dig. Covenant, A. 1.
(u) Ch. x. Specific performance when compelled in equity.
(x) 141. *Ante*, note.
(y) 141. Injunction when granted against breach of contract, covenant, or trust, *post*, ch. viii.
(z) 288.
(a) *Ante*, note.
(b) *Ante*, note(a). May purposely purchase goods and set off the price against a prior debt, *post*, ch. vii.
(c) 140. Not unless under a demise, *post*, ch. vii.
(d) 141. In all cases of contract not under seal.
(e) Not if money payable by instalments, and all not due or against executor, 1 Hen. B. 547; 5 Bing. 200.

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(f) 142, note (d). If fraud in purchase and credit not expired, the declaration must be in case, 9 B. & Cres. 59.

(g) *Post*, ch. viii. Injunction against paying when, Chit. Eq. Dig. 1056.

(h) 125. *When may take*, 7 B. & Cres. 26; *Shop. Touch.* 225; *Long on Personal Property*, 147, 148; *Roberts's Stat. Frauds*, 165 to 170. *When not*, 1 Taunt. 318; 2 Campb. 240; 5 Bar. & Ald. 492; 2 Bos. & P. 584; *Cowp.* 294; although purchaser paid the price in advance, see cases 3 Chit. Com. L. 126, and case, as to loss by fire, 6 Bar. & Ald. 360.

(i) 125. 7 B. & Cres. 26; detinue when for a specific chattel sold, last note, *Fit. N. B.* 138; *Willes*, 120; 1 Dyer, 24, b.; 3 *Woodes*. 104; 2 *Bla. C.* 152.

(k) 3 *Price's R.* 68; 1 *East*, 203.

(l) *Post*, chap. x. When it lies, *Chitty*, Eq. Dig. *Chattels Personal*, and *post*.

(m) 126. In case of warranty of a specific chattel purchaser may immediately refuse to take, but cannot return it after once accepting, except where fraud or express agreement, 2 Bar. & Adol. 456. But goods ordered generally, if unfit, may be returned in a reasonable time, *Id. ibid*.

(n) 126. If property returned immediately, may resist any payment, 2 Taunt. 2; *aliter not*, 2 Bar. & Adol. 456.

(o) 126. May reduce damages by proof of breach of warranty. 2 Bar. & Adol. 456.

(p) 126. Action assumpsit on express, *Id.*; *post*, chap. x.; 2 *East*, 451.

(q) 126. *Dougl.* 21.; 2 *Starkie's R.* 162; 2 *East*, 446; 4 *Bing.* 73. This is the proper remedy when there is deceit without warranty, 12 *East*, 11; 4 *Campb.* 22.

(r) *Post*, chap. x.

(s) *Post*, chap. viii.

(t) 6 *East*, 569; 4 *Bar. & Cres.* 345.

(u) When a breach of contract is also a breach of duty, or misfeazance, or malfazance, and not a mere omission, case lies, *per Bayley*, J. 5 *Bar. & Cres.* 605; 5 *T. R.* 142; 1 *Chit. R.* 1; 1 *Chit. Pl.* 153 to 155.

(x) See c. viii.; 2 *Swanst.* 253; 2 *Mad.* 198.

(y) 142. Assumpsit.

(z) 142. Case when, see note (u).

(a) 142. When the only proper remedy, 4 *Campb.* 22, 144, 169; 12 *East*, 11. Case for deceit is the proper action when the credit on which goods were sold has not expired, 9 B. & C. 59.

(b) 110 to 114. As to legacies in general, see *Roper on Legacies*, and *Chit. Eq. Dig. Legacy*. For a legacy of a specific personal or real chattel after *assent* trover, if personal, and ejectment, if chattel real, lies, 3 *East's R.* 120; 3 *Atk.* 224, 284; *Cowp.* 284, 289. So assumpsit lies for a legacy after executor's promise to pay in consideration of forbearance, *aliter not*, 5 *T. R.* 693; 1 *Moore & P.* 209; 7 *Bar. & Cres.* 542. So if executor has borrowed the legacy, 1 *Moore & P.* 209.

(c) 110. *Chit. Eq. Dig. Legacies*, viii., 4; 3 *Ridg. P. C.* 243. Not in *Eccles. Court*, if devise of land to pay debts, 9 *Bar. & Cres.* 489.

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(d) 8 Bar. & Cres. 151; 2 Man. & Ryl. 136, when not.
(e) 110. 7 Bar. & Cres. 542; when otherwise, 1 Moore & P. 209; 3 Bar. & Cres. 623; 3 Price's R. 54; 4 Taunt. 488, 779, 847; 6 Taunt. 522.
(f) Chit. Eq. Dig. Distribution.
(g) 14 Geo. 5, c. 78, s. 41; Chit. Col. Stat. Building Act; 2 Chit. Pl. 247.
(h) 144. Forgery, 11 Geo. 4 and 1 Wm. 4, c. 66.
(i) 144. Larceny, 7 & 8 Geo. 4, c. 29.
(k) Id. ibid. Embezzlement.
(l) Id. ibid. False Pretences. But the raising money on a second mortgage, concealing the first, is not a false pretence, *Rex v. Coddington*, Car. & P. 661. Indictment lies at common law for conspiracy.
(m) 143. *Injuring records, &c.*, 7 & 8 Geo. 4, c. 29, s. 21.
(n) 144. *Concealing or destroying a will or title-deeds*, Id. sect. 29, 23.
(o) 145. Real property defined, 145 to 150. I. THE RIGHTS TO REAL PROPERTY CONSIDERED, 145 to 373. Of real property in general, and distinction between corporeal and incorporeal, 145 to 147; then an analytical division of the subject under seven heads is given, 145 to 147. First, the different kinds, under which ten general legal terms are considered, with their respective different civil and criminal injuries and offences, remedies and punishments, affecting each, 151 to 163. Then are enumerated thirty-nine principal corporeal real things, with their peculiar civil and criminal injuries and offences, remedies and punishments applicable to each, 163 to 203. Then thirteen kinds of incorporeal real things, with the pe-

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(r) 374, 375. Ouster defined, Co. Lit. 199, 200.
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(t) 375. How to be made, *post*, c. vii.
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(w) 172, 173, 174, 410. Action, case, 7 & 8 Geo. 4, c. 31; Chit. Col. Stat. tit. Hundred. A reversioner may sue, 9 B. & Cres. 135; 4 M. & Ryl. 130. The building must have been complete and inhabited, 8 B. & Cres. 461.

(x) 172, 173, 410, 411. 7 & 8 Geo. 4, c. 30.

(y) 382. Mere omissions are not trespasses, and the remedy is in general case, as not removing tithe, 1 Stra. 634; continuing an incumbrance after recovery in trespass, 380 to 382; 1 Stark. R. 22.

(z) Can only remove, after request, to a proper distance, *semble*, 1 Stark. R. 173 to 178.

(a) May distrain damage-feasant, but cannot turn in caule, 8 T. R. 72.

(b) Action, case, not trespass, 1 Ld. Raym. 187; 3 Burr. 1891; 8 T. R. 72; 3 B. & Cres. 213; 2 Chit. Pl. 782.

(c) Remove to proper distance, 1 Stark. R. 22, 173; 4 T. R. 364; 3 Chit. Pl. 109.

(d) 3 Wils. 20; 1 Saund. 221; Com. Dig. Pl. M. 26.

(e) Case, not trespass, after a recovery in trespass, 1 Stark. R. 22, 58, 59; 9 B. & Cres. 591. So against a mere continuer of a trespass erected or made by another party.

(f) 382. As to the obligation to repair fence, 193

to 197; Vin. Ab. Fences.

(g) 382. 1 Salk. 335; 2 Young & J. 391; 1 B. & Ald. 59; 1 Ld. Raym. 273.

(h) 3 Chit. Pl. 5th edit. 1103 to 1105, and notes.

(i) 382, 383.

(k) 41 Geo. 3, c. 109, s. 19, 24 to 28; Chit. Col. Stat. tit. Commons.

(l) 196, 197, *post*, 407, Criminal Injuries.

(m) 383.

(n) 383. How and when, 2 Smith's Rep. 9; 2 Salk. 459. By leet jury, Burn's J. Nuisance, III.

(o) 383. Chap. viii. Chit. Eq. Dig. 1055. Against darkening ancient lights, Id. 1053; 2 Russ. R. 121; 2 Swanst. R. 333; 16 Ves. 338. Against powder mills, 19 Ves. 617; 18 Ves. 211.

(p) *Semble*, 7 & 8 Geo. 4, c. 30, s. 24.

(q) 383 to 385. 267.

(r) 412. Only indictable when the nuisance was public, not if merely private, Burn's J. Nuisance, IV. Judgment is to prostrate building if necessarily a nuisance, 8 T. R. 166. *Aliter*, only to stop the improper use of the building, Co. Ent. 92.

(s) 2 Stark. R. 377; 5 B. & Ald. 837; 1 Dowl. & R. 837. When it lies, 1 Dowl. & R. Cas. N. P. 35; 3 Stark. R. 162. But a reversioner cannot sue without proof of actual injury, 10 B. & C. 145. A person must build independently on his own land, and cannot sue for not propping up his house whilst pulling down another, &c. 9 B. & Cres. 735.

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| | | 3. Breaches of covenant by waste, &c.(f).... | 1. Entry to repair.(g) 2. Injunction.(h) 3. Entry, forfeiture.(i) 4. Action, covenant.(k) 5. Action, case.(l) 6. Ejectment.(m) |
| | III. Parceners, joint te- nants and tenants in common(o) | 4. Other small injuries 1. Same as to a single proprietor. 2. Inter se(p)..... | Justices, summary.(n) 1. Prevention.(q) 2. Equity, injunction.(r) 3. Trespass.(s) 4. Action, case.(t) 5. Ejectment.(u) |
| II. Incorporeal real- ty. (z) | | | |
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(t) 2 Dowl. & R. 33; 6 Moore, 47.
(u) Indictment and costs, 1 & 2 Geo. 4, c. 41, s. 1.
(s) Rights in, 264 to 268. Injuries in general, 386 to 393.
(y) 386 to 393. As to waste in general, 5 B. & Cres. 603; 1 Chit. Pl. 161, 162.
(z) 391. May enter to prevent, 8 Coke, 146.
(a) 391, *post*, chap. viii. 4 Madd. 393; 5 Madd. 45.
(b) 392, n. (d). *Semble*.
(c) 391, 392. 2 Saund. 251, 259.
(d) 391. When case or trespass, *Id*.
(e) 392. 7 T. R. 13.
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(g) 389 to 391. Entry to repair.
(h) 391, *post*, chap. viii. Injunction.
(i) 391. Entry, forfeitures, 288 to 291.
(k) 389, 391. Covenant, when not, 1 B. & Cres. 410; 9 B. & Cres. 505; 1 Crompt. & J. 105.
(l) 389, n. (a). Case or covenant.
(m) 288 to 291. 391.
(n) 407. *Semble*, 7 & 8 Geo. 4, c. 30, s. 24.
(o) 268 to 272. Rights between, in general.
(p) 268 to 272. Injuries *inter se* in general.
(q) 375. One may always prevent injury, not using dangerous instrument.
(r) 393. 271, 272. Injunction.
(s) 272. Trespass for destruction.
(t) 393, n. (m). Case for injury.

(u) 271. 374, 375. Ejectment, ouster, when implied.
(x) *General Points*, 203 to 206. Distinguished from corporeal, 206 to 229. Several kinds enumerated, as ancient lights, pews, common, ways, watercourses, advowsons, tithes, offices, dignities, franchises of several kinds, corrodies, annuities and rents, with their respective *particular* injuries and remedies. 229 to 238. Tenures by which held. 238 to 264. Estates or interests therein. 264 to 268. Times of enjoyment. 268 to 272. Number of owners. 272 to 365. Titles to, how acquired; and herein in particular that they lie *in grant*, and must be *created* by deed of *grant*, or by *prescription* implying it, or by devise, see 203, 309; and *transferred* by assignment or devise, 319. 393 to 413. Injuries and remedies in general to incorporeal real property.
(y) 393 to 413. *Injuries in general*.
(z) 383, 384. 393 to 413. *Remedies in general*.
(a) 383 to 412. 2 Smith's Rep. 9. Prevention or removal of injury to *incorporeal* realty seems in general permitted, carefully avoiding any breach of the peace or unnecessary damage. In general it should, when the injury consists in *omission* or mere *continuance*, be preceded by a request that the wrong-doer himself remove the nuisance, 2 B. & Cres. 302; *post*, chap. vii.

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| III. REAL PROPERTY. | | | |
| II. Incorporeal realty. | | | |
| 1. In general . (continued.) | Private rights (continued.) | Injuries in general (continued.) | 1. Prevention.—(continued.) 2. Mandamus.(b) 3. Equity, injunction.(c) 2. Compensation. 1. Action, case.(d) 2. Summary.(e) 3. Ejectment.(f) 3. Punishment. 1. Summary.(g) 2. Indictment, when.(h) |
| 2. Ancient lights | Immediate enjoyment .. | Obstruction | Remedies.(i) |
| 3. Pews | Immediate enjoyment .. | Disturbance | Remedies.(k) |
| 4. Commons(l) | Immediate enjoyment .. | Disturbance.(l) 1. Obstruction.... 2. Turning off cattle 3. Putting on cattle and surcharges.. 4. Deterioration of soil.. 5. Rabbits or lord's overstock 6. Illegal improve- ments, trees, &c. 7. Other injuries .. | Abatement.(l) Injunction.(m) Action, case.(n) Action, trespass.(o) Distraining.(p) Action, case.(q) Action, case.(q) Summary, justices.(r) Action, case.(s) Injunction.(t) Action, case.(u) Action, case.(u) Summary.(x) Criminal proceeding.(y) |
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(b) 412. *Mandamus*, when a *clear* case of public duty.

(c) 208. Equity, injunction, Chit. Eq. Dig. 1053, 1055.

(d) 393, 394. 412, n. (d).

(e) *Semble*, 7 & 8 Geo. 4, c. 30, s. 24.

(f) 371, n. (s). Not in general, only for tithes of parish.

(g) 407, 408. *Scumble in general*, 7 & 8 Geo. 4, c. 30, s. 24.

(k) 412, 413. 192, 193, 198. Only when injury to a public incorporeal right.

(i) *Ancient lights*, 207, 208, 394. Same as the above general remedies.

(k) **Pews, 208 to 210, 394.** Action case, or suit in ecclesiastical court, *Id. ibid.*

(l) **Common rights, 210 to 214. Injuries, Id. 394 to 397. Abatement, when or not, 394 to 397.**

(m) 315. Injunction, equity.

(п) 396. Action, case.

(o) 396, 397. *Trespass*, 2 Chitty's Pl. 5 ed. 858.

(p) 396. But not recommended, action, case preferable.

(q) 396. Action, case.

(r) 407. *Semble*, 7 & 8 Geo. 4, c. 30, s. 24.

(s) 396. Action, case, but not killing rabbits, &c.

(t) 395, 396. Injunction, action case.

(u) 394 to 396. Action, case.

(x) 407, 408. 7 & 8 Geo. 4, c. 30, s. 24, *semble*.

(y) 407. *Semble*, summary proceeding, 7 & 8 Geo. 4, c. 30, s. 24, and on inclosure act, 397, n. (b), (c), (d).

(z) Right of private ways, 214, 397.

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(b) 407. *Semble*, 7 & 8 Geo. 4, c. 80. s. 24.

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| 7. Advowson . 8. Tithes (n) . | Immediate 1. Of whole parish 2. From a particular pa- rishioner. 1. Predial tithes .. | Disturbance..... Injuries in general (o).. Injury to right. 1. Ouster..... Subtraction. 1. Before set out. 1. Refusing to set out 2. Refusing to pay modus .. 3. Refusing to pay composi- tion 2. After set out. 1. Withholding . 2. Damaging .. | Remedies in general. (p) Ejectment. (q) Bill in exchequer. (r) Bill in chancery. (r) Remedies. 1. For single value of tithe. 1. Bill in exchequer. (s) 2. Bill in chancery. (s) 3. Suit in ecclesiastical courts. (s) 4. Justices, summary. (t) 2. For treble value. (u) Bill, equity. (x) Action. (y) Summary, justices. (z) Caption. (a) Trover. (b) Action, trespass. (c) Justices, summary. (d) |

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(f) Rights to, 189 to 193, 197, 215, 224. No right of appropriation, 191, 192.
(g) 215, 398. Abatement, 2 Smith R. 9.
(h) 398 n. (r), 191, 192. Injunction, equity.
(i) 215, 398. Action, case, when trespass, Id. ibid.
(k) 407, 408. *Seemle*, 7 & 8 Geo. 4, c. 30, s. 24, and as to illegal fishing, 7 & 8 Geo. 4, c. 29, s. 34, 35, 36, and considerable malicious mischief, 7 & 8 Geo. 4, c. 30, s. 12, 15.
(l) 192, 193, 198. Indictment.
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(o) Injuries in general, 218 to 221, 398, 399.
(p) Remedies in general, Id. ibid.
(q) Ejectment for tithe of whole parish, at suit of lay impropiator, given by 32 Hen. 8, c. 7, s. 7; Cro. Car. 301; 2 Ld. Raym. 789; 2 Saund. 304, note 12. When not, 2 Rol. 309; 3 Bla. C. 88.
(r) When in general, 1 Mad. Ch. Prac. 104 to 109.

(s) Bill for an account of single value in exchequer or chancery, and for single value, waving penalty, 1 Mad. Ch. Prac. 104 to 109. When single value is small, but exceeds 6l. 13s. 4d., a suit in equity for single value is preferable to debt for treble value, because costs are recoverable in equity, 398. 399.
(t) Summary before justices, when, 221, 399.
(u) 398, 399. Treble value, 398, 399; 2 & 3 Ed. 6, c. 13, s. 1. See note (u) as to costs. Of agistment tithe, 3 Anst. 763; but as to small tithe, Moore, 915.
(x) *Supra*, note (r).
(y) Assumpsit or debt, 399, n. (b).
(z) 221, 399.
(a) 399. *Seemle*, post, c. vii. May enter by usual occupation way to remove, 2 New R. 466.
(b) *Seemle*, after tithe set out, the separate property vests in tithe owner.
(c) 399. 8 T. R. 72.
(d) *Seemle*, 7 & 8 Geo. 4, c. 30, s. 24.

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| III. REAL PROPERT- TY. II. Incorporeal real- ty (continued.) | 1. Predial tithes (continued.) 2. Personal and mixed. 1. In kind 2. Modus 3. Composition .. | 3. Obstructing removal by or- dinary way .. 4. Owners not re- moving Subtracting Subtracting Not paying | Action, case. (e) Action, case. (f) Bill in equity. (g). Suit in ecclesiastical court. (h) Justices, summary. (i) Bill in equity. (k) Action. (l) Justices, summary. (m) |
| III. All the above | All the above | Criminal Injuries | Criminal Punishments. (n) |

(e) 399. 2 New R. 466.
(f) Case not trespass, Stra. 634; Ld. Raym. 1399; Occupier cannot turn on cattle, 8 T. R. 72; but may distrain the tithe as damage-feasant, 399.
(g) Same as ante, xlii. note (s).
(h) Ante, xlii. note (s).
(i) 221, 399.
(k) Same as ante, xlii. note (s).
(l) Action, assumpsit or debt, 399, n. (f).
(m) 221.

(n) The particular criminal injuries and punishments applicable to each kind of real property will be found stated under each, ante, 162 to 229, 268. The general criminal injuries and punishments are stated 400 to 413, such as forcible entries, 401, night poaching, id., game act, 403, setting spring guns, 406, small malicious injuries, 407, burglary, arson, and riotous demolitions, 410, 411, and other criminal offences to real property, 412, 413.

CHAPTER I.

OF RIGHTS, INJURIES, AND REMEDIES, IN GENERAL.

A PARTY who considers himself about to be, or to have been injured by the conduct of another, naturally wishes to adopt the *best* means to *prevent* or *remove* the injury, or to enforce *specific relief*, or *performance*, or *compensation*, or *punishment* for its commission; on the other hand, the party resisting the claim wishes to know whether he can do so effectually, and by what means; for these purposes, each of these parties, complainant and defendant, or at least his professional adviser, must well consider the *law* affecting the asserted *right* and the nature of the *injury* or *offence*, and the *remedies* or *punishments*, before he can safely take any step, whether precautionary, offensive or defensive, or he may find himself in *error*, and perhaps that he has, although unintentionally, become a wrong-doer by adopting some illegal, irregular or injudicious course, and will sometimes not only incur great and useless expense, but frequently lose all redress. Independent of the process of the courts, there are many cases in which a person may clearly, by his *own act*, *prevent* or *remove* an injury, or obtain *satisfaction*, and which may be known to all members of society; as, for instance, every one knows that he may resist an assault or direct attack upon his person by *self-defence*. But the great variety of the remedies by *acts of the parties themselves*, and of the *modes or degrés* of resistance or prevention without legal process, are but little known; and in many cases the *summary* remedies by the intervention of *legal assistance*, and the *modes* of applying them, are still less known, and are frequently mistaken or attended with danger of excess; and much judgment is required in the *choice* of one of several remedies, by the intervention of *legal authority* and in the *modes of conducting them*, and many of them are accompanied with technical difficulties. The object of the following pages is to enumerate and remove them.

Necessity for ascertaining the nature of rights, injuries and remedies in general.

CHAP. I.
NECESSITY, &c.General division
of rights, inju-
ries and reme-
dies.

In most civilized countries the laws made for protecting the public interests of the society at large, and the private rights of individuals composing it, have been judiciously classed and arranged under certain distinct heads, as, 1st, *Rights*; 2d, *Injuries*; and 3dly, *Remedies*. Rights and duties have again been divided into those which are *private*, or belonging to particular *individuals*; and *public*, those which belong to *society at large*. *Injuries* (*in jus*) or offences, also, as well as their *remedies*, naturally follow the same divisions and arrangement. These several rights, injuries, and remedies, are all subject to numerous modifications and varieties, and the rules respecting them are multifarious. In the present chapter we will take a concise view of the principles and rules which affect rights, injuries and remedies *in general*; and in the three next immediately following chapters will be given a *practical* view of *each* right and its *particular injuries* and *remedies*, with some suggestions with respect to the conduct advisable to be pursued in cases of difficulty that frequently arise. We shall then be prepared for the consideration of the still more practical parts of the subject.

I. OF RIGHTS,
PUBLIC AND
PRIVATE, IN
GENERAL.

Rights and Duties (the converse of each other), as recognized by *law*, (a) have always been divided into *public* and *private*. Some of each are founded upon the *common law*, others have been created or modified by *statute*.

1. PUBLIC
RIGHTS.

Public rights, when they relate to *all society in general*, are termed the rights or *law of Nations*; (b) and when they affect

(a) There are many *moral* and *religious* rights and *active* or *affirmative* duties not recognized or enforced by *municipal law*, such as affection and kindness between husband and wife and children, education of children, and charity and benevolence to all mankind, &c. Those rights and duties which are recognized and enforced by *law* are termed *perfect*; those which are not so enforced, are termed rights and duties of *imperfect obligation*. See observations in *Mellish v. Motteur*, Peake's Rep. 115, 116; Pal. Mor. Ph. 3 vol. 4; 1 Bla. C. 123. The common law of England considers that many moral and religious *affirmative* duties are better left in their *performance* to the impulse of nature, and their *violation* to the censure of conscience and of society. But it has been observed, that as to *negative* duties it is otherwise, and that there is no act which *Christianity forbids* that the law will not reach, per

Best, C. J., *Bird v. Holbrook*, 4 Bing. 641. Perhaps, however, that position is too largely laid down; no one will doubt that *Christianity forbids* a great variety of immoral and improper acts, but the breach of which is not punishable.

(b) It will be observed that injuries against the rights and law of *Nations* are never cognizable in a municipal Court, but only by the King or some particular Court or persons particularly commissioned by the King to take cognizance of such injuries, as in the instance of our Prize Courts, under a particular commission. There is no proper *international Court*, and no action can in general be sustained in a municipal Court for a hostile capture or seizure; *Elphinstone v. Bedecheemed*, Knapp's Rep. 316 to 361; *Caux v. Eden*, Doug. 594; but the proceeding must be in the Admiralty under the special commission from the King.

only a particular state or separate community, they are termed *Municipal*. The latter relate to God, religion, morality and decency; or to the king and royal family, and his prerogative, revenue and government; or to subordinate magistrates and other public officers; or they relate to the regulations of *all* the individuals, subjects of the country, as those respecting public justice, peace, trade, health and police, and the protections of *all* persons and their property; and the violations of, or injuries and offences to which, have the influence of bad example, and a tendency to be *generally* injurious to *all* members of the society. We shall find that in the observance of these public rights in general each individual has so far a *private* right or interest, that he may insist on and compel the observance, or cause the injury to be punished, by becoming a public prosecutor or accuser, but that in general this must be in the name of the King, or at least *as* on the behalf of the public society at large, or, in the case of pecuniary penalties for an offence, in the name of a *common* informer, either for himself and the King, or for himself and the poor of the parish, or as of late for the county rate, and seldom entirely for his own private and particular benefit. Some public rights, however, are *also* sometimes *private*, so that any individual who happens to be *particularly* interested or injured may act for himself, and have his *private* remedy as well as prosecute for the benefit of the community; (c) and therefore rights of this nature will throughout this work be considered at the same time that mere private rights are examined, though strictly they might more properly belong to a work on criminal law.

Private rights (including their converse *duties*) are those which appertain to a *particular* individual or individuals, and relate either to the *person* or to *personal* or *real property*; and the first respect either *his own* particular *person*, as personal security of his life, body and limb, health and reputation, or his personal liberty; or they regard *his interest* in some particular *relation* (being termed his *relative* rights,) as to his wife, child, ward, apprentice, or servant. *His duties* towards *them* constitute *their* rights or claims upon *him*.

2. PRIVATE
RIGHTS.

First, Of Person.

And see *Hill v. Reardon*, 2 Sim. & Stu. 431. But this rule does not extend to take away the jurisdiction of the Court of Chancery, where a person, in whose favour an adjudication has been made, is affected by a trust or by fraud, that Court then having jurisdiction to enforce the

trust or relieve against the fraud. Same case, 2 Russ. R. 608, A.D. 1827, qualifying the Vice-Chancellor's decision in 2 Sim. & Stu. 437.

(c) *The Mayor of Lyme Regis v. Henley*, 3 Bar. & Adol. 77, and *post*, 11.

CHAP. I.
RIGHTS, &c.

Secondly,
Rights to Per-
sonal Property.

The rights to *personal property* involve the consideration of the *nature* of the *thing itself*, and the extent of the interest therein, and the modes by which the rights thereto may be acquired and transferred. There are certain peculiar properties affecting most personal property, and which render it in legal estimation inferior to real property, and consequently distinguish it in various important respects. These are, principally, that it gives no right to vote on various occasions, as real property does: *secondly*, that property in personal chattels may be originated or created without any written document, and that it may be alienated or transferred from one to another by mere delivery or verbal assignment, without title-deeds; whereas in general some deed or written document is essential to the transfer of real property: *thirdly*, the whole interest in most tangible personal property may be taken in execution and sold, when at most only a part of the annual value of real property can be taken by a single creditor: *fourthly*, upon death the legal interest passes to the executor or administrator of the owner; whereas real property descends to the heir, unless legally devised: *fifthly*, if felony be committed by the owner, the whole of his personal property is forfeited; whereas only the profits of his real estate is forfeited during his life, and upon his death it descends to his heir. These are only a few of the leading distinctions; sufficient, however, to establish the importance of the division. The term *personalty* includes every thing moveable, whether animate or inanimate, when the law considers them to be the subject of property, and sometimes things quasi moveable, as tenants' fixtures; and whether tangible or not, such as choses in action, or things which cannot be beneficially obtained without suit; and there are some description of interests which, though connected with and issuing out of realty, yet, being temporary and only for *years*, are considered merely as *personalty*, such as leases for years. So canal shares are in general only personal property, and therefore give the owner no right to vote for a member of parliament; (*d*) though sometimes shares in bridges, rivers, &c. are real property. (*e*) So because a company, having only the *navigation* of a river, have no interest in the soil or realty, they are not rateable to the relief of the poor, although they have a dam erected in the river. (*f*) Like real property, the interest in *personalty* may

(*d*) *Hollis v. Goldfinch*, 1 Bar. & Cres. 205; *King v. Thomas*, 9 Bar. & Cres. 114, acc.; but see *Buckridge v. Ingram*, 2 Ves. 651; *Howe v. Chapman*, 4 Ves. 542,

contra.

(*e*) *Rogers on Elections*, 27.

(*f*) *Rex v. Air and Calder Navigation*, 3 Bar. & Adol. 139.

be either absolute for ever, or only temporary for life or for years, or it may be solely in one person, or in several as joint tenants or tenants in common; or with respect to the time of enjoyment it may be in possession or in remainder or reversion; and the modes of creating or transferring it are various, viz. by mere possession, (generally sufficient against all wrong-doers,) or by prerogative or forfeiture, by custom, by gift or grant, by bankruptcy, by will or testament, or under the statute of distribution, but principally by *contracts*, which, though formerly otherwise, has now become by far the most frequent and important ground of claim to *personal chattels*, and to *debts* and *damages* for the nonperformance of contracts.

The rights to *real property* are various, as regards, *first*, the *subject-matter* or nature of the thing itself; as whether it be corporeal or tangible, or incorporeal or nontangible: corporeal being houses, lands, and every other visible, tangible and immoveable property; and the latter or incorporeal being a property which cannot in general be touched, and has no *corpus*; such as rights of common, or rights of way and other easements, and rights which, though they may be enjoyed in, upon, over or relating to land or other corporeal property, yet in consideration of law constitute no right to the land itself.

Thirdly, Rights to Real Property.

There is also one description of property connected with land which may be either real or personal property, depending on the statute which creates it; as *canal shares*, which under some acts are real property, and under others mere personalty, although issuing in some respects out of land. (g) These distinctions will be found of the utmost practical importance, not only as they affect the modes of *creating* and *transferring* the right and the wrong, and remedies relating thereto, but also as regards the extent of the incidents connected with the property. Thus a person who has a *freehold* interest in houses or *land*, is entitled to vote in the election of a member to serve in parliament, as part of or appurtenant to the principal right; but not so the owner of a mere right of common or other easement, though perhaps it may in reality be much more valuable than the house or land, but which seems in general, by the terms of the original grant or by usage, limited in beneficial enjoyment to *itself*, and has no excrescent or collateral right or appurtenant growing out of the same.

Real property, *secondly*, is to be regarded with respect to the *tenure* and *quantity* of *interest*, and principally whether

(g) *Buckeridge v. Ingram*, 2 Ves. 652; 205; *The King v. Thomas*, 9 Bar. & Cres. 114; 4 Ves. 541. and *Hollis v. Goldfinch*, 1 Bar. & Cres.

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it is a freehold or a copyhold interest. If the former, a moiety of the owner's legal interest may be seized under an *elegit*, but no execution at the suit of a creditor will affect the debtor's *copyhold* interest; though if he become bankrupt, or be discharged as an insolvent, the entire freehold as well as copyhold interest may be sold for the benefit of the creditors. So with regard to the extent and duration of interest, it may be an estate of inheritance or only for life, and either for a party's own life or for that of another, as dower, or tenancy by courtesy, &c., or it may be only for years, or strictly at will or by sufferance. So with regard to the *number* of owners, it may be in joint tenancy or coparcenacy or in common; and with regard to the *time of enjoyment*, it may be in possession, remainder, or reversion; and as to the *modes by which these several interests or rights may be acquired or transferred*, it may be by descent, or by purchase, as it is technically termed, which includes not only purchases, vulgarly so termed, (where some conveyance upon a sale has been executed,) but also when the estate has been obtained by *any* other means than by *descent*; as when the property is merely in possession without strict title, and which possession may enable him to sue a mere wrong-doer in trespass, (*h*) or even in ejectment, (*i*) or by special occupancy, prescription, or by alienation, whether by deeds of various kinds, or by matter of record, as by fine or recovery, or by special custom, or by devise. The different modes of acquiring the right (and the exact knowledge of which constitutes the science of conveying) frequently affect the remedies, and in practice are essential to be well considered before deciding in any difficulty upon any injury or remedy affecting these rights.

Fourthly, Rights are temporal, either legal or equitable; or they are ecclesiastical or spiritual; or cognizable only in a Prize Court.

It is further necessary, with respect to private rights and duties, to observe, that they are *temporal*, or *ecclesiastical*, or *spiritual*; the former are generally cognizable only in the Common Law or Equity Courts; the latter only in the Ecclesiastical or Spiritual Courts. Thus alimony and restitution of conjugal rights, and punishment for verbal slander merely imputing fornication or other offence of a spiritual nature, and unattended with special damages, must be proceeded for in the latter Courts. Again: the former or *temporal* rights are either *legal* or *equitable*, and Courts of *Law* in general only take notice of and remedy the infraction of *legal* rights, and if an action is to be brought, it must be in the name of the *legal*

(*h*) *Graham v. Peat*, 1 East, 244; 4 Taunt. 548; 8 East, 356. 47 (*c*); 7 Bingham, 346; 1 Chitty on Pleading, 218, note (*c*).

(*i*) 2 Saund. by Patteson & Williams,

owner, being the party in whom the legal right or interest is vested, though he have no beneficial interest; and the person trusting or confiding in the trustee (being the *cestui que trust*) cannot sue in his own name, (k) still less can he sue his own trustee, (l) but recourse must be had by him to a Court of Equity. (m) Courts of Common Law will not in general notice mere *equitable* rights, as contradistinguished from the strict *legal* title and interest, so as to invest the equitable or merely beneficial claimant with the ability to adopt *legal* proceedings in his own name, although the equitable right may embrace the most extensive, and indeed the exclusive interest in the *benefit* to be derived from the contract or other subject-matter of litigation. This rule could not be disregarded without destroying the fundamental distinctions wisely constituted between Courts of Common Law and Courts of Equity, with regard to the cognizance of rights and the remedies peculiar to each jurisdiction. If the *cestui que trust* were permitted to sue at law in his own name, the benefits and protections intended to result from the intervention of the trustee, clothed with the legal title, might be lost, and the advantages arising from giving the Court of Equity exclusive control over matters of trust would be defeated. Thus if a husband could proceed at law for a legacy left to the separate use of his wife, he might receive and spend the whole, and leave his wife destitute, when, if compelled to resort to a Court of Equity, terms may be imposed and maintenance secured. (n) Besides it would be impossible, consistently with the common principles of jurisprudence, to exclude the power of the trustee to sue in respect of his *legal* right, and it would be highly mischievous and unjust to permit the defendant to be harassed by two proceedings upon the same contract or transaction. The right of action is therefore wisely vested solely in the *party* having the strict *legal* title, in exclusion of the mere equitable claim; and if a right be vested in A. for the use of B., the latter can neither release nor sue at law for an injury. (o) And this rule, though in general established by decisions respecting *actions*, has a more extensive application and extends to proceedings antecedent to litigation; thus a notice to quit, or a demand, &c., should be in the name of the legal owner

(k) 1 East, 497; 8 T. R. 332; 1 Saund. 158, n. 1; 7 Mod. 116; 2 Sanders on Uses and Trusts, 222; 2 T. R. 696; 7 T. R. 667; 2 Bingh. 20; where this rule is explained and elucidated.

(l) Id. *ibid.*

(m) Id. *ibid.*

(n) See observations of Lord Kenyon in *Goodtitle v. Jones*, 7 T. R. 50; and in *Bauerman v. Radenius*, 7 T. R. 667.

(o) Id. *ibid.*; 2 Inst. 673; 1 Lev. 235; 3 Id. 139.

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and party who must afterwards sue or prosecute, and not merely in the name of the party beneficially and equitably interested, though he may properly *join*, to show his concurrence in the proceeding for his benefit. However a cestui que trust in actual possession may in general sue a wrong-doer in trespass for an injury to the *possession*, for in that case the *title* would not come in question, and bare possession is sufficient against a wrong-doer.^(p) Nor is the distinction between legal and equitable rights confined in its consequences to the *jurisdiction* or *form* of the remedy, it affects in various cases the *right itself*, at least as regards collateral incidents. Thus if a person be in possession of an estate merely under an *agreement* of purchase, without an actual conveyance, and have children and die, he had merely an *equitable estate*, and it follows that if his widow subsequently reside with his children on the estate, she does not thereby acquire a parochial settlement as if her husband had had the *legal* estate, because a widow can never be guardian in socage of an *equitable* interest, but only where a *legal* estate has *descended* on her child, although at any instant a Court of Equity would have decreed a conveyance of the legal estate to such father or child.^(q) So if under colour of war the personal property of a person be illegally *captured*, he cannot try his right to restoration or compensation in any temporal Court, but must sue alone in the Prize Court, having jurisdiction over prize questions by special commission from the King.^(r)

II. INJURIES
whether PRIVATE OR PUBLIC.

Injuries like rights are *private* or *public*, and as they affect the person, personal or real property, naturally follow the same arrangement as that of rights. In considering them, so as to decide on the proper remedy, it will be found in general necessary to ascertain *four* points: 1st. The *nature of the property* and right affected, and whether it was public or private, corporeal or incorporeal; 2dly. The *mode of committing the injury*, as whether it was a felony or only a misdemeanor, or a tort, or a breach of contract; and if a tort, whether it was committed under colour of process, and whether it was direct and immediate or only consequential, and whether it was with or without force, and if the latter, whether it was a nonfeasance, misfeasance, or malfeasance; and 3dly. *Upon what occasion* or

(p) 1 East, 244; 2 Saund. 47 (d).

(q) *Rex v. Toddington*, 1 Bar. & Ald. 560; 2 Mod. 176; Co. Lit. 87, b. note

1, by Hargreave; Vin. Ab. Guardian, I.

(r) *Ante*, 2, note (b).

for what purpose the injury was committed, and whether *primâ facie* lawful or illegal; and sometimes, 4thly, With *what intent* it was done, as whether with or without *malice*.

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INJURIES, &c.

Thus, *first*, with respect to the nature of the thing affected and right thereto. Injuries to the person, and to personal and real property *corporeal* in the possession of the claimant, may be *direct* and with *force*, and the remedy may be trespass *vi et armis*; but if the property were *incorporeal* and not tangible, or not in possession, and the interest were in remainder or reversion, then the injury to such a right cannot be considered as committed *directly* with *force*, and consequently it would be incorrect to describe it or its consequent damage as committed with force; and as the *character* of another is not corporeal or visible, the injury must be stated accordingly, and the remedy in the latter instance is *case* for the consequential injury.

Material to consider *first* the nature of the thing affected, and right thereto.

Secondly. Injuries may be by nonfeasance, misfeasance, or malfeasance; *nonfeasance*, the not doing that which it was a legal obligation, or duty, or contract to perform; *misfeasance*, the performance, in an improper manner, of an act, which it was either the party's duty or his contract to perform, or which he had a right to do; and *malfeasance*, the unjustifiable performance of some act which the party had no right, or which he had contracted not to do. These several modes of committing private injuries are compensated by peculiar and appropriate remedies, in which the cause of action must be properly described. Again: if the injury were committed by improperly putting in force either criminal or civil *process* duly and regularly issued, no action of *trespass* could be supported, but the proper remedy would be, after an acquittal or verdict for the defendant, an action on the *case* for maliciously, and without probable cause, arresting the party, or otherwise causing such lawful process to be put in force; for, excepting in cases of excess, no man can be treated as a trespasser for acting under lawful process, and according to its direction, however maliciously he may have obtained it. (s)

Secondly. The nature of the injury itself.

Again: it is of the utmost importance to consider whether the injury complained of was strictly an injury *public* or *private*, as the answer will not only regulate the conduct of parties acting for themselves, but also materially affect the substance as well as the form of the remedy. Thus an indi-

Whether the injury was public or private, and whether a felony, &c.

(s) Per Lord Kenyon, *Belk v. Broadwood*, 304; 1 Dow. & R. 97, S. C.; 1 Chit. Pl. 3 Term R. 185; *Elsee v. Smith*, 2 Chit. R. 214, 215.

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vidual may of his own accord, and without previous request, abate many *public* nuisances or injuries of *commission*, and perhaps with *more force* and to a greater extent, and without such particular care to avoid injury to the materials than he could a *private* nuisance; (t) whereas if it were a mere *omission*, there should be a prior request, and if it were a private nuisance, (u) he must cautiously avoid doing more than what is strictly necessary for the enjoyment of his right, and if guilty of any excess he will be a trespasser at least *pro tanto*, if not *ab initio* for the whole. (x) So if the injury were *merely public*, the remedy can only be public, and no particular individual could proceed by *action* for compensation for the supposed injury that he has individually sustained; for, otherwise, many individuals would sue separately, and there would not only be a multiplicity of suits (which the law considers should be suppressed); (y) and as each individual would be content to receive or recover his private compensation, the general interest of the public would be disregarded, and the nuisance perhaps continued, or the crime be inadequately punished; and for this reason, in general, the remedy must be by indictment or criminal proceeding for a nuisance to or for not repairing a public highway, or bridge, or other offence affecting a public right. (z) So in cases of *felony* the remedy by action for the private injury is generally *suspended*, (sometimes, erroneously, termed *merged*,) until the party particularly injured has fulfilled his duty to the public by prosecuting the offender for the public crime. (a) And for homicide all civil remedy is entirely *merged* in the felony, (although compensation is sometimes afforded to the widow, or relatives, in case of the homicide of a person endeavouring to apprehend an offender); therefore no action lies for

(t) In *Lodis v. Arnold*, 2 Salk. 458, the Court held, that when an individual has a right to abate a *public* nuisance, he is not bound to do it orderly, and with as little hurt in abating it as can be, and, therefore, the defendant was not answerable in that case for the rolling into the sea of the materials of an house erected across, and constituting an injury to a public way. And in another case of public nuisance, although the defendant might have opened the gate without cutting it, yet the cutting was holden not to be illegal, as the party did it in abatement of a public nuisance; *id. ibid.* So upon a cry of murder any person may break open the outer door of an house to prevent the commission of such public offence, though

if a mere private assault had been committed, it might have been otherwise. 2 Bos. & Pul. 260,

(u) 2 B. & Cres. 302.

(x) 9 Co. Rep.; 2 Stra. 686; Godb. 221; 1 Stark. R. 56, 173.

(y) Although that reason applies in *this case*, it is not in general any answer to an action; for, as has been observed, if a man will commit an injurious act to the separate rights of *several*, there is no reason why he should not make separate satisfaction to all.

(z) *Russell v. The Men of Devon*, 2 T. R. 667; 11 East, 349, 355. Same reasoning, 3 Bla. Com. 219, 220.

(a) 7 & 8 Geo. 4, c. 29, s. 57; 2 T. R. 750; 12 East, 409; 2 Car. & P. 41.

the battery of a wife or servant whereby death ensued, (b) and, in general, all felonies *suspend* the civil remedies; (c) and before conviction of the offender there is no remedy against him at law or in equity; (d) but *after* conviction and punishment on an indictment of the party for stealing, the party robbed may support trespass or trover against the offender; (e) and after an acquittal of the defendant upon an indictment for a felonious assault and stabbing, the prosecutor may maintain trespass to recover damages for the civil injury, if it be not shown that he colluded in procuring such acquittal. (f)

In some cases of *misdemeanors*, and other particular offences, there are express enactments that the civil remedy shall not be affected by the criminal; as in the case of embezzlements by clerks, bankers, &c. (g)

But in the former case of a *public* nuisance, which is merely a misdemeanor, if a particular individual has sustained actual and particular material damage or inconvenience in consequence of the offence; as if in throwing a log into a public highway it hurt an individual, or afterwards occasion his horse to fall; or if a public road, which a private individual was bound to repair, be so impassable as to delay another a *long* time in his journey, or compel him to take a circuitous route, then the latter may sustain an action for such particular damage; (h) and he may at the same time prosecute the offender by indictment for the public nuisance. (i) So some injuries are in their nature as well private as public, as assaults and batteries, libels on individuals, and forcible entries; and the party particularly injured may proceed by action, or he, or any other person, may indict the wrong-doer for breach of the peace; and in general the civil remedy for a private injury, also constituting a public *misdemeanor*, is not, as in cases of *felony*, even suspended.

Thirdly. The *occasion* upon which the supposed injury was committed should be considered, as it frequently, at least *primâ facie*, legalizes or excuses the act, as in the case of slander in giving the character of a servant the libel is excusable, unless express malice be proved. (k)

Thirdly, The occasion of committing the injury.

(b) Styles, 347; 1 Lev. 247; Yelv. 89, 90; 1 Ld. Raym. 339. At least it is so as respects the death and *subsequent* loss of service, but it might be otherwise for the expense and *temporary* loss of service. Semble.

(c) Styles, 347.

(d) Id. *ibid.*; 17 Ves. 531.

(e) Styles, 347; Latch. 144; Sir W. Jones, 147; 1 Lev. 247; Bro. Ab. tit. Trespass.

(f) 12 East, 409.

(g) 52 Geo. 3, c. 63, s. 5.

(h) *The Mayor and Burgesses of Lyme Regis v. Henley*, 3 Bar. & Adol. 77; *Chichester v. Lethbridge*, Willes' Rep. 71 to 75; 9 Moore, 489; 11 East, 60; 12 East, 432; see other cases, 3 Bla. C. 219, 220, note (6).

(i) Id. *ibid.*

(k) *Pattison v. Jones*, 8 Bar. & Cres. 578.

CHAP. I.
INJURIES, &c.

Fourthly. The intention of the wrong-doer.

PRIVATE INJURIES in particular.
Torts independently of contracts.

Fourthly. It may in some cases be necessary to prove a malicious or bad *intention*, as in an action for a malicious prosecution, and in some cases of slander. But in general when the act occasioning an injury is unlawful, the intent of the wrong-doer is immaterial. (*k*)

With respect to *private* injuries it is essential to consider what was the right affected, and then to ascertain whether the injury was a *tort* without contract, or a mere *breach of contract*, or of what other precise nature. If it were a mere *tort*, was it an immediate injury with *force* to a corporeal and tangible thing, so as to constitute a *trespass*, and remediable as such; or was the injury to an incorporeal or nontangible matter, or indirect and without force and only consequential, or to property in remainder, and therefore remediable by another form of remedy, viz. an action on the *case*; (*l*) and was it a mere violation of a right by a party under no particular obligation, or was it the breach of a duty? Was it a nonfeasance, misfeasance, or malfeasance? These questions are of great importance, in many respects substantially so, and at least in regard to their governing the form of remedy. (*m*) Thus if B. illegally enter the house or land of A. with *actual force* and in a violent manner, such illegal entry would justify A. in immediately opposing force to force, and laying hands on him and turning him out without previous request; but if B. entered peaceably or to demand a debt, he must first be requested to depart, and if he refuse, then, although hands may be laid on him, yet this must be done *gently* (*molliter*), and no more force to push him out must be used than absolutely requisite. (*n*)

Torts, in their infinite varieties, affect the *person* absolutely or relatively, or *personal* or *real property*. To the *person* they are threats and menaces, assaults, batteries, wounding, mayhems; injuries to health, by nuisances or by medical malpractice; or affecting reputation, they are verbal slander, libels, and malicious prosecutions. Affecting personal liberty, they are false imprisonment and malicious prosecutions. To the relative right of a husband, they are abduction and harbouring, adultery or criminal conversation, and battery. Of a parent, abduction, seduction, and battery; and of a master, seduction, harbouring and battery of his apprentice or servant. And as they affect the right of the *inferior relation*, viz., as the wife, child, appren-

(*k*) 6 East, 464, 473; 2 East, R.107; 5 Esp. R.214; *Weaver v Ward*, Hob. 134; 1 Bing. 213; 1 Chit. Pl. 5 ed. 147, 148, 149.

(*l*) 9 Bar. & C. 591.

(*m*) See the distinction 1 Chitty on Pleading, 142 to 151.

(*n*) 2 Salk. 641; 8 T. R. 78, 357; *Fulley v. Reed*, per Park, J. 1 C. & P. 6, post.

tice, or servant; they are withholding conjugal rights, maintenance, wages, &c.

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INJURIES, &c.

Injuries to *personal property* are the unlawful taking or detention thereof from the owner; and other injuries, are some damage affecting the same whilst in the claimant's possession or that of a third person, or injuries to his reversionary interest.

Injuries to *real property* are ousters, or turning or keeping the owner out of possession, trespasses to the owner's possession, nuisances to corporeal and incorporeal real property, waste, subtraction of rent, services, &c., disturbances of franchises, right of common, rights of way, or of pews, of tenure, and of patronage, &c.

It must further be considered whether the injury was *temporal*, or *ecclesiastical*, or *spiritual*. Thus, although the common law protects private reputation, yet *actions* are only sustainable when a verbal slander imputes an offence punishable in the temporal courts, and not a mere imputation of fornication, adultery, drunkenness, or other immorality, punishable only in the Spiritual Courts, unless it can be averred and proved that actual temporal damage, such as the loss of the society of one or more particular persons, has ensued. If such damage cannot be proved, then the calumniator must be proceeded against (within six calendar months) for correction in an Ecclesiastical Court, whose sentence is not, as supposed, mere *brutum fulmen*, and though not for damages is for corporal punishment and costs. So a married woman, though entitled to alimony and conjugal rights, cannot sue her husband at law, but must resort to an Ecclesiastical Court (o) or to an action at law in the name of her trustees, in case of a deed securing her money or a separate maintenance, (p) though probably deeds stipulating for separation would now be held void at law, even as to covenants with a trustee, according to the recent decision in the House of Lords. (q)

Torts are
temporal or
ecclesiastical.

If a *breach of contract* be complained of, then the nature of the contract must be considered, as whether it was of record, under seal, in writing, or merely verbal; and if the latter, whether it was an express or implied contract. The remedies, we shall find, principally depend on the form and mode in which the contracts were entered into. It must be ascertained whether there was any prior act (termed in law a *condition precedent*) to be performed by the party complaining, and whether any requisite tender, offer, request, or notice, or other step has

Breaches of
contract.

(o) 27 G. 3, c. 44; 53 G. 3, c. 127; 3 Maule & Selw. 429.

(p) 9 Bar. & C. 67; 3 Dowl. & R. 570.

(q) *Westmeath v. Westmeath*, 1 Dow. Rep. New S. 519, and post next chapter.

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INJURIES, &c.

Public injuries.

been performed essential to establish that the party required to perform his contract *has* no excuse for his nonobservance.

With respect to *public* injuries (usually denominated *crimes* and *offences*), they necessarily are as various as the public rights themselves, and even more so, for there is no limit to the perverted inventions of the malicious and the depraved in their unjust desire to injure others or to benefit themselves. All public offences or injuries may be classed under one of four heads, *treasons*, *felonies*, *misdemeanors*, and *offences*. (r) The former are certain offences against the King or state, and to which our present inquiries will not extend. The distinction between *petty* treason (viz. the killing of a husband, master, &c.) and ordinary murder, is now abolished. (s)

Felony, what.

Felon is a term of disputed origin, though probably derived from *fee* and *lon*, (*fee* signifying the fief, feud, or beneficiary estate, and *lon* meaning the price or value,) and signifying all crimes of so high a nature as to be punished, as heretofore the case, with the total loss of the *fee*, or estate, and its *value*; and to which, capital or other punishment may be superadded, according to the degree of guilt. (t) And when a statute declares that an offender guilty of any certain act shall be deemed to have *feloniously* committed it, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony. (u)

Misdemeanor.

The term *misdemeanor* means every offence inferior to felony, but punishable by *indictment* or by particular prescribed proceedings. (x)

Offence.

The term "*offence*" also may be considered as having the same meaning, (y) but is usually by itself understood to be a crime *not indictable* but punishable *summarily* or by the forfeiture of a *penalty*. If one statute make the doing an act *felonious*, and a subsequent act make it only *penal*, the latter is considered as a virtual *repeal* of the former. (s) These distinctions will be found highly important in their consequences. Private remedies are, in the case of *felonies*, suspended until after conviction or acquittal of the felon, but not so in general in the case of *misdemeanors* or minor *offences*.

Public offences are to the law of *Nations*; or against God or religion, morality or decency, as recognized by our own public

(r) See the several public treasons considered, 2 Chit. Crim. L. 60 to 122.

(s) 9 G. 4, c. 31, sect. 2.

(t) Sir H. Spelman and 4 Bla. Com. 94, 95.

(u) 3 M. & S. 556; 1 Hawk. c. 40, s. 5.

(x) Burn J. Misdemeanor; and see the *King v. Powell*, 2 Bar. & Adolp. 75, when the term misdemeanor, in the singular, may be taken as *nomen collectivum*, and including several offences.

(y) Id. *ibid*.

(s) 1 Hawk. c. 40, s. 5.

(C 47 43)

municipal laws ; offences against the King, whether amounting to high treason, felony, or misdemeanor, or contempts of his government and prerogatives ; offences against public justice, of various descriptions ; against public peace, trade, health, and public police or economy ; and offences against the positive enactments of a statute subjecting the party violating the regulation to a pecuniary penalty or punishment ; all which in themselves are direct violations to rights strictly public.

Besides these are certain public *offences* more immediately affecting a *particular* individual, and constituting a *private* injury, but which, in respect of their bad example and tendency, are also considered to be public ; such as those affecting the *person*, as homicide, which *directly* seems only to affect the party killed and his near relatives ; other offences against the person of an individual, such as mayhems, abduction of an heiress or other female, rapes, unnatural crimes, assaults, batteries, woundings, and false imprisonment, libel, challenges and duels. Offences against *habitation*, as arson and burglary and riotous destruction ; certain offences against private *personal* property, as larceny, embezzlement, false pretences and cheats, malicious mischief, forgery, and others. These, it will be observed, although directly and immediately more particularly injurious to one or more individuals, are, as breaches of the peace, and calculated to rouse and instigate men to revenge, and affording dangerous examples to others, therefore injurious in their consequences to society at large, and punishable as such. Some of these we shall find are *remediable* or rather *punishable* only by particular means, or in a particular course ; and hence it is of great importance to ascertain the precise nature and classification of the *public* injuries or offences complained of.

We have seen that, with regard to private injuries, if a wrong be committed, the *intention* of the wrong-doer is seldom material. But with regard to *public* offences, it is in general otherwise, and the criminal *intention* frequently constitutes the *essence* or the *degree* of crime ; thus homicide is murder, if committed maliciously, but if only occasioned by want of due care, it is only manslaughter. So seeming horse stealing or other larceny, will become at most trespass, if it appear that there was a total absence of felonious or criminal intent. (a)

With respect to *remedies*, they naturally follow the same order as rights and injuries, and it is essential, before the adop-

III. REMEDIES,
PRIVATE, OR
PUBLIC, in general.

(a) *Rex v. Alexander and Davis*, Barn's J. tit. Horses, 262, 263, and tit. Larceny ; *Rex v. Martin*, 2 East's P. C. 618 ; 1 Leach, 171. S. C.

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REMEDIES, &c.

tion of any remedy, well to ascertain the public or private, legal or equitable, or ecclesiastical properties and qualities, as well of the right as of the injury to which the remedy is to be applied.

Here we must distinguish between *private* remedies and those which are PUBLIC, and advert to the rules before noticed, viz. That for *mere public* injuries no individual can institute a *private* remedy, (b) although, by adopting a public criminal proceeding, he may frequently obtain private compensation, at least by leave of the Court, (c) and that where the right affected was merely *equitable*, an injury to it can in general be redressed only in a Court of *Equity*, and that ecclesiastical and spiritual injuries must be redressed in an Ecclesiastical Court. (d)

Remedies of
three descrip-
tions,
Preventive,
Compensatory,
or Punishments.

It will be found that for most injuries which more or less affect a *private* right and a *private* individual, (although often also affecting the public,) there are *three* descriptions of remedies or proceedings, and each of which again has its variety. The *first* are the *preventive*, or removing, or abating remedies, and which may be by acts of the party aggrieved, or by the intervention of legal proceedings; as in the case of injuries to the person, or to personal or real property, defence, resistance, recaption, abatement of nuisance, and surety to keep the peace, or injunction in equity, &c.: *secondly*, remedies for *compensation*, which may be either by acts of the party aggrieved, or summarily before justices, or by arbitration, or action, or suit at law, or in equity, or in an Ecclesiastical Court: and *thirdly*, proceedings for *punishment*, or mixed of compensation and punishment, and either summary before magistrates, or by indictment, or criminal information, ecclesiastical censure, &c. If the injury were an unlawful *capture* or seizure of that nature, or constituting a breach of international law, then no action can be sustained in a municipal court, but the proceeding for redress must be in the Prize Court of the Admiralty, or before commissioners specially constituted by the King. (e)

The wrong-doer in most cases of private injuries, (which also constitute *public offences*,) as batteries and libels, is liable both to an action at the suit of the party injured, and also to an indictment, (f) (though this is sometimes prohibited, (g)) and the Court in which the action is brought will not in general compel the plaintiff to elect, (h) though the Attorney-General may stay

(b) *Ante*, 10.

(c) *Post*.

(d) *Ante*, 7, 8.

(e) *Elphinstone v. Bedreechend*, Knapp's Rep. 316 to 361; and see *Hill v. Reardon*, 2 Sim. & Stu. 431; but see 2 Russ. R. 608, *ante*, 2, note (b).

(f) Hawk. P. C. c. 62, s. 4.

(g) 7 & 8 Geo. 4, c. 29, s. 70; Id. c. 50, s. 36; 9 Geo. 4, c. 31, s. 28; 1 & 2 W. 4, c. 32, s. 46.

(h) 1 Bos. & Pul. 191.

the public prosecution. (i) But a court and jury will in general consider the double proceeding vexatious, and the latter in that case will seldom give large damages.

In some cases of public offences, but which have more immediately injured a private individual, as batteries and libels, if the public remedy by prosecution be adopted, the court will sometimes permit a reference, (k) or allow the defendant, even after conviction, to *speak* (as it is termed) with the prosecutor before any judgment is pronounced, and a trivial punishment (generally a fine of a shilling) will be inflicted, if the prosecutor declare himself satisfied, or if, in other words, an adequate apology or compensation has been made; (l) and where the defendant was convicted on an indictment for ill treating a parish apprentice, and at the recommendation of the Court of Quarter Sessions gave security for the fair expenses of the prosecution, upon an understanding that the court would abate the period of his imprisonment, the security was held to be legal and binding. (m) So upon summary proceedings before a magistrate, (as for petty larcenies or injuries to personal or real property,) he is sometimes authorized to discharge the offender from a conviction, upon his making such satisfaction to the party aggrieved for damages and costs, or either, as shall be ascertained by the justice. (n) But it should seem that this permission does not extend to felonies. (o) By leave, therefore, of the court, some public prosecutions may be allowed to enforce civil compensations for the private injury. But it should seem that a *compromise* of an indictment for a *public* misdemeanor and private satisfaction cannot take place without the sanction of the court, (p) and that the same rule would extend to an indictment for a common battery or libel. (q) But at least a bond conditioned to *discontinue* a public nuisance is valid. (r)

When private compensation is obtainable by compromising a public prosecution.

By the ancient common law, and by the older statutes, remedies were divided and distinguished as *private* or *public*, and

The occasion for, and introduction of, summary proceedings.

(i) Burn's J. tit. Nolle Prosequi.

(k) See *post*, and Burn's J. tit. Award; 1 J. B. Moore, 120: 7 Taunt. 422; 9 East, 497.

(l) 4 Bla. C. 363, 4.; 1 Moore, 120. See *Elworthy v. Bird*, 2 Sim. & Stu. 372. But see 1 Dow. Rep. New S. 519, overruling that case as to the effect of a covenant between husband and wife to separate.

(m) 11 East, 46.

(n) 7 & 8 Geo. 4, c. 29, s. 63; and chap. 30, s. 34.

(o) *Elworthy v. Bird*, 2 Sim. & Stu. 372.

(p) 5 East, 294; 1 Smith, 515; Burn's J. 26 ed. tit. Award.

(q) *Rea v. Rant*, Kyd on Awards, 64; and see 2 Bing. 258; M'Clel. R. 69; 2 Dowl. & Ry. 265; 7 Taunt. 422; *sed quare*, see *Elworthy v. Bird*, 2 Sim. & Stu. 372; that an indictment for a misdemeanor may be compromised, though not an indictment for *felony*, *Westmeath v. Westmeath*, 1 Jac. Rep. 126. where specific performance of an agreement for separation of husband and wife was decreed, though the agreement provided for the compromise of an indictment for an assault.

(r) 7 T. R. 475.

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REMEDIES.

each were either at law or in equity, or *ecclesiastical* or *spiritual*. The first were to be pursued in the temporal common law civil courts; the second in the public criminal courts; the third in courts of equity; and the fourth and fifth in certain ecclesiastical or spiritual courts. Formerly, the trial or investigation of private remedies in the common law courts, and of public crimes and offences in criminal courts, were principally, if not entirely, by *jury*; then considered the only constitutional mode of investigating disputed facts. But as society enlarged, and the expenses of litigation increased, innovations were gradually introduced on that mode of deciding upon facts. Inferior Courts of Requests (commonly termed Courts of Conscience) were instituted for the purpose of determining small debts, where the claimant is allowed to substantiate his demand by his own oath; and in cases of petty offences and misdemeanors, a most extensive jurisdiction has been gradually given and extended to magistrates and others, enabling them to decide upon facts civil as well as criminal, which must in former times have been determined by a jury, and in superior courts. But now, justices, who, by the terms of their commission, formerly had jurisdiction only over *crimes* and breaches of the *peace*, have, in almost all cases of petty offences and torts, unconnected with contract, (and, indeed, in some cases even of *contract* of an inferior nature, as between masters and apprentices and masters and servants in certain trades, and between members of friendly societies, and in fixing the amount of salvage, &c.) been invested with jurisdiction quite foreign to their original institution, and they have been clothed with powers to hear and determine, combining the several functions and powers of a judge and jury and a court of equity. So that summary jurisdiction without trial by jury is now extended to almost every small injury or dispute that can usually arise between members of society. On the one hand, this is great saving of expense to parties, but upon the other, magistrates are invested with jurisdiction which might, in some cases, be very injuriously exercised.

I. PRIVATE
REMEDIES.
General rules.

Keeping in view these extensions and introductions of new remedies, we will now proceed to state the general rules which affect the ancient as well as modern remedies for *private injuries*, strictly so called, and those which, though nominally public, yet more particularly affect one or more individuals, and which may be resorted to by them in lieu of a civil remedy.

It is a general rule that when the right and injury were merely *private*, then no one can interfere or seek or prosecute a remedy but the party immediately injured; nor can others,

excepting professional advisers, instigate or encourage their prosecution, without being guilty of the offence of barretry, or maintenance, or champetry. (s) But on the other hand, if the remedy be even *nominally public*, and prosecuted in the name of the King, then *any one*, though not privately injured, may institute or continue the prosecution. (t)

Private remedies are either *by act of the party, or by legal proceedings, to prevent* the commission or repetition of an injury, or to *remove it*; or they more frequently are to recover, by summary proceeding, or by action or suit, *compensation* for the completion of an injury.

The *preventive* remedies are more numerous than usually supposed, but they are not so frequently resorted to as might be advisable, (u) which may be attributed to the ignorance of their existence until it is too late to resort to them, or to the hazard of their being mistaken, and subjecting the party to an action for his irregularity, or to the preference given to a more formal and expensive proceeding.

First. Preventive
and removing
Remedies.

First. By party's
own act.

It has been frequently observed, that "*Laws for prevention are better than laws for punishment.*" (x) The *preventive* and *removing* remedies are principally of two descriptions, viz. *first, those by act of the party himself*, or of certain relations or third persons permitted to interfere, as with respect to the *person*, by self-defence, resistance, escape, rescue, and even prison breaking, in case of imprisonment clearly illegal; or in case of *personal property*, by resistance or re-capture; or in case of *real property*, by resistance or turning a trespasser out of his house or off his land, even with force; (y) or by apprehending the wrong-doer, or by re-entry and regaining possession, taking care not to commit a forcible entry or breach of the peace; (z) or in case of nuisances, private or public, by abatement; (a) or remedies by distress for damage feasant, or for rent, or for heriot, &c., or by set-off or retainer. By these and various other remedies, in which a party, as it is vulgarly termed, takes the law into his own hands, he may frequently avoid proceeding by action, which, especially in the instance of actions of ejectment, are too frequently unnecessarily resorted to. (b)

(s) 4 Bla. C. 134, 5. 13 b.

(t) 1 Salk. 174; 1 Atk. 221; 3 M. & Sel. 71.

(u) *Ante*, Preface.

(z) See *Wilcock v. Windon*, 3 Bar. & Adol. 43; and *Venegan v. Attwood and others*, 1 Mod. 202.

(y) 2 Salk. 641; Co. Lit. 257; 1 Saund. 81, 140, note 4; 8 T. R. 78, 357.

(z) *Id.* *ibid.*

(a) 2 Smith's R. 9,

(b) See 1 Bing. R. 158; 1 Man. & Ry. 220; 7 T. R. 431; 1 Price, 53; 3 Bng. 11.

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It has been properly suggested that there is frequently danger in persons availing themselves of remedies *by their own act*, because, by mistake or otherwise, they by so acting may expose themselves to the risk of being subject to an action for irregularity. This risk, however, is in a great measure provided for by modern acts requiring notice of action before they can be sued, and enabling them to tender amends, or even to pay the amount into court, in case a tender before action has not been made. Thus the modern acts against larceny and petty offences of that nature, and against wilful or malicious injuries to personal and real property, enable the owner of the property, or his servant, or any other person authorized by him, to apprehend the person *found committing* any offence punishable by indictment or summary conviction by virtue of the acts; and it is enacted, that all persons acting in *pursuance* of the acts, (and which term is construed to mean *bonâ fide* acting under colour thereof, though erring by mistake, (c)) shall have notice of action, and may tender sufficient amends, or pay the same into court; (d) and the game act contains a similar enactment; (e) consequently there is not much risk of expensive litigation by a party thus acting for himself.

There is, however, one general caution to be observed before the adoption of some of these remedies *by act of the party*, that a party who has availed himself of such summary proceeding cannot *also* afterwards proceed by action. Thus, if a party abate a nuisance by his own act, and without waiting the judgment of law *quod prosternavit*, he is not entitled also to proceed by an action, (f) for although he hath his choice of two remedies, either by abating it himself by his own mere act and authority, or by suit, in which he may both recover damages and remove it by the aid of the law, he hath not both, and having made his election of one, he is totally precluded from resorting to the other. (g) Hence it should seem that when a party has already sustained any considerable damage worth suing for, it is better to proceed by action for compensation than to abate the nuisance. (h)

(c) See *post*, 4 T. R. 556.

(d) 7 & 8 Geo. 4, c. 29 & 30; and 9 Bar. & Cres. 806.

(e) 1 & 2 W. 4, c. 32, s. 47; see decisions on these acts, *post*, ch. vii.

(f) 9 Coke Rep. 55; 3 Bla. C. 219, 220.

(g) *Id.* *ibid.*

(h) *Id.* *ibid.* It will be observed that

a person may proceed in a court of equity by bill for an injunction, and yet afterwards sustain an action for damages previously sustained; *post*, ch. viii. So after a person has obtained his release from illegal imprisonment by habeas corpus, he may sue a magistrate for the trespass; *Ex parte Hill*, 3 Car. & P. 225.

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Secondly. Preventive remedies by legal assistance.

The second description of *preventive remedies* are those which are obtained by some *legal assistance*; as by calling in a peace officer, by obtaining a warrant and security to prevent a duel, by application to a magistrate for security to keep the peace (i), or by application to the Court of King's Bench for the like purpose, or by obtaining a writ of habeas corpus; or by filing a bill and obtaining an injunction to prevent a nuisance, or a piracy of a copyright or other invention, or to prevent waste; and by writ of *ne exeat regno* to prevent a person who owes an equitable debt from getting out of the jurisdiction and eluding justice; and bills for specific performance of certain contracts, or to secure a due administration of assets among legatees, &c.

All these *preventive* or specific remedies, so calculated to anticipate and prevent loss, and to diminish litigation, we will hereafter very fully consider, because they are most essential to *speedy justice*.

Supposing the injury to be complete or continuing, then the remedies to obtain *compensation*, either *specific* or in *damages*, are to be considered. These are by arbitration; or are summary, before justices or others; or are formal, whether by action or suit in inferior or superior Courts of Law, or Equity, or Ecclesiastical, or Spiritual, or of Admiralty.

Secondly. Remedies for Compensation either specific or in damages.

Some modern acts, as those relating to *Friendly Societies* and to *servants* in certain trades, are *compulsory* on parties to refer their disputes to *arbitration*, as being of too small value to justify the trouble or expense of a formal suit or trial. (k) Here the parties have *voluntarily* placed themselves in the situation or character to which the statutory regulation applies, and they must have anticipated that such mode of settling any difference must be resorted to. It has recently been attempted to introduce a power of compelling all persons to refer certain matters of account to arbitration, when unfit to be tried by a jury, but the measure has not yet passed into law. It should seem that some restraint should be imposed upon obstinate parties who will assert their right to have tried in a superior court all the items of a long and intricate account, and which would frequently occupy several whole days, which, in the due and ordinary distribution of justice, ought to be divided amongst several suitors, and which account ought more properly to be investigated in a Master's office of a Court of Equity, or before an

Remedy by compulsory arbitration.

(i) Burn's J. Surety, Peace.

(k) 9 Geo. 4, c. 92, as to Friendly So-

cieties; *Crisp v. Bunbury*, 8 Bing. 394; and as to servants see 5 G. 4, c. 96.

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Summary remedies by legal assistance.

arbitrator, (*l*) or in an action of account before auditors. (*m*) Attempts have been made at Nisi Prius to prevent such an inconvenient trial at law; (*n*) but the party still has a strict legal right to insist upon it, (*o*) though in general it would be most unwise to try the question so adversely to the feelings of the judge and jury.

The remedies by the intervention of legal authority are frequently *summary*. Thus the party may regain possession by applying to magistrates under the statutes against forcible entries and detainers. (*p*) Or he may obtain summarily before justices punishment or compensation for petty or common assaults and batteries, (*q*) for which the offender may be fined 5*l.* to be paid in aid of the county rate; and for petty larcenies and for small and wilful or malicious trespasses and injuries to personal or real property, for which also 5*l.* may be imposed; (*r*) or for entering land to kill game without authority, or for laying poison to kill game; (*s*) or to justices for recovery of penalties for other small injuries and offences. (*t*)

Thus in case of a *common* assault and battery, not accompanied with any attempt to commit a felony, nor upon which title to land, or bankruptcy, or insolvency, or legality of an execution shall come in question, two justices are expressly authorized to convict in a fine of 5*l.*, to be paid in aid of the county rate; but the justices' certificate of the proceedings is to be a bar to any action or indictment for such assault and battery. (*u*)

So in cases of *petty takings of personal or real property* not amounting to an indictable felony or misdemeanor, (*v*) or for *wilful or malicious injuries to personal or real property* when not felonious (*x*), two or sometimes one justice may convict and award damages to the party aggrieved, and a penalty in aid of the county rate; (*y*) excepting that when the conviction has proceeded on the evidence of the party injured, then the sum he

(*l*) 2 Camp. 238; Eq. Cases Ab. 5; 7 Ves. 588; but when not so, 2 Young & Jervis, 33.

(*m*) 2 Chitty R. 10; 3 Dowl. & R. 596.

(*n*) 2 Camp. 238; Tidd, 9th ed. 2, note (*a*).

(*o*) 5 Taunt. 431, 432; 1 Marsh. 115; 2 Young & J. 33.

(*p*) Burn's J. tit. Forcible Entry and Detainer.

(*q*) 9 Geo. 4, c. 31, s. 27.

(*r*) 7 & 8 G. 4, c. 30.

(*s*) 1 & 2 W. 4, c. 32.

(*t*) Burn's Justice, per tot.

(*u*) 9 Geo. 4, c. 31, sect 27, 28, 29. As no part of the 5*l.* is to be paid to the party

aggrieved, it will be observed that a party seeking pecuniary satisfaction must still proceed by action at the risk of his not obtaining a verdict for 40*s.* damages, and of the judge declining to certify. There seems no reason why two justices should not have power of awarding private satisfaction for a battery, when proved by a third person's evidence or admission, as in small injuries to *personal or real property*, where a single justice has express power to award private satisfaction, under 7 & 8 G. 4, c. 29 & 30.

(*v*) 7 & 8 Geo. 4, c. 29, s. 66.

(*x*) Id. c. 30, s. 24, 32.

(*y*) See notes (*v*) and (*x*).

would otherwise receive is to be applied as the penalty. But a justice has power, upon the first conviction for such petty taking, or injury to personal or real property, to discharge the offender, upon his making such satisfaction to the party aggrieved, for damages and costs, or either of them, as shall be ascertained by the justice. (s) So the recent *game act* contains provisions, not only for apprehending but for fining persons to the extent of 5*l.* for trespassing in pursuit of game, to be paid in aid of the county rate; (a) but it is provided, that although the party injured by the trespass shall have the option of proceeding by action, yet there shall be no double proceeding, and that if he institute or concur in the proceeding for the penalty, he shall not also sue. (b) In general, upon these summary proceedings before magistrates, costs are recoverable, but in case the penalty amounts to 5*l.*, then the costs are to be deducted from it. (c)

These and similar enactments, as far as regard small injuries to the person, or personal or real property, and petty trespasses, will be preferable to actions, unless the damages are very considerable. They do not absolutely take away the common law right of action, but they give the party injured the *option* of obtaining compensation, or, for assaults upon the person, punishment for such small injuries by summary proceedings, supported by his own testimony, instead of having recourse to a trial by jury of an expensive action or prosecution for small damages or injuries, subject to the risk of not recovering a sum sufficient to enable him to obtain costs; and no respectable or prudent attorney or solicitor would hazard the rebuke of a judge, upon the trial of a trifling action, for encouraging or allowing his client to bring an action for a petty demand, which ought to have been proceeded for elsewhere (d).

(s) 7 & 8 G. 4, c. 29, s. 68, and chap. 30, s. 34.

(a) 1 & 2 W. 4, c. 32, s. 30, 31.

(b) *Id.* s. 46.

(c) 18 Geo. 3; see Burn's J. tit. Costs.

(d) Perhaps the principle of these enactments might be advantageously extended to verbal and even written slander, and to common assaults and batteries, and torts occasioning small damages, such as injuries by irregularities in making or conducting a distress for rent; and indeed to all cases of small injuries where no permanent right is to be tried, and to all cases where a party injured would be content to receive a small compensation rather than hazard an expensive suit in a superior court. Such an enactment would prevent numerous trifling actions in the superior courts, the

expense of which is very unequal to the sum actually recovered.

It seems at least expedient to provide a summary remedy for verbal slander, which would prevent many trifling actions. Such actions are repressed by the statutes depriving the plaintiff of more costs than damages, when the jury find a verdict for less than 40*s.* damages; and juries are not favourable to such actions, unless there be proof of actual damage beyond 40*s.*, and consequently much of the valuable time of the superior courts of justice is occupied in trying them, and the result is ruinous to both parties; and yet parties are either induced to revenge themselves or to clear their characters from the imputation by risking an action.

It should seem that a summary remedy

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REMEDIES.

Remedies by
formal proceed-
ings in the
superior and
other courts.

If the injury has been considerable, and worth the expense of a formal proceeding in a superior court, then if it affected a *legal right*, the remedy is in general by *action* in a *Court of Law*; but if to an *equitable* right, or if it will be better investigated in a *Court of Equity*, then the remedy is by *bill*; or supposing a debtor has become a bankrupt, then the proceedings are to be before assignees, or commissioners, or in the *Court of Review*; (e) or if he have become an insolvent debtor, then the proceeding is to be in the *Insolvent Court*. (f) If the injury relate entirely to an ecclesiastical or spiritual offence, not cognizable in the Temporal Courts; as fornication, or slander, imputing a spiritual offence, then recourse must be had to an *Ecclesiastical Court*. (g) So in the case of a married woman, she must proceed in that Court for alimony or restitution of conjugal rights. We merely here advert to these several modes of redress, to show their infinite variety. In a subsequent chapter a concise outline of the present jurisdiction of justices and of all the courts will be given, in order to show before what forum redress should be sought.

Of the particu-
lar rights and
remedies
introduced by
statute.

It will be observed that the ancient *common law* rights and remedies were comparatively few and simple and readily divided and enumerated; but in the progress of time the occasions of society have led, especially of late, to an accumulation of new statutory regulations, which have either better defined or modified or regulated what were *previously* partially recognized by the common law, or have actually *created* new rights or imposed new duties and penalties for their non-observance; we speak not merely of public regulations of police, but refer also to those of a private nature.

might be as well provided in these cases. In *Harrison v. Thornborough*, Hil. T. 12 Ann. Gilb. cases, L. & E. 117, Parker, C.J. said he remembered a saying of Treby, Chief Justice, that *people should not be discouraged that put their trust in the law, for if men could not have a remedy at law for such slanders, they would be apt to carve it for themselves, which would let in all the ill consequences of private revenge*; and Powys, Justice, said, that the latter judgments had been right in denying the rule of taking words in *mitiori sensu*, because it left a liberty for men to defame others, provided they did it with a little caution; and it had been known that people had taken advice of counsel upon a sheet of paper full of scandalous words, in order to know which they might "out" with safety.

The legislature have already, in some instances, given magistrates summary jurisdiction in case of *verbal abuse*, as in the stage coach act, 2 & 3 W. 4, c. 120, s. 47, 99, which enacts that if the driver or guard of a

stage coach assault or use "*abusive or insulting language*" to any passenger, he shall forfeit 5*l.* and may be convicted by *one justice*. A magistrate at one of the London police offices lately fined a stage coachman (who had during the journey been guilty of incivility to a passenger, and who therefore refused to give him any thing for himself,) in 40*s.*, for saying, in the presence of the other passengers, "*Gentlemen* always give me something," insinuating by his tone and manner that the passenger was not a gentleman. Why might not magistrates have a similar but modified power over common slander as over petty assaults and batteries and injuries to personal and real property? See 9 G. 4, c. 31, s. 27, 28, 29; or even power to compel private satisfaction, as in 7 & 8 G. 4, c. 29 & 30.

(e) 1 & 2 W. 4, c. 56.

(f) 7 G. 4, c. 57.

(g) Limited by 27 G. 3, c. 44, s. 1, 2, to eight and six calendar months.

It follows, that from the introduction of these *new rights* and *duties* by numerous statutes, that a great variety of *new injuries* and *offences* must arise from the infraction or non-observance of such new rights and duties; these require *new remedies*, to prevent, or remove, or compensate, or punish.

In some cases, where *new rights* or *duties* have been created, the statutes introducing them have been silent with regard to the remedies for their infraction. When this is the case, the law *impliedly* gives an appropriate remedy. Thus if a new *private* right be created or recognized, the law *implies* a remedy, as *by action on the case*, where the damages for the infraction of the right are uncertain, (*h*) as for removing goods under an execution without paying a year's rent; (*i*) and by action of *debt* where the sum is in its nature certain or readily ascertained. (*k*) And where the damages or penalties are recoverable by a person particularly aggrieved, as by a corporation, to whom the latter is given, costs also are recoverable; (*l*) so treble the value of tithes when not set out in kind, or even treble damages, incurred by extorting money, are recoverable in *debt*. (*m*) In general, however, the same act that creates or modifies the right or duty, *prescribes* the remuneration, penalty, or punishment, and even the form of the remedy; and gives the same either to the party injured, or to a common informer, or to the king. (*n*) As to the party aggrieved, an action of *debt* for an escape out of execution, (*o*) or the same form of remedy for double yearly value, for not quitting, in pursuance of a notice to quit from a landlord to his tenant. (*p*) And whenever a statute, introducing a new right or duty, prescribes a *particular* remedy, no other can be adopted; (*q*) therefore, no *action* will lie for a poor rate, or for composition money duly assessed under the highway act, the remedy by distress being prescribed in those cases by statute. (*r*) When, however, a statute gives a remedy in the affirmative, without a negative expressed or implied, for a matter which was actionable by the common law, the statute remedy is considered as *cumulative*, and the party may sue at common law or upon the statute, and

(*h*) Com. Dig. tit. Statute, A. F. and tit. Pleader, II. s. 1, 2, 20: 10 Coke, 75, b.; 2 Inst. 486; 2 Salk. 451.

(*i*) 8 Ann. c. 14; Dougl. 665; 1 Chit. Pl. 263, 264.

(*k*) 1 Chit. Pl. 127; 1 Rol. Ab. 598; 1 M'Clel. & Y. 457; 4 B. & C. 962; 9 B. & C. 524.

(*l*) 9 Bar. & C. 524; or, if an acquitted defendant is entitled to costs, under 4 Jac. 1, c. 3, then debt lies for the same, id. ibid.

(*m*) 2 Bla. R. 1102.

(*n*) A common informer cannot sue for a penalty, unless he be expressly or impliedly authorized so to do, 5 East, 313.

(*o*) Rich. 2, c. 12; 1 Saund. 34, 39, 218.

(*p*) 4 G. 2, c. 28, s. 1; 1 New R. 174.

(*q*) 10 Bar. & C. 546; 2 Burr. 1157; 1 M'Clel. & Y. 450.

(*r*) Id. ibid.

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sometimes both. (s) So if a statute be *prohibitory* or *injunctive* in one clause, and in another distinct clause enact a particular penalty, the offender may be prosecuted at common law, either for the disobedience of the first clause, or upon the statute for the penalty. Thus disobedience of an order of justices is an offence indictable at common law, though a specific penalty be provided by some particular statute for the neglect of that duty which the order is intended to enforce; (t) and therefore, although the prescribed statutory penalty for disobeying an order upon a parent for maintenance of his children, is only twenty shillings per month, yet by indicting at common law for disobedience of the order, punishment, and probably maintenance to the full and proper extent, may be enforced. (u)

In some cases we shall find that the *common law* remedy is *altered* by a statute. Thus the common law remedy of trespass against a magistrate is taken away by 43 Geo. 3, c. 141, where a conviction has been quashed, and the action must be trespass *on the case*, alleging and proving that the magistrate acted maliciously, and without any reasonable cause. (x)

How far the recovery of costs is to be considered in adopting a legal remedy in general.

Before the adoption of any remedy by *legal interference*, whether summary or more formal, it is essential to consider what will probably be the sum or *damages recovered*, and whether any and what *costs* will be recovered, and consequently whether it is worth while to adopt any remedy. At common law *no costs* were recoverable, and the statute of Gloucester gives costs only where *damages* are recovered, (y) and this extends to a *penalty* recoverable by a *party grieved*, because he is also entitled to *damages* for detaining the penalty and consequently costs. (z) But where a common informer is entitled to a penalty, he is not entitled to damages, and consequently has no costs, unless expressly given. (a)

The right to costs was qualified by statute 48 Eliz. c. 6, enabling a judge to certify, so as to take away costs in *any* action whatever, whether upon a contract or for a tort, if the plaintiff did not recover a verdict for forty shillings; (b) and as judges

(s) Com. Dig. Action upon Stat. C.

(t) 2 Burr. 799; 4 Dougl. 333, 388; 4 T. R. 205; 8 East, 41; 3 M. & S. 62.

(u) 43 Eliz. c. 2; 2 Burr. 799; 1 Bla. C. 448, note 3; *sed quære* as to the impropriety of any extension of this rule authorizing a discretionary punishment, perhaps *beyond* the measure of that *prescribed* and intended by the legislature.

(x) 12 East, 67; 16 East, 13; 5 Taunt. 580. This was a singular enactment, unnecessarily violating the general rules and forms of actions. It would have been bet-

ter to have let the old form of action remain, and to have enacted that the defendant should be acquitted, if it should, appear that he had acted upon probable cause and without malice.

(y) 6 Edw. 1, c. 1; 2 Inst. 288; Hardw. 152.

(z) Willes, 440; 9 B. & C. 666

(a) 1 Salk. 206.

(b) 2 Wils. 258; 2 New R. 471; 5 Bar. & Ald. 796; 1 Dow. & R. 413; 9 Price, 314; 10 B. & C. 492.

were reluctant actively to exercise that power, subsequent acts were passed absolutely depriving the plaintiff of more costs than damages, if he recovered less than forty shillings in certain particular actions, as in actions for assault and battery, or for trespass to land, (c) unless the judge certified that a battery was proved, or that the freehold came in question; (d) and in an action for verbal slander no costs are recoverable, when the damages are under forty shillings, whether or not the defendant plead a justification; (e) and in an action for treble the value of tithes not set out, the plaintiff is not entitled to costs, unless the single value found by the jury *do not* exceed twenty nobles, that is, 6*l.* 13*s.* 4*d.*, (f) the legislature at that time considering that when the treble value exceeded 20*l.* the sum recovered would be quite sufficient to enable the plaintiff to pay his own costs, (f) and various other statutes have a similar operation.

Other acts, giving jurisdiction to numerous local Courts of *Request or Conscience*, as they are termed, in cases of common debts, some for 10*l.*, others for 5*l.*, and others 2*l.* enact, that if the action be improperly brought in a superior court, the plaintiff shall not recover at all, unless he establish a claim to a larger extent, or shall not recover costs.

The operation and application to each particular case of all these acts, must necessarily be considered, because they should influence every prudent person in the choice of his remedy, as it would obviously be most imprudent to commence an action in a superior court, where the debt or damages to be recovered will probably be so small as not to entitle the plaintiff to recover his full costs. And if he should be so entitled, it should also be considered that in the present mode of taxing or ascertaining the amount of costs, expenditure, although prudently incurred in obtaining advice, or in consultations and otherwise, is disallowed, and which consequently he must bear without any return; and that even when *treble costs* are given by statute, they are singularly construed only to mean the aggregate of, 1st, the usual taxed costs; 2d, half thereof; and 3rd, half the latter; (g) so that in effect the treble costs amount only to the taxed costs, and three-fourths thereof, and frequently such aggregate does not cover the whole actual expenditure. The *treble damages*

(c) 22 & 23 Car. 2, c. 9, sect. 136; 1 Young & J. 360; 7 J. B. Moore, 269; 6 Bing. 350.

(d) *Id.* *ibid.*

(e) 21 Jac. 1, c. 16; 4 East, 567.

(f) 8 & 9 W. 3, c. 11, s. 3; 1 Hen. Bla. 107, 8. But full costs are recoverable

in a suit in the Exchequer for tithes, unless there has been a previous adequate tender, 2 Madd. Ch. R. 556, 557. Therefore, if the treble value would not be much more than 20*l.* a suit there is better than an action.

(g) 1 Chit. R. 137; Tidd, 8 ed. 1025.

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are more liberally construed to mean actually treble the single damages. Thus, if the jury give 20*l.* damages for a forcible entry, the court will award 40*l.* more. (*h*)

But the legislature, at the same time that they have discouraged actions for small debts and damages in the *superior courts*, have in many cases considered, especially in recent enactments, that a person ought not in such cases to be deprived of proper remedy *elsewhere*, for, as observed by Lord Kenyon, a party, whose claim is under forty shillings, but who cannot recover it in the County Court, ought not therefore to be without remedy ; (*i*) and if a man be assaulted, and sustain damages under forty shillings, yet, as he cannot sue for a *trespass vi et armis* in the County Court, his remedy elsewhere should not be discouraged, for, otherwise, men will be driven to revenge themselves ; (*k*) and, therefore, the modern principle of legislation has been in general to afford *summary* remedies for small debts, and some torts occasioning small damage. (*l*)

II. PUBLIC REMEDIES.

With respect to *public remedies*, it might seem that the consideration of them is foreign to a work professing to treat of private rights, injuries, and remedies. But (especially of late) proceedings of a public and criminal nature, in very many cases, are intended to have, and in effect actually have a *double operation*, as well to *prevent* the commission of similar offences by others, as to afford future security and compensation, or satisfaction, either pecuniary or otherwise, to the private individual who has been more immediately and particularly injured by the offence ; and hence the consideration of such public remedies is here essential.

We must, however, remember, that the primary object of all prosecutions and of all punishments, is the protection of society from danger of the repetition of offences, and from the bad effects of example if they should remain unpunished ; and that the object of *punishment* is either the *amendment* of the offender, or the depriving him of the means of future offence, or deterring others by the dread of similar punishment from offending in the like way. (*m*) The *measure* of *punishment*, with these views, is one of the most difficult subjects of legislation ; and hence the fluctuation, or rather *variation*, in the degrees of punishment at different times, according to the increase or decrease of particular crimes, and the necessity for the change

(*h*) 4 B. & C. 154 ; M'Clel. Rep. 567.

(*i*) 1 Dowl. & R. 359 ; 2 Hen. Bla. 29.

(*k*) Gilb. Cases, L. & E. 117 ; *ante*, 24.

(*l*) *Ante*, 22.

(*m*) 4 Bla. C. 11, 12, 251, 252.

of punishment, or its degree. (n) The modern policy and recent enactments are greatly in favour of humanity. (o)

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REMEDIES.

For offences of a public nature, *any one*, though not privately or particularly affected, may be the accuser and prosecutor on behalf of the king or public; and even in the case of a prosecution for a libel or assault, or other injury of a private nature, but tending to a breach of the peace, although the original prosecutor who was injured die, any person may *continue* such prosecution. (p) And several persons may legally associate and contribute towards the expense of prosecuting persons supposed to have been guilty of crime; (q) and so far has this doctrine been carried in its construction for the benefit of public justice, that even an individual, who has, for the purpose of detecting a suspicious person, afforded him an opportunity to commit a particular crime, or even induced the commission of it, is not thereby precluded from becoming a prosecutor, and instituting proceedings against him, (r) unless where a particular offence be destroyed by the consent of the party indicting: as in the instance of a concerted robbery, where it is essential that alarm should be excited; and, therefore, if a plot be deliberately laid to detect a supposed offender, no such offence has in fact been committed. (s) So, persons injured by an assault, libel, or other offence of a private nature, may (and should, if their own evidence will be material,) become the prosecutor instead of suing; and, indeed, criminal charges of that private nature are seldom proceeded for, excepting by the party injured. But in all these cases, it must be kept in view, that *revenge* ought not to be the motive; and, if it should be detected or inferible, and the prosecution fail, and there was no reasonable ground for instituting it, the prosecutor will be justly exposed to an action at the suit of the acquitted defendant, and probably have to pay considerable damages. (t) The true object of *criminal remedies* is not vengeance for the past, but security for the future. And to the furtherance of

(n) 4 Bla. C. 13, 14, &c.

(o) The punishment of death is now rarely inflicted, and is taken away in some cases, before punishable capitally, by recent acts, (2 & 3 W. 4, c. 62,) even in the case of forgery, except of a will and certain powers of attorney, (2 & 3 W. 4, c. 123); and real estates are only forfeited during the life of the offender, and afterwards descend to his heir.

(p) 1 Wils. R. 222; 2 Taunt. 334; 2 Bos. & Pul. 508; 2 Leach, 912, 1019,

1033; Russ. & Ry. 160; 1 Atk. 221.

(q) 1 Salk. 174; 3 M. & S. 71.

(r) 2 Taunt. 334; 2 Bos. & Pul. 508; Russ. & Ry. 160; 2 Leach, 912, 1019, 1033.

(s) 2 Taunt. 334; 2 Bos. & Pul. 508; Russ. & R. 160; 2 Leach, 616, 912, 1019, 1033;

(t) See Lord Mansfield's observations on the proceedings by appeal, 5 Burr. 2643; 2 Woodes. 565, &c.; 1 Chit. Crim. L. 3, note (a); 4 Bla. C. 312 to 315.

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that design every man is bound to contribute. It will be observed, that in most of the modern acts which enable magistrates to convict and fine an offender, it is enacted, that when the conviction proceeds on the evidence of the party aggrieved, he shall not have any part of the fine or penalty, so that any pecuniary motive for perjury is removed; (u) and for the same reason, no part of the five-pound penalty, upon conviction of a common assault or battery, is payable to the party aggrieved, but the whole is to be paid towards the county rate; so that he must institute a summary proceeding merely with a view to *punishment*, or to repress similar aggressions, and not for pecuniary compensation; and the magistrate has not, as in cases of small injuries to *property*, any power to discharge the conviction, upon the offender making satisfaction to the party aggrieved. (x) In these cases it should seem, that there would be no objection to the recovery by the same means of civil compensation, at least when the party aggrieved has not himself proved his own case, the fine or penalty in such case would not only operate as a punishment, but the awarding small compensation would save the necessity for any action to recover damages for the private injury. (y)

As in cases of *private* injuries, so in regard to *criminal remedies*, many strong proceedings may be had to *prevent* the completion, or continuance, or repetition of a crime, by the acts of any individual. Thus, the commission of a felony with force may be prevented even by *killing* the offender, when other means would not be effectual, though such a mode of resistance should not be resorted to without occasion, and would amount at least to criminal manslaughter if unnecessary, or the felony was attempted without force, as when the offender was merely picking a pocket. (z) Persons in the act of committing larceny, or petty thefts, or takings, (a) or wilful or malicious injuries to personal or real property, (b) or trespassing in pursuit of game and refusing to give his name, (c) and various other offenders, may be apprehended *flagrante delicto*; (d) and even *persons of loose character*, and in a suspicious situation, termed *vagrants*, or rogues and vagabonds, or incorrigible rogues, may be apprehended and imprisoned, and *prevented* from committing offences by the interference of peace-officers and magis-

(u) 7 & 8 G. 4, c. 29, s. 66; c. 30, s. 32.

(x) 9 G. 4, c. 31, s. 27.

(y) See observations, *ante*, 23, note (d).

(z) 1 East, P. C. 271 to 273, 287; 9 G. 4, c. 31, s. 10.

(a) 7 & 8 G. 4, c. 29, s. 63.

(b) *Id.* c. 30, s. 28.

(c) 1 & 2 W. 4, c. 32, s. 31.

(d) Burn's J. Arrest, *supra*, n. (q), see reasons, 2 Mood. & Malk. C. N. P. 15

trates; (e) and dangerous lunatics may be imprisoned and taken care of, under the order of a justice. (f)

Public nuisances *may* be abated, and even with rather more force and to a greater extent than is permitted in case of a private nuisance. (g) So, a Court of Equity may, by injunction, prevent the erection or continuance of a public nuisance.

The *summary* proceedings for the *punishment* of small offences are very various, especially in modern times, when so much *summary* jurisdiction by information and conviction has been vested in magistrates, commissioners of customs and excise, and others.

The ancient and more constitutional proceedings tried by a *jury*, are presentments, inquests, indictments, and criminal informations, and to these recourse ought always to be had in cases of serious or important offences.

The *modes* of prosecuting offences have been much *simplified* by the recent modern acts for improving the administration of criminal justice in general, (h) and by the consolidation and amendment of the laws relating to offences against the person, (i) and to personal and real property, whether in the nature of larceny or robbery, or petty theft, (k) or wilful or malicious injuries to property; (l) and prosecutors and their witnesses are relieved from the expenses of conducting or giving evidence in support of any prosecution for *felony*, and for most prosecutions for *misdemeanors* of a *public* nature, and are even allowed compensation for trouble and loss of time. (m)

(e) See 5 G. 4, c. 83, s. 6; Burn's J. Vagrant. In these cases it will be observed, that in many instances imprisonment and punishment may be inflicted as it were for a mere *supposed disposition* to crime, so as to prevent the party from completing his supposed criminal intent. Looking at the provisions of that act, it should seem that in many cases the party ought to be discharged on finding sureties for his good behaviour, and that the long imprisonment for the supposed offence seems severe.

(f) 39 & 40 G. 3, c. 94, s. 3; 7 Bar. & C. 669. So before this act a private individual might imprison a lunatic to prevent mischief. See Bac. Ab. Trespass, D. 3.

(g) *Ante*, 10, *Lodie v. Arnold*, 2 Salk. 458.

(h) 7 G. 4, c. 64.

(i) 9 G. 4, c. 31.

(k) 7 & 8 G. 4, c. 29.

(l) *Id.* c. 30.

(m) 7 Geo. 4, c. 64, s. 22 to 24.

CHAPTER II.

RIGHTS OF PERSONS, THEIR INJURIES AND REMEDIES IN PARTICULAR.

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IN the preceding chapter we took a general view of rights, injuries and remedies. For *practical* utility, we will now proceed to consider *more particularly* each right and its injuries and remedies, occasionally introducing suggestions for rendering each right and remedy more certain and perfect. And first we will examine the absolute and relative rights of *persons*, and their respective injuries and remedies.

I. *Absolute*
Rights of per-
sons, Injuries,
and Remedies.

As relates to the *person*, rights are absolute or relative; *absolute* rights, such as every individual born or living in this country (and not an alien enemy) is constantly clothed with, and relate to his *own personal security* of life, limbs, body, health and reputation; or to his *personal liberty*; rights which attach upon every person immediately upon his birth in the king's dominions, and even upon a *slave* the instant he lands within the same. (a) And *relative* rights, such as between

(a) It is a maxim "*no slave can breathe in British air*," *Somerset's Case*, 11 State Trials, 340; 20 Howel's State Trials, 79; 1 Lord Raym, 147; 2 Bar. & Cres. 448. Hence after a slave has landed in England he is capable of receiving the benefit of a *donatio mortis causa*, *Stanley v. Harvey*, 2 Eden's Rep. 126; and this extends to all the British dominions, so that if a slave escape to any island belonging to England, or to an English ship not lying within those parts where slavery is allowed, as in our West India islands, East Florida, &c., he instantly becomes a freeman, and no action is sustainable by

the person to whom he belouged against a person who harbours him; 2 Bar. & Cres. 448; 3 Bar. & Ald. 353. But a contract by a slave with a person to serve him in consideration of his purchasing his freedom, is so far binding that an action may be supported to recover damages for nonobservance, though no specific performance could be enforced by habeas corpus, or in equity or otherwise; 2 Hen. Bla. 511. And if a slave, after arriving in England, continue in the service of his master without any express contract for wages there is no implied contract for any remuneration; 3 Esp. R. 3; 2 Car. & Pa. 231.

husband and wife, parent and child, guardian and ward, master and servant or clerk.

CHAP. II.
I. ABSOLUTE
RIGHTS.

First. The *injuries* to LIFE are homicide, attempts to murder or maim, cruelty to infants, attempts to cause miscarriage, concealments of births, written and verbal threats to murder, challenges and fights. Relating to these, as well as almost all other injuries which are prejudicial to the individual as well as the public, there are three descriptions of remedies: 1st. The *preventive*; 2ndly. Those for *Compensation*; and 3rdly. *Punishments*.

I. PERSONAL
SECURITY.
First. LIFE.
Injuries, and
punishments.

1st. The *preventive*, or protective remedies against injuries to life, allow the killing the aggressor, when *absolutely* necessary for self-defence, but *not otherwise*; for if two persons quarrel and fight and one runs away, and when the other overtakes him he pulls out a knife and stabs him, if death ensue, this is *manslaughter*, because his own life was not in danger, and the use of such a weapon of defence was illegal. (b) Though formerly otherwise, a proper self-defence, although it occasion death, is now *wholly* dispunishable; (c) and it is lawful even to break open an outer door upon a cry of murder, to prevent its completion; (d) and the imprisonment of a lunatic by a private individual, or by a justice, to prevent his committing homicide or mischief, is also expressly allowed. (e) So by application to a justice, in the case of threat of bodily harm, (f) or by exhibiting articles of the peace in the King's Bench, (g) security may be obtained to prevent the completion of the threatened or expected homicide, or other injury to the person.

1. Homicide.

Preventions
thereof.

As the writ of appeal of murder is now taken away, (h) there is no *compensation* directly recoverable from the party committing homicide. (i) But if an officer of justice, or other person, endeavouring to apprehend a criminal or certain persons, as offenders against the laws of customs or excise, be killed in the attempt, his widow or near relation, is entitled to an allowance to be paid out of the county rate. (k)

Compensation,
when.

Homicide, if unlawful and *malicious*, is punishable capitally with death as *murder*, (l) and if not malicious, but unlawful and blameable, as in case of want of due care, it is punishable as *manslaughter* with transportation for life, or for not less than

Punishments of
homicide.

(b) *R. v. Kessal*, 1 Car. & P. 437.

(c) 9 G. 4, c. 31, s. 10; formerly in such a case it was necessary to obtain a pardon and writ of restitution, though they issued of course on paying for the same, 4 Bla. C. 187, 188; 2 Curw. Hawk. 530.

(d) 2 Bos. & Pul. 260; 2 Rol. Ab. 546.

(e) 39 & 40 G. 3, c. 94, s. 3; 7 Bar. & Crea. 669. When not, see 4 Car. & P. 210.

(f) Burn's J. Surety, Peace, and post.

(g) Id. ibid. and post.

(h) 59 G. 3, c. 46.

(i) Styles, 347; 1 Lev. 247; Yelv. 89; 1 Lord Raym. 339.

(k) 7 G. 4, c. 64, s. 30; 6 G. 4, c. 108, s. 61.

(l) 9 G. 4, c. 31, s. 3 to 8.

CHAP. II.
I. ABSOLUTE,
&c.

I. PERS. SEC.

2. Attempts to
murder, maim,
&c.

seven years, or with imprisonment for not exceeding four years, or a fine, according to the discretion of the judge. (m) But homicide, when justifiable or excusable, as in self-defence or even by misfortune, or under any circumstances which prevented the means of death from being felonious, is not punishable *at all*, not even nominally, though formerly it was otherwise. (n)

2. Certain *malicious attempts* TO MURDER, as maliciously administering or attempting (o) to administer to any person, or causing to be taken by such person, any poison or other destructive thing, (p) or shall maliciously attempt to drown, suffocate or strangle any person, or shall maliciously shoot at any person, or shall by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or shall maliciously stab, cut, or wound any person with intent to murder him, he shall suffer death as a felon. So CERTAIN MALICIOUS ATTEMPTS TO MAIM, or *disfigure*, or *disable*, or do *grievous bodily harm*, are also punishable capitally; such as maliciously shooting at a person, or stabbing, cutting or wounding him with intent to maim, disfigure, or disable him, or to do him some other grievous bodily harm, or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or of any of his accomplices for any offence for which he may be liable by law to be apprehended or detained, is also punishable with death, unless in such cases where if death had actually ensued the homicide would not have constituted murder, and in that case the attempt would at most be a misdemeanor. (q)

3. Cruelty and
starving infants,
not capable to
support them-
selves.

3. So at common law, it is an indictable offence to expose a person of tender years, under the party's care, to the inclemency of the weather, (r) or to keep such a child, of inability to pro-

(m) 9 G. 4, c. 31, s. 9. In cases of homicide, amounting at most to manslaughter, the indictment should be framed accordingly and not for murder. In indictments, &c. for *manslaughter* much is for the decision of a jury. As in the instance of the recent prosecution of Heath in Sussex, for the manslaughter of Captain Burdett at Brighton by want of care in labelling medicine, which occasioned the death, where he was acquitted; so, much is vested in the *discretion* of a single judge as regards the *degree* of punishment. In a recent instance a party who, through the outer door of his house, shot a sheriff's officer whilst illegally forcibly attempting to break it open to effect an arrest, he was sentenced to transportation for life. Captain Nestor's case at Hertford Assises.

(n) 9 G. 4, c. 31, s. 10, enacts, "that no punishment or forfeiture shall be incurred by any person who shall slay another by

misfortune, or in his own defence, or in any other manner without felony."

(o) 9 G. 4, c. 31, s. 11. It has been correctly observed, that the statutes are confined only to a few *particular* attempts, and that there is no legislative enactment which reaches *attempts* to murder by starvation, or by exposure to inclemency of the weather, or by blows, except so far as they may be considered as attempts to commit felony, and as such punishable with hard labour, under 3 Geo. 4, c. 114, and also at common law.

(p) It is not an *administering* of poison unless the poison or poisoned article be taken into the stomach. *R. v. Cadman*, cor. *twelve judges*, A.D. 1826; Carr. Crim. L. 257; S. C. 4 Carr. & P. 369, 571.

(q) 9 Geo. 4, c. 31, s. 12; what is, or is not a *wounding* under this clause, see 4 Car. & P. 381, 487, 558, 563.

(r) *R. v. Ridley*, 2 Campb. 650, 653.

vide for himself, without adequate food; (s) or for an overseer not immediately, and without waiting for a justice's order, providing food and medical care to a pauper, having urgent and immediate occasion for them. (t) But unless there be a legal obligation to afford relief it is otherwise; and, therefore, where a person had an idiot brother, who was bed-ridden in his house, and kept him in a dark room without sufficient warmth or covering, it was held that such misconduct did not sustain a charge of an assault or imprisonment, and that as he was under no legal obligation to clothe his brother he was not indictable for the omission. (u)

CHAP. II.
I. ABSOLUTE,
&c.
I. PERS. SEC.

4. The unlawfully and maliciously administering to, or causing to be taken by a woman *quick* with child (usually between the sixteenth and twentieth week after conception) any poison or other noxious thing, or using any instrument or other means with intent to procure her miscarriage, is a capital felony, punishable with death; (x) and if the woman be *not quick* with child, or proved to be so, then the same act is punishable as a felony with transportation, for not more than fourteen years, nor less than seven, or in the discretion of the court, to imprisonment, with or without hard labour, for not exceeding three years, and whipping, if a male, and the court think fit. (x) To constitute an *administering* or causing to be taken, the woman must actually swallow the poisonous matter, and if she merely receive it into her mouth and then spit it out without swallowing it, the crime is not complete. (y)

4. Attempts to
cause miscar-
riage.

5. And as the concealment of birth and death is generally suspicious, and therefore fit to be punished, it is provided that if any woman, having been delivered of a child, shall *by secret burying, or otherwise disposing of the dead body*, endeavour to *conceal* the birth, (z) she shall be guilty of a misdemeanor, and be liable to be imprisoned with or without hard labour for not exceeding two years. (a) So that if a child be born alive, and

5. Concealment
of birth.

(s) *Rex v. Ridley*, 2 Campb. 650, 653; 1 Leach, 157; *Rex v. Friend & wife*, Russ. & Ry. C. C. 20.

(t) *Rex v. Meredith*, Russ. & Ry. C. C. 46; *Rex v. Booth*, Id. 47; *Rex v. Warren*, Id. 48; and *Hays v. Bryant*, 1 H. Bla. 253.

(u) *Rex v. Smith*, 2 Car. & P. 449.

(x) 9 Geo. 4, c. 31, s. 13. In other countries no such distinction is taken as to *quickening*, but the *fœtus* is equally protected between conception and birth, and see 1 Paris & Fonb. 239; 3 Id. 90; Beck's Med. J. as to the absurdity of the English law in this respect. If the woman be not with child at all, the administering is not an offence under this act, 3 Car. & P. 605.

(y) *Rex v. Cadman*, ante, 34, note (p).

(z) Conceal the birth. It should seem

that this term ought to be confined only to a child *born alive*, birth being the act of coming into life; for otherwise the act might apply to the concealment of a miscarriage even at an early period after conception. It has however been reported to have been decided under the previous act of Lord Ellenborough, 43 G. 3, c. 58, that a woman might have been found guilty under that act of concealing the birth of her bastard child, though from appearances it were probable that the child was still born. *Rex v. Cornwall*, Russ. & R. C. C. 336, and it has even been suggested that that decision appears to apply equally to the present provision; *sed quære*.

(a) 9 Geo. 4, c. 31, s. 14.

CHAP. II.
I. ABSOLUTE,
&c.
I. PERS. SEC.

afterwards die without any fault of the mother, yet if she attempt by the *above mentioned means* to conceal the birth, such *suspicious concealment* of itself constitutes a crime. (b) In a case of that nature, and where there is no ground for imputing the death of the child to the mother, the indictment should merely be for misdemeanor, and not, as too frequently the practice, with a view to the allowance of costs for murder, (c) and in another case it was laid down that on all inquests held on the bodies of dead children, it was the bounden duty of the coroner to tell the jury, in all cases where there was not the most *clear and decisive* proof that the child was *born alive*, that they ought never to think of returning a verdict of wilful murder against the mother. (d)

6. Threats to
kill.

Challenges and
fights.

6. *Threats against life*, without any actual attempt, and whether written or verbal, are also peculiarly punishable. (e) And *challenges* to fight duels, and provocations with intent to induce another party to send a challenge, may be prosecuted as misdemeanors by indictment, or by motion to the Court of King's Bench for a criminal information, where the case is fit for the interference of that higher tribunal. (f) And all parties concerned in or countenancing a *prize fight*, which may end in homicide, are liable to imprisonment and indictment, and it is the duty of magistrates and all others to prevent their taking place. (g)

(b) 9 Geo. 4, c. 31, s. 14. The mother's preparing clothes, &c. affords presumption against *concealment*, 4 Car. & P. 366.

(c) Per Bolland, B. on Northern Circuit, A.D. 1832.

(d) Anne Bayley's case, at Stafford, 1828, before Vaughan, B., Carr. Crim. L. 243.

(e) 4 Geo. 4, c. 34, s. 3, enacts, that if any person shall knowingly and willingly send or deliver any *letter or writing* with or without any name or signature subscribed thereto, or with a fictitious name or signature, threatening to kill or murder any of his Majesty's subjects, or to burn or destroy his or their houses, outhouses, barns, stacks of corn, grain, hay, or straw, or shall procure, counsel, aid, or abet the commission of the said offences, or any of them, or shall forcibly rescue any person being *lawfully* in custody of any officer or other person for any of the said offences, every person so offending being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for such term, not less than seven years, as the court shall adjudge, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of

correction for any term not exceeding seven years. See 4 Car. & P. 562.

(f) 1 Burr. R. 316; 3 East, 581; 6 East, 464, 471; 2 Bar. & Ald. 462.

(g) *Rex v. Perkins and others*, 4 Car. & P. 537. It was there held that all persons who are present at a *prize fight*, and who have gone thither with the purpose of seeing the persons strike each other, are principals in the breach of the peace, and indictable for an assault as well as the actual combatants, and that it is not at all material which of the combatants struck the first blow: and see *Rex v. Bellingham*, 1 M. & R. M. C. 127, where Bayley, J. said, "My advice to magistrates and constables is, in cases where they have information of a fight, to secure the combatants before hand, and take them to a magistrate, who ought to compel them to enter into securities to keep the peace till the next assizes or sessions, and if they will not, to commit them to prison. In this way the mischief would be prevented, and the fights be put a stop to. The circumstance of an injury having been committed in an amicable or agreed fight may destroy any civil remedy, Com. Dig. Pleader, 3 M. 28; but would constitute no answer to a criminal proceeding for breach of the peace.

Secondly and thirdly. Injuries to the *limbs* or *body* are principally *assaults*, *batteries*, bruises and contusions, *wounding*, or *mayhems*. 1st. An *assault* is an attempt or offer, accompanied by a degree of violence, to commit some bodily harm, by any means, within a distance, and calculated to produce the end, if carried into execution, and to alarm the other party, and put him in well grounded apprehension of immediately ensuing actual injury. (*h*) Thus, levelling a gun at another within a distance from which, supposing it to have been loaded, the contents might wound, is an assault; (*i*) or riding after a person and obliging him to run away into a garden to avoid being beaten, is an assault; (*k*) and if a master or medical attendant take indecent liberties with a scholar or patient, without her consent, or by misrepresentation, although she do not resist, he may be punished as for an assault; (*l*) and it is an assault in parish officers to cut off the hair of a pauper in the poor house against her will. (*m*) But abusive words alone however violent, cannot constitute an assault, and, indeed, they may sometimes so explain the aggressor's intent as to prevent an act *primâ facie* an assault from amounting to such an injury; as where a man, during assize time, in a threatening posture, half drew his sword from its scabbard, and said, "if it were not assize time I would run you through the body:" this was held to be no assault, the words explaining that the party did not intend to inflict any immediate injury. (*n*)

2. A *battery* is any unlawful touching the person of another by the aggressor himself, or by any other substance put or continued in motion by him, as by throwing about a squib in a public market-place, which put out the party's eye; (*o*) and the striking a horse upon which a person is riding, and by which he was in consequence thrown, is considered a battery upon him. (*p*) But it has been supposed that taking a hat off the head of another is not a battery; (*q*) and a battery must be either wilfully committed, or proceed from want of due care, for otherwise it is *damnum absque injuria*, and the party aggrieved is without remedy; as if a horse run away without any fault of the rider, and go over another person, no action lies, because the injury is considered as proceeding from the horse, and not from the rider. (*r*) But it would be other-

CHAP. II.
I. ABSOLUTE,
&c.

I. PERS. SEC.
*Secondly and
thirdly. LIMBS
and BODY. In-
juries to, reme-
dies and punish-
ments.*

1. An assault,
what.

2. Batteries,
bruises, and
contusions,
what.

(*h*) 3 Bla. C. 120; Com. Dig. Battery, C.; Bac. Ab. Assault and Battery, A.; Burn's J. Assault; 5 Car. & P. 549.

(*i*) Id. ibid. Com. Dig. Battery, C.

(*k*) *Morton v. Shoppee*, 3 Car. & P. 573.

(*l*) *Rex v. Nichol*, R. & R. C. C. 130; *Rex v. Rosinski*, R. & M. C. C. 19; *Rex v. Dawson*, 3 Stark. R. 62; and *Rex v. Evans*, Id. 35.

(*m*) *Forda v. Skinner*, 4 Car. & P. 238.

(*n*) 1 Mod. 3; Bul. N. P. 15; Vin. Ab. Trespass, A. 2; Hawk. c. 62, s. 1.

(*o*) 3 Bla. C. 120; 1 Saund. 29, b. n. 1, 13 & 14, note 3; 3 Wils. Rep. 403.

(*p*) 1 Mod. 24; Sir W. Jones, 444; 8 Moore, 63; 1 Bing. 213, S. C.

(*q*) 1 Saund. 14.

(*r*) Hob. 134; Plowd. 19; 1 Stra. 596; 3 Wils. 403; 4 Mod. 405; 2 Chit. R. 639.

CHAP. II.
I. ABSOLUTE,
&c.

I. PERS. SEC.
3. Wounding
and mayhem,
what.

4. Special as-
saults.

Prevention of
such injuries.

Compensations
and punish-
ments.

wise if he were riding furiously, or otherwise in fault. (s) Bruises and contusions are where the skin is not broken. (t)

3. A *wounding* consists in giving another a cut, or even a scratch, opening the flesh. (t) A *mayhem* is defined to be the deprivation of a member proper for defence in fight, and which are not only an arm, leg, finger, eye, and a foretooth, but also some others; but not, as it has been said, a jaw tooth, or the ear, or a nose, because they have been supposed to be of no use in fighting. (u) One remarkable circumstance peculiar to an action for a mayhem is, that the court may, on view of the wound, increase the damages awarded by the jury. (v)

4. Some assaults of a more *special* nature, as upon persons standing in particular situations, as clergymen, magistrates, officers, &c., are particularly provided against. (x)

All these may be *prevented* by the party attacked, or his servant or relation, even by forcible self-defence, but without using a *dangerous weapon*, unless life be in peril: (y) but a stranger or third person, not being a relative, must not proceed *ex parte*, but merely interfere, (*molliter manus*.) to preserve the peace, and *separate* the parties, and not defend the person about to be beat. (z) So, after threat of such an injury, sureties of the peace may be obtained by application to a justice of the peace. (a)

Compensation, strictly so termed, for batteries, wounds, and mayhems, can only be obtained by action in the superior courts, for the county court has no jurisdiction over trespasses *vi et armis*. (b) But conviction in a fine of 5*l.*, to be paid towards the county rate, may be obtained upon summary information before justices, (c) and in each case the wrong-doer may be indicted at common law for the breach of the peace. In the instance of the special assaults before alluded to, there are express punishments afforded by particular statutes. (d) Assaults, with intent to commit certain *felonies*, as murder, or to maim, or to commit an unnatural crime, or to rob, are specially punishable. (e) So, furious driving, (f) and the setting spring guns or other dangerous engines, excepting at night in a dwelling-house, are

(s) *Id.* *ibid.*; 8 Moore, 63; 1 Bing. 213, S. C.

(t) *Ante*, 34, note (q).

(u) 3 Bla. C. 121. But note, in examinations, in modern times, of a party, whether he be fit to serve in the army, the loss of any teeth which would be essential in biting off the end of a cartridge would be considered an objection, G. Smith's Med. Jurisp.

(v) 1 Wils. 5; 3 Salk. 115.

(x) 9 Geo. 4, c. 31.

(y) 2 Rol. Ab. 546.

(z) 2 Stra. 954.

(a) *Post*, c. viii.; Burn's J. Surety, Peace.

(b) Vin. Ab. County Court, 101.

(c) 9 Geo. 4, c. 31, s. 27, 28, 29, 33, 34, 35.

(d) 9 Geo. 4, c. 31, s. 23, 24, 25, 26, 29. Assaults on Park-keepers, 7 & 8 Geo. 4, c. 29, s. 29; on Custom House Officers, 6 Geo. 4, c. 108, s. 56, 57, 59.

(e) 9 Geo. 4, c. 31, s. 11, 12, 15, 18, 25. Attempt to rob, 7 & 8 Geo. 4, c. 29, s. 6.

(f) 1 Geo. 4, c. 4.

respectively indictable as a misdemeanor, on account of the danger, although no actual injury ensue; (g) and it is a general rule that whenever any act is declared to be a *misdemeanor* by the public criminal law, either by the common law or by statute, any particular individual having sustained special and particular damage may have his private remedy by action to recover compensation for the damage he has actually sustained; (h) although, in cases of felony, we have seen that the civil remedy is in general suspended until after the trial of the supposed offender. (i)

5. Mere *menaces* and *threats* of bodily harm, or to burn a house, which may occasion great personal injury, may also be prevented by the like means, as in the case of actual assault. (k) And compensation may be recovered by action, if the menace occasion any actual damage, as the deterring servants from performing their master's work; (l) and some menaces are indictable at common law. (m) A threat of murder or of burning a house, are highly penal by express enactments. (n)

5. Other menaces, and threats of bodily harm.

6. A *rape* may be prevented even by killing the assailant. (o) It is an offence punishable with death, (p) and it is no longer essential to prove *all* the particulars formerly necessary to be established, it having been enacted that proof of penetration without more shall suffice; (q) and though it has been decided that if that be proved, yet actual proof of the negative of the other circumstance, which was formerly considered the more complete part of the offence, will entitle the offender to an acquittal; (r) it has been suggested that that doctrine is questionable. (s) At all events, however, if penetration cannot be proved, then the indictment should be for a misdemeanor, being the assault with intent to commit the capital offence. It has been held by the majority of the judges that the offence of rape is not committed if a party have carnal knowledge of a married woman without her consent, but under her supposition that the offender was her husband, because there was an absence of violence, terror, and alarm, which constitute part of the capital offence. (t)

6. Rapes and attempts.

(g) 7 & 8 Geo. 4, c. 18, s. 1; 4 Bing. 648.

(h) 3 Bar. & Adol. 93, ante, 11.

(i) Ante, 10.

(k) Ante, 38.

(l) 2 Lutw. 1428; Co. Lit. 161.

(m) 6 East, 126; Burn's J. Threat.

(n) 4 Geo. 4, c. 54, s. 3.

(o) 1 Hale, 485; 2 Bos. & Pul. 260.

(p) "That every person convicted of the crime of rape shall suffer death as a felon," 9 Geo. 4, c. 31, s. 16.

(q) 9 Geo. 4, c. 31, s. 16, 18; 4 Car. & P. 249; Burn's J. Rape. What penetration sufficient, see Russen's case, 1 East, P.C. 438; 1 Russell, 803. In that case it was held that the *least degree* of penetration is

sufficient, though not attended with the deprivation of the marks of virginity. In that case it was proved, that the parts of the injured party were so narrow that a finger could not be introduced, and that the hymen was whole and unbroken, and yet this was held a sufficient penetration to complete the offence, emission having also been proved, which was necessary, as the law stood at that time; mere proof of penetration now suffices, 4 Car. & P. 249.

(r) *Rex v. Russell*, 2 Mood. & M. C. N. P. 112, cor. Taunton, J.

(s) *Id.*, 123, in notes, *sed quare*.

(t) *Rex v. Jackson*, R. & R. C. C. 487.

CHAP. II.
I. ABSOLUTE,
&c.

I. PERS. SEC.
7. Carnal know-
ledge of female
children.

7. If any person shall unlawfully and carnally know and abuse a *girl under the age of ten years*, he is punishable capitally as a felon ; but if the girl be above the age of ten and under twelve years, the offence is only a misdemeanor, subjecting the offender to imprisonment, with or without hard labour, for such term as the court shall award ; and in both these cases proof of penetration, however small, is sufficient to establish the offence. (s) If there be no evidence of the latter, then the offender may be indicted for the assault with intent to abuse and carnally know, and should the jury find that the prisoner only assaulted the child with intent to abuse her, and negative the intention charged carnally to know her, prisoner may be convicted and sentenced to twelve months imprisonment, the averment of intention being divisible. (t) If a master or medical attendant take indecent liberties with his scholar or patient, he may be convicted as for an assault, though not with intent to commit a rape or carnally know. (u)

We may here observe that the *specified* ages in these cases are completed at the first instant of the day *before*, and not upon, the anniversary of the day of the birth. (v)

8. Indecent ex-
posures of per-
son.

8. The wilful exposure of the naked person in a public situation, even for bathing, and with or without any criminal intent towards females, is punishable as a misdemeanor ; (w) and where a medical man with a similar intent persuaded a female patient to strip, under pretence that the examination was essential to enable him to prescribe, he was convicted upon an indictment charging the special assault. (z)

9. Abduction of
females and in-
fant children.

9. Other punishable injuries to the person, are the *forcible abduction of any female* possessed of certain property, for the sake of her fortune, with intent to marry or defile her, and which is felony, punishable with transportation or imprisonment not exceeding four years. (y) So the unlawful taking away any unmarried girl under the age of *sixteen* out of the possession of her father or mother, or other person having the lawful care of her, is a misdemeanor, punishable with fine or imprisonment, or both, as the court shall award ; (z) and the maliciously by force or fraud leading or taking away, or decoying or enticing away, or detaining *any child*, male or female,

(s) 9 Geo. 4, c. 31, s. 17, 18 ; *Rex v. Russen*, 1 East, P. C. 438 ; 1 Russ. 803 ; ante, 39, tit. Rape.

(t) *Rex v. Dawson*, 3 Rush. R. 62 ; and *Rex v. Evans*, id. 35.

(u) *Rex v. Nicholl*, R. & R. C. C. 130 ; *Rex v. Rosinski*, R. & M. C. C. 19.

(v) *Post*, c. ix.

(w) 2 Campb. 89 ; and see Vagrant Act, 5 Geo. 4, c. 83, s. 4.

(x) *Rex v. Rosinski*, R. & M. C. C. 19.

(y) 9 Geo. 4, c. 31, s. 19.

(z) *Id.* s. 20.

under the age of *ten years*, with intent to deprive the parent or parents, or other person, of the lawful possession of such child, or with intent to steal any article, or receiving or harbouring any such child, knowing the same to have been so taken away, is felony, and punishable with transportation for seven years or imprisonment; but there is an exception in favour of fathers taking their illegitimate children from the mother. (a)

10. The offence of *bigamy* is punishable with transportation for seven years, or imprisonment, with or without hard labour, for not exceeding two years. (b) An illegal deceptive marriage, when effected by conspiracy, is a misdemeanor at common law, punishable by indictment or information; (c) and, under the marriage act, the husband forfeits his interest in the property he would otherwise acquire by the marriage. (d)

11. *Unnatural offences* are punishable capitally upon proof only of penetration; (e) but if the latter cannot be proved, then the prosecution should be for the misdemeanor, the attempt to commit the offence: the conviction even of the latter offence would enable the offender's wife to proceed in the Ecclesiastical Court for a divorce. (f)

12. Injuries to the person, limbs, or body, occasioned by *negligence* or *misfeasance*, subject the wrong-doer to an action for the recovery of damages; as injuries arising from leaving open trap doors or areas in public streets, (g) or suffering a dangerous dog to go at large or to be placed in an open yard, (h) or any injuries from similar causes; (i) and where the injury is of a public nature, the party may also be indicted for the nuisance. (k)

When the injury to the person has occasioned considerable damage, and can be readily proved by third persons, an action for compensation may be the preferable remedy; but in case of secret injuries, which require the evidence of the party himself clearly to establish the facts, a summary proceeding before justices or an indictment may be preferable. And when the

When it is advisable to indict or to sue.

(a) 9 Geo. 4, c. 31, s. 21.

(b) Id. s. 22.

(c) 3 Ves. & Beames, 175.

(d) 4 Geo. 4, c. 76, s. 23; Russ. & Ry. C.C. 459, post.

(e) 9 Geo. 4, c. 31, s. 15, 18.

(f) It was determined by the Court of Delegates, that the public infamy of the husband, arising from a judicial conviction of an attempt to commit an unnatural crime, is a sufficient cause for the Ecclesiastical Court to decree a separation *a mens et thoro*. Feb. 1794, 3 Bla. Com. 94,

note (15), Chitty's ed.; and see Mr. Christian's note in his edition.

(g) 5 Bar. & C. 519; 3 Campb. 398; 4 Campb. 262.

(h) 4 Car. & P. 297; 3 Car. & P. 138, post, c. vii.; Com. Dig. Action, Negligence, A. 5.

(i) 4 B. & C. 223; 1 Car. & P. 636; 5 M. & S. 198; who not, 4 M. & S. 27.

(k) Burn's J. Nuisance, II.,; with respect to unsound steam engines, 1 & 2 G. 4, c. 41, s. 1.

CHAP. II.
I. ABSOLUTE,
&c.

I. PERSONAL. SEC.

injury is of a trifling nature, it should be remembered, before the commencement of an action, that costs are not recoverable unless the plaintiff obtain a verdict for forty shillings; (l) and that courts and juries seldom participate in the feelings of resentment occasioned by a mere trifling assault; and, consequently, plaintiffs proceeding for them would probably only expose themselves to ridicule and contempt. (l)

Fourthly.
HEALTH, inju-
ries, and reme-
dies.

Fourthly. The *health* of an individual may be *injured* by a public or private nuisance, as by breaking quarantine, by sale of unwholesome food, by want of due care in medical practitioners, or by sudden alarms affecting the nervous system. The *remedies* are threefold, preventive, compensatory, or punishment. Private and public nuisances to health already existing, and not merely prospective or apprehended, may, in some cases, be *prevented* by *abating* or removing by act of the individual sustaining a resulting injury, (m) or they may, whilst in progress, be prohibited and restrained by *injunction* obtained summarily upon bill filed and motion to a Court of Equity. (n) *Compensation* may be obtained for the private and particular injury by action on the case, (o) and the public nuisance may be *punished* and abated upon judgment, and by writ upon an indictment; (p) and breaking quarantine is particularly punishable. (q) The sale of *unwholesome food* is prohibited, and punishable at common law and by statutes, and sometimes prevented by local customs. (r) Thus, there are particular enactments against millers and bakers, to prevent the adulteration of flour and bread, and an indictment at common law is sustainable against a baker for selling bread improperly mixed with alum, though only by his servants. (s) So, the sale of bad meat, (t) and bad butter, (u) and of bad food in general, (x) are prohibited and punishable; and if there be a conspiracy to sell bad food it is punishable at common law. (y) So it is illegal to sell or mix drugs with beer; (z) and in some of these cases, if adulterated, or bad articles be found, they may be seized, (a) and the wrongdoer is subjected to penalties. Innkeepers selling unwholesome

(l) *Ante*, 23, 26, 27.(m) 12 Mod. 510, *post*, c. vii.(n) *Post*, ch. viii.

(o) 9 Coke, 55, 58, b.; 16 East, 196.

(p) 8 T. R. 142.

(q) 6 Geo. 4, c. 78 & 105; 4 Term R. 202.

(r) 3 B. & Adolp. 43, and *case* there cited.

(s) 31 Geo. 2, c. 29, s. 29, 30; Burn's J. Bread, and tit. Mill; 3 M. & S. 11.

(t) Burn's J. Butcher; 1 Stark. Slander, 143.

(u) 36 Geo. 3, c. 86, s. 4.

(x) 2 East, P. C. 822; 6 East, 133.

(y) 2 Ld. Raym. 1179.

(z) 56 Geo. 3, c. 58, s. 2, 3; Burn's J. Excise, vol. II. 324, 325; and Burn's J. Alehouse, IV. & V.; *Langton v. Hughes*, 1 M. & S. 593; *Attorney-General v. King*, 5 Price, 195.

(a) 31 Geo. 2, c. 29, s. 29, 30.

wine (*b*) or victuals may, it is said, be indicted for a misdemeanor at common law, and any person to whom the same has been sold may maintain an action against him for the injury done; (*c*) and it has been holden a good custom in a manor for the homage to search and seize all unwholesome food offered for sale. (*d*)

So if the health of an individual be injured by the unskilful or negligent conduct of a surgeon or apothecary, or general practitioner, in assuming to heal a dislocated or fractured limb or internal disorder, an action for compensation may be sustained, (*e*) or the wrong-doer might be proceeded against by censure in the college, (*f*) or for gross negligence or misconduct he might be indicted. (*g*)

It should seem, on principle, that if the health of an individual be injured by a person wilfully assuming the appearance of a ghost, or doing any other act on purpose to terrify persons, and whose nerves are thereby injured, an action would lie for the consequence; and that the wrong-doer might be indicted for the *misdemeanor*, although Lord Hale has stated that if death should ensue the offender could not be indicted for murder. (*h*) And we have seen that if a parent or master, or other person having the custody of an infant unable to support himself, and whose legal *duty* it was to feed and take adequate care of the same, and thereby injure the child's health, he would be indictable for the misdemeanor. (*i*)

Fifthly. Injuries to *reputation* are *written* or *verbal* slander, and *malicious prosecutions* imputing the guilt of some disreputable crime.

1. A *libel* signifies any malicious defamation expressed either in printing, writing, pictures, or effigies. (*k*) Every *written* calumny is actionable and punishable, although it do not impute any indictable offence, but merely tend to disgrace or ridicule, or bring into contempt the party calumniated, even by imputing hypocrisy or want of proper feeling, and still more if it impute fornication, swindling, or any other deviation from moral recti-

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Mala praxis.

Fifthly. REPUTATION, injuries, remedies, and punishment.

1. Libels, what.

(*b*) As to mixing wine with other wine, or with any other thing, 100l. penalty, and 40l. penalty on the retailer, 12 Car. 2, c. 25, s. 11; 26 Geo. 3, c. 59, s. 23; 54 Geo. 3, c. 77, s. 4, 8; Burn's J. Excise, Wine.

(*c*) Rol. Ab. 95; 2 East, P. C. 322; 6 East, 133; 2 Bla. C. 163; Burn's J. Alehouses, IV. & V.; 7 & 8 W. 3, c. 30, s. 25; 22 & 23 Car. 2, c. 5, s. 11.

(*d*) *Vaughan v. Atwood*, 1 Mod. 302; *Willcock v. Windsor*, 3 Bar. & Adolp. 47.

(*e*) 2 Wills. 359; 8 East, 348.

(*f*) Com. Dig. Physician; Vin. Ab. Physician.

(*g*) *The King v. Long*, 4 Car. & P. 398; Id. 407, n. (*a*); Id. 423; 3 Car. & P. 629, 635.

(*h*) 4 Bla. C. 197, 201, note 25; G. Smith's Forensic Med. 34, 37, 38; 1 Paris & Fonbl. 351, 352; 1 Hale's P. C. 429.

(*i*) *Ante*, 34, 35, and *post*.

(*k*) 5 Coke, 125.

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tude or principle, (*l*) unless it were written and published on a *lawful occasion*, as in bonâ fide giving a fair character of a servant or a confidential communication, or to a certain extent a correct report of a trial or proceeding in court, where both plaintiff and defendant may be supposed to have been present before the court. But not a report of an ex-parte proceeding, (*m*) or matter relating to a third person not before the court. (*n*)

The continued publication of a libel may be *prevented* by destroying it, (*o*) but not by a cross libel on the wrong-doer. (*p*) It may be *compensated* by action, in which full costs may be recovered although the damages be under forty shillings, (*q*) and it may be *punished* by indictment. (*r*) If the libellous matter were in an affidavit or articles of the peace, or in the course of *other legal proceedings*, then the party scandalized can merely apply to the court to have the matter struck out, and cannot sustain any action. (*s*)

2. Slanderous
words.

2. But *slanderous words* cannot legally be *prevented* by battery of the slanderer, (*t*) nor can any action be supported unless the words either *first* impute the guilt of some *temporal* offence for which the party slandered, if guilty, might be indicted and punished in the temporal courts, and which words are technically said to endanger a man in law; or, *secondly*, impute the having an existing contagious disorder tending to exclude from society; (*u*) or, *thirdly*, an unfitness or inability to perform an office or employment of profit, or want of integrity in an office of honour; (*v*) or, *fourthly*, words prejudicing a person in his lucrative profession or trade; (*x*) or, *fifthly*, *any untrue words* occasioning *actual damage*. (*y*)

If the words, however insulting, do not in themselves or by circumstances import any certain charge under one of the first four of these heads, and be not followed by actual damage, then there is no remedy in courts of *common law*; thus to call a man "forsworn," or a "scoundrel," or a "cheat," or a "rogue," or a "rascal," and perhaps a "swindler," is not actionable, because the words do not *necessarily* import that the party has committed any

(*l*) 4 Taunt. 355; 2 Bar. & C. 678; 1 Bos. & P. 331; 2 Bos. & P. 748; 2 H. Bla. 532; 2 Wils. 404.

(*m*) *Deacon v. Devereux*, 2 Russ. Chan. Rep. 607.

(*n*) *Lewis v. Clement*, 3 Bar. & Ald. 702.

(*o*) *Semble*, 2 Camp. 511; 5 Coke's R. 125, b. *post*.

(*p*) 2 Stark. R. 93.

(*q*) 1 Saund R. 228; 1 Stra. 193.

(*r*) Andr. 384; 1 Stra. 420; 2 Stra. 1157.

(*s*) 1 Saund. 132, note (1); 2 Shaw, 245; 3 Dow. R. 377; *Hodson v. Scarlett*, 1 Bar. & Ald. 232.

(*t*) 3 Wils. 186; 6 T. R. 694.

(*u*) 2 T. R. 473.

(*v*) 2 Salk. 695.

(*x*) 3 Wils. 186; 1 Lev. 115.

(*y*) 1 Lev. 53; 2 Leon. 111; 8 T. R. 130; 1 Taunt. 39.

punishable crime. (z) But if either of those, or any other expression, should be accompanied by any other circumstance tending to fix a direct imputation of some punishable crime upon the party calumniated, and be so understood by any other third party, then the otherwise uncertain imputation may become actionable; (a) and a general charge of criminality, by a term known in law to impute a punishable crime, is actionable, as to call a person a "traitor," "highwayman," "thief," or to say he is guilty of "perjury" or "murder," though the particulars of any pretended crime be not stated. (b) A mere *verbal* imputation of the breach of any *mere moral* virtue, duty, or obligation, such as chastity, sobriety, &c. (though it may depreciate a person in the opinion of society, and subject him to censure and punishment in the Ecclesiastical Courts, yet does not expose him to punishment in the Temporal Courts) is not actionable, unless followed by actual damage. (c) And the party aggrieved must, to punish the slanderer, prosecute him in an Ecclesiastical Court; though, when the accusation is partly of an offence punishable in the Ecclesiastical Courts and partly in the Temporal Courts, or where special damage has been sustained, the latter courts have the exclusive jurisdiction, and will then afford redress for the entire slander. (d)

Actions for words are restrained by the enactment, that the plaintiff shall recover no more *costs* than damages, unless he obtain a verdict for forty shillings; (e) and there is in general no *punishment* by indictment or otherwise for *verbal* slander, unless in the case of insulting words spoken to a magistrate whilst in the exercise of his office. These, and other distinctions between verbal and written slander, proceed upon the principle that the former are often spoken in heat upon sudden provocations, and are fleeting and soon forgotten, and, therefore, less likely to be permanently injurious; but that written slander is more deliberate and more malicious, more capable of circulation in distant places, and, consequently, more likely to be permanently injurious.

Malice is in general to be *inferred*, as well in the publication of written as of verbal slander, (f) unless the occasion of uttering the slander afford a contrary presumption; as where the

Express malice,
when or not
essential.

(z) 3 Wils. 177; 6 T. R. 691; 2 H. Bl. 531; 4 Co. 16, b.; 2 Chitty's R. 657.

(a) Id. *ibid*, 6 T. R. 694.

(b) Cro. Jac. 114; 1 Stra. 142; 2 New R. 335.

(c) 4 Taunt. 355.

(d) 2 T. R. 473; 1 Lev. 134; 3 Lev. 193.

(e) 4 East's Rep. 567; 2 Wils. 258.

(f) 4 Bar. & Cres. 247, 585; 9 Bar. & Cres. 643; 4 Bing. 195; 12 Moore, 418, S. C.

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calumny was in giving the character of a servant, (g) or by a counsel or justice of the peace in the course of a cause or proceeding; (h) and in a case of this nature, the party suing must prove express malice; (i) and where the language is ambiguous, and it is doubtful whether it implies any injurious matter to the plaintiff, the proper question for the jury is, not whether the *intention* of the publication was to injure the plaintiff, but whether the tendency of the matter published was so injurious. (k) The term *malice* is well defined in an old case, and its derivative *malò animo*, in its more extensive signification, well explained and applied; the term does not necessarily mean what must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another; malice, in *vulgar* acceptation, is a desire of revenge, or a settled anger against a person, but in its *legal* sense it means the *doing any act without just cause*. (l)

Restraint upon
communication
of slanderous
reports.

Though much allowance has been made for the weakness of mankind in indulging in conversation scandalizing individuals, instead of accumulating better materials for mental improvement, yet that weak and mean propensity has of late been properly checked by the decisions of the courts, that in reporting calumnious statements of others not only must the name of the original author be given as the source of the information, but the *precise* words must be repeated, or their substance, without any additional assertion of the repeater, so as not only to give a perfect action against the original author, whose assertion, if

(g) 3 Bos. & P. 587; 8 B. & Cres. 578.

(h) 1 Dow. R. New S. 495; 4 Wilson and Shaw, 102.

(i) 9 Bar. & Cres. 403; 4 Bar. & Cres. 247, 584; *Allardice v. Robertson*, 4 Wils. & Shaw, R. 102; 1 Dow. R. New S. 495; 8 Bar. & Cres. 578.

(k) *Fisher v. Clement*, 10 Bar. & Cres. 472.

(l) Gilb. Cases, L. & E. 190; 2 Bar. & Cres. 257. In 3 Bar. & Cres. 584, *Abbott, C. J.* said, "I take it to be also a general rule that an act unlawful in itself, and injurious to another, is considered both in law and reason to be done *malò animo* towards the person injured, and this is all that is meant by a charge of *malice* in a declaration of this sort, which is introduced rather to exclude the supposition that the publication may have been made on some *innocent* occasion, than for any other purpose. There are even some acts not in themselves unlawful, but which become so only by reason of their

injury to others, which in all civil actions are charged to be *maliciously done*. Take the common case of an offensive trade, the melting of tallow for instance, such a trade is not in itself unlawful, but if carried on to the annoyance of the neighbouring dwellings, it becomes unlawful with respect to them, and their inhabitants may maintain an action, and may charge the act of the defendant to be *malicious*; and no one ever objected to such a charge, though probably in most cases the defendant has no personal malice towards his neighbours, but acts only with a view to his own profit and gain. The publication in question impeaches the plaintiff's character; a publication impeaching private character is actionable, unless the occasion of publishing makes the publication excusable; as where the publication is a violation of the criminal jurisprudence of the country, and there is nothing to call for it, the publication is not excusable."

it stood alone, might not be credited, but also without adding weight or effect to the prior slander; (*m*) and it is not even an excuse to repeat in *writing* what has been previously spoken or written by others. (*n*)

In case of written slander, imputing any immorality that cannot be so well negated by the testimony of others, it may be advisable for the party calumniated to *indict* the slanderer, because in support of the prosecution he would himself be a witness, and by his positive evidence negative all imputation on his character.

3. *Malicious* prosecutions are another mode of affecting the *character*, but these will be more properly considered under the next head of injuries to *liberty*, which they also in general affect.

There are also some descriptions of *threats*, which at the same time that they create alarm also injure the character, and are highly punishable, such as written menaces to impute any infamous crime, with intent to extort money, which are punishable capitally by indictment as robbery. (*o*) Menaces, or forcible demands of chattels with intent to steal, are punishable with transportation for life, or not less than seven years, or imprisonment for not more than four years, and with whipping if a male offender; (*p*) and any accusation or threat to accuse any person of any offence punishable with death, or transportation, or pillory, or of an assault with intent to commit a rape, or of any infamous crime, with intent to extort any chattel or money, is punishable in like manner; (*q*) and at common law extorting by duress or threat of accusation of an unnatural offence was indictable. (*r*)

The infraction of *personal liberty* has ever been regarded as one of the greatest injuries. It will be observed that in the scale of punishments the legislature, in most of the statutes we have noticed, have considered four years' imprisonment as nearly equivalent to transportation for life, or for seven years. The injuries to liberty are principally termed "*false imprisonments or malicious prosecutions*."

Imprisonment consists of any restraint of a person contrary to his will; the most obvious are the confinement in a prison, or private house, or in the stocks, or by forcible detention in the street, or by a peace officer touching another by way of

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When preferable to indict for a libel.

3. Malicious prosecutions.

Threats of criminal charges, injurious to reputation and punishable.

II. PERSONAL LIBERTY.

Injury by imprisonment defined, and what not.

(*m*) *M'Pherson v. Daniels*, 10 B. & C. 263.

(*n*) *De Crespigny v. Wellesley*, 5 Bing. 392.

(*o*) 7 & 8 Geo. 4, c. 29, s. 7.

(*p*) *Id.* sect. 6.

(*q*) *Id.* sect. 8.

(*r*) 6 East, 126; Burn's J. Threat.

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arrest. (s) But it has been decided that the lifting up a person in his chair, and carrying him out of the room in which he was sitting with others, and excluding him from the room was not a false imprisonment, so as to entitle him to a verdict and full costs on a count for false imprisonment; (t) and the merely giving charge of a person to a peace officer, not followed by any actual apprehension of the person, does not amount to an imprisonment, though the party to avoid it on the next day attend at a police office; (u) and if in consequence of a message from a sheriff's officer holding a writ, the defendant execute and send him a bail bond, such submission to the process will not constitute an arrest, in proof of an allegation of arrest, in an action for maliciously holding to bail. (x)

1st. False imprisonment defined.

1st. The term *false imprisonment*, though technical, does not appear to convey any sufficiently definite meaning. It means in law any *illegal imprisonment*, either without any process *whatever*, or under colour of process *wholly illegal*, without regard to any question whether any crime has been committed or a debt due, so that the proper civil remedy is *trespass vi et armis* as for a direct injury wholly unwarranted even in its inception. Whereas the terms "*malicious prosecution*," or "*malicious arrest*," always in law suppose *regular process and proceedings*, but that the *facts* did not warrant their issuing, and which is to be decided by the *result*; as where the warrant to imprison a party was *perfectly regular and proper*, but he was *innocent* of the supposed crime and ultimately acquitted; or where there has been a *sufficient affidavit* to hold to bail and a *valid writ*, but when, *in fact*, no debt was due, and so established on the trial or other termination of the suit. In the latter cases the remedies are *not* by *trespass vi et armis* as for a direct injury, but by action on the *case* for the malicious adoption of the *regular proceeding* when there was no probable cause or ground for issuing it.

2dly. Malicious prosecution, or arrest, defined.

These distinctions are also *substantially* important, for if the process or the imprisonment were *wholly illegal* or *misapplied* as to the *person* intended to be imprisoned, without regard to any question of fact, or whether guilty or innocent, or the existence of any debt, then the party imprisoned may legally *resist* the imprisonment and may escape or be rescued, or even break prison; whereas however innocent he might be, yet if

(s) Bac. Ab. Trespass, D. 3; 1 Esp. R. 431, 526.

(t) *Gardner v. Wedd*, Easter T. 1825, C. P. on a motion for a new trial from Essex; *sed quære*.

(u) 1 Esp. R. 431; 2 New R. 211; 1 Car. & P. 153; 1 R. & M. 26.

(x) 6 Bar. & Cres. 528; 7 Dowl. & R. 233; 9 Bing. 91, S. P.

the process and imprisonment were in form legal, each of those acts would be highly punishable, (y) for he ought to submit to the legal process and obtain his release by due course of law. Even in cases where the imprisonment is *manifestly informal and illegal* the party must not, to obtain his release, use any dangerous weapon, and the safest course in all cases is to obtain liberty by *habeas corpus*, or by procuring bail as hereafter fully explained, (z) by which means relief from continued imprisonment may be speedily obtained, and without prejudicing the remedy by action for the intervening illegal imprisonment.

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Compensation for every illegal imprisonment without process, or under void or misapplied process, may be obtained by action of *trespass*, in which damages under forty shilling in general entitles the plaintiff to full costs, (a) and the wrong-doer may also be indicted. (b) The cruel act of forcing or leaving a seaman abroad is punishable by particular enactment. (c)

Compensation
for illegal im-
prisonments.

The compensation for imprisonment, under colour of *regular criminal or civil process*, is by action *on the case*, (not trespass), and is subjected to certain qualifications, even if it turn out in the result of a prosecution that the party imprisoned be acquitted, or that in an action he obtain a verdict or nonsuit, it does not necessarily follow that he can recover any compensation for the intervening imprisonment; for there may have been adequate *reasonable ground* for setting on foot the inquiry, though it may ultimately be established that there was no crime or no debt. It has been considered that if in the event of every acquittal the prosecutor were liable to an action, the apprehension of that consequence would deter persons from becoming prosecutors, and crimes would go unpunished; and with regard to actions, it has also been considered that the trial of a private claim in a public court of justice is matter of right, and if the party do not succeed, his payment of the defendant's costs is a sufficient compensation. The presumption, therefore, is in general in favour of the prosecutor and of the plaintiff that they properly instituted the proceeding; and with respect to prosecutions for felony, the judges at the Old Bailey, 6 Car. 2, resolved, "that no copy of any indictment for felony be given without special order upon motions made in open Court, at the general gaol delivery; for that the late frequency of actions against prosecutors, which cannot be without copies of the indictment, deterreth people

(y) *Post*, c. vii.

(z) *Post*, c. viii.

(a) 3 Bla. C. 318; 6 T. R. 11.

(b) 4 Bla. C. 218, 219; 2 Burr. 993.

(c) 9 Geo. 4, c. 31, s. 30.

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2. Liberty.

from prosecuting for the king upon just occasions." (d) But it has been well observed that the power of the judges to make such resolution and order, was, to say the least, questionable; and the better opinion is, that an acquitted defendant is entitled, as a matter of right, to a copy of the record of his acquittal, as well in felonies as misdemeanors. (e) In both the cases of an acquittal upon a *criminal* charge, or in an *action* where the proceeding has been unnecessarily and vexatiously by *arrest*, if the acquitted defendant can prove that there was *no probable cause* for instituting the indictment, or proceeding by arrest, (i. e. no adequate ground at the time to induce a prudent and cautious man, uninfluenced by revenge, to suspect the guilt of crime, or the existence of so large a debt,) and still more, if he can show *express malice*, (which however is in general to be inferred from the want of probable cause,) then he may in a *special action on the case* obtain compensation for the vexatious proceeding. But in general the *onus probandi*, at least, of the want of probable cause, lies upon the acquitted defendant. (f) In cases of arrests, either malicious or without adequate cause, the superior courts have summary jurisdiction on motion to compel the plaintiff to pay the defendant's costs, (g) but not to make compensation, which can only be enforced by action. However, if a party has maliciously and falsely sworn to a debt, he may be punished by indictment for perjury, (h) and when several *combine* they may be indicted for the conspiracy. (i)

3. Rights of
Burial. (k)

Burial, in *some part* of the parish church-yard, is a common law right, without even paying for breaking the soil, and that right will be enforced by mandamus to the incumbent, (l) but

(d) Kelyng's Rep. 9; *Brown v. Cumming*, 10 Bar. & C. 71.

(e) *Brown v. Cumming*, 10 Bar. & C. 70. It would be a monstrous power to vest in a judge to prevent an acquitted defendant from trying his civil remedy for the injury to his character and person by an unfounded prosecution. A jury is the only proper jurisdiction to decide upon the propriety of the prosecution.

(f) 2 Bar. & Adolp. 179; 1b. 695; 1 Bar. & Adol. 128; 3 Bar. & Cres. 139; 2 Wils. 307; 3 Bla. C. 126, note 20; 4 B. & C. 26.

(g) 43 Geo. 3, c. 46, s. 3.

(h) Peake's R. 112.

(i) 2 Burr. 993.

(k) Although as *burial* is subsequent to death it can scarcely be regarded as strictly an absolute right of the deceased, but is rather a part of the public law enforcing decency, yet as it is usually contemplated, and frequently regulated by will and by the wish of the deceased party, and

is usually complied with, it is submitted that the right may properly be here considered. See in general Burn's Eccl. L. tit. Burial, 1 vol. 258. Funeral expenses to the extent of 20*l.* have recently been allowed even against a creditor, 1 Bar. & Adol. 260, and see 3 Bla. Com. by Chitty, 508, n. 31. The burial of dead bodies, cast on shore, is enforced by 48 Geo. 3, c. 75; Burn's J. tit. Burial; and of persons found *felo de se*, by 4 Geo. 4, c. 52. Funerals are exempt from tolls by 3 Geo. 4, c. 126, s. 32. A conspiracy to prevent a burial is indictable at common law, 2 T. R. 734; and so is the wilfully obstructing a clergyman in reading the burial service over the dead in the parish church, and by threats and menaces hindering the burial, 7 Dowl. & Ry. 461. The recent Anatomy Bill, 2 & 3 W. 4, c. 75, regulates schools of anatomy, and is calculated to prevent the stealing of dead bodies.

(l) Willes, 258; 2 Bar. & Ald. 806; 1 Chit. R. 588, S. C.; 1 Bar. & Ald. 122.

the particular mode and precise place of burial are entirely of ecclesiastical cognizance, and the incumbent is the proper judge of the fitness or unfitness, whether any particular person ought to have privilege of being buried in the body of the church, or in any particular part of a church-yard, or in any particular manner, as whether in a stone or iron coffin; (*m*) and therefore the Court of King's Bench refused a mandamus to inter the body of a parishioner in an iron coffin. (*n*) Nor will the Ecclesiastical Court enforce such a burial, though they will regulate the fees in case the incumbent agrees to bury the body in a coffin constructed of such durable materials. (*o*) Nor will the Court of King's Bench even grant a mandamus to compel the rector to bury the corpse of a parishioner in his family vault, or in any particular part of a church-yard, that being entirely in the discretion of the parson. (*p*) And where a rector, in consideration of 20*l.*, by parol, gave leave to a person to make a vault in the parish church and to bury a corpse there, and promised that he should have the exclusive use of such vault, but afterwards, without leave of that person, opened the vault and buried another person there, it was held that no action on the case or otherwise could be sustained against him for so doing; for that even supposing that the rector had power to grant the exclusive use of a vault during his own life, yet he could not do it by parol, as a grant under seal is always essential to the creation of a freehold easement; (*q*) and it was also considered that a rector cannot grant a family vault in the church, but only leave to bury there in each particular instance. (*r*) It should seem, therefore, that, in order to acquire *de novo* a perfect right to be buried in a particular vault or place, a *faculty* must be obtained from the ordinary, as in the case of a pew; or a man may prescribe that he is occupier of an ancient messuage in a parish, and ought to have separate burial in such a vault within the church, and such prescription implies that a faculty was originally obtained. (*s*) It has been observed that by means of a faculty a pew can only be granted to the inhabitants of a parish, and it is for the most part limited to a house, a removal from which destroys the right to the pew, and that the same rules would be applicable to a vault; (*t*) and that suggestion is confirmed by a recent decision, in which it was held that a faculty for the appropriation of a vault "to the use

(*m*) *Ante*, 50, n. (*l*).(*n*) 2 Bar. & Ald. 806; 1 Chit. R. 588; Willes, 536.(*o*) Hagg. Rep.(*p*) 1 Bar. & Adol. 122; 8 Bar. & Cres. 288.(*q*) 5 B. & Cres. 221; 8 B. & Cres. 288.(*r*) 8 B. & C. 288.(*s*) Com. Dig. Cemetry, B.; 8 B. & C. 293.(*t*) Per Bayley, J. in 8 B. & C. 293.

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of a family so long as they continue parishioners and inhabitants of the parish" will be granted, if it may be done without probable inconvenience to the parish; (u) and the court said, "The faculty, however, must be limited in the same manner as faculties for pews, to the use of the family as long as they continue parishioners and inhabitants;" and in this instance it must also contain a clause that the bodies already deposited there shall not be removed. (x)

A clergyman has neither by the ecclesiastical law nor by the common law any right to black cloth and other ornaments placed round a pulpit upon the occasion of a burial, but the same belong to the executors or persons at whose expense they were placed there; if taken by the parson or any other, the latter may recover the value in an action of trover. (y)

It has been a vulgar error that a creditor may legally arrest or detain and prevent the burial of the dead body of his debtor until paid his debt, but that notion has been refuted by Lord Ellenborough, (z) and it is singular how such an error upon so useless and ineffectual an act could ever have been entertained. (a) Another error equally erroneous has existed upon the supposition that the permitting a funeral to pass across private grounds creates a public right of way, which doctrine also has long been refuted. The *stealing* of the shroud, coffin, &c., which are the property of the executor or administrator, or whoever incurred the expense of the funeral, is larceny, and indictable. (c) But it is clear that no action at the suit of an heir or executor lies for violating or disturbing the remains of the dead, nor is the stealing a corpse a felony, the same being *nullius in alterius terra*. (d) However, the stealing or removal of a dead body, though for the improvement of anatomy, is an indictable misdemeanor, it being contrary to common decency, and shocking to the general sentiments and feelings of mankind; (e) but it was questioned whether the apprehension of a person in the act of stealing a dead body from a church-yard was a lawful apprehension, so as to subject such person to an indictment for calling a sexton in order to obstruct such apprehension. (f)

(u) *Magnay and others v. The Rector, Churchwardens, &c. of the United Parishes of St. Michael & St. Martin, Vintry*, 1 Hagg. Ecc. Cas. 48.

(x) *Id.* *ibid.*

(y) So decided at Maidstone summer assizes, A. D. 1825.

(z) See Lord Ellenborough's strong observations in *Jones v. Ashburnham*, 4 East's R. 455.

(a) It is equally singular that Dr. Johnson, in his "Lives of the Poets," states

the anecdote of a body having been arrested whilst in funeral procession, and a noble lord getting out of his carriage and paying the debt, so as to enable the procession to proceed, without a single comment hinting that the arrest was illegal.

(c) 2 East, P. C. 652; 1 Hale, P. C. 515.

(d) 3 Inst. 203.

(e) 2 T. R. 733; Russ. & Ry. C. C. 366; Dowl. & Ry. N. P. C. 13; R. & R. C. C. 366.

(f) R. & R. C. C. 365.

CHAP. II.
II. RELATIVE
RIGHTS.1. Between
husband and
wife. (g)

The *Relative* rights between *Husband* and wife principally depend on the due solemnization of the marriage between them according to law, and which in England must be by *banns* or by *license*. (h) If by *banns*, a notice correctly dated of the day it is delivered, and stating the *true* christian and surnames of both the parties, and of the houses of their respective abodes within the parish or chapelry, and of the time during which they have dwelt, inhabited, or lodged there, (i) must be given to the minister seven days, at least, before the time required for the first publication of such banns, and a marriage by *banns* not *truly* stating the christian and surnames of each party is invalid. (j) But the section requiring the consent of parents or guardians is merely *directory*, and the want of such consent will not invalidate the marriage. (k)

To obtain a *license*, the statute 4 Geo. 4, c. 76, s. 14, enjoins the form of oath that there is no existing impediment, and that if either party be under twenty-one the consent of all proper parties has been obtained. But a marriage by *license* between parties, one of whom is a minor, without the consent of parent or guardian, although obtained by false swearing that the party was of age, and contrary to such express regulation, is not void; (l) though the husband, when a party to the violation of the above enactment, is to be deprived of all right to the pro-

(g) See in general 1 Bla. Com. chap. xv. and notes.

(h) 3 & 4 Geo. 4, c. 75; 4 Geo. 4, c. 5, c. 67, c. 76, c. 91; 5 Geo. 4, c. 32, c. 68; 6 Geo. 4, c. 92.

(i) But the 4 Geo. 4, c. 76, s. 26, enacts, that after the marriage has been celebrated the proof of the *actual residence* of the parties at the place described shall be immaterial. *Rex v. Hind*, Russ. & R. C. C. 253.

(j) 4 Geo. 4, c. 76, s. 7, 22. *Rex v. Inhabitants of Tibshelf*, 1 B. & Adol. 194; *Rex v. Inhabitants of Billingham*, 3 M. & S. 257; and in *Wiltshire v. Prince*, a marriage by banns of a minor, whose name was Henry John Wiltshire, by the name of John Wiltshire, omitting *Henry*, for the purpose of eluding detection, was declared void in the Consistory Court, 17 July, 1830. MS. But a second marriage by banns in a fictitious name pending the first, although void, will nevertheless subject the bigamist to punishment as such, *Rex v. Pearson*, Maidstone, Kent, 13 Dec. 1852, coram Mr. Baron Gurney, who said "that the objection could not prevail; such second marriage was void however solemnized, as the first was a valid one. There was a

marriage *in fact* between the prisoner and the second female, and whether all the forms necessary to constitute a valid marriage, if no previous marriage existed, were not adopted, was of no consequence. If such an objection were allowed to prevail, nothing would be easier than for persons disposed to commit such offences as the present, to have some defect in the forms required by the marriage act, and thus escape from the punishment due to their offence." Verdict, guilty sentence, twelve months imprisonment and hard labour.

(k) 4 Geo. 4, c. 76, s. 16; 8 Bar. & Cres. 29.

(l) *Rex v. Inhabitants of Birmingham*, 8 Bar. & C. 29. The same point was so ruled by Lord Tenterden on an indictment for a conspiracy to marry an infant by a license obtained by the woman falsely swearing her intended husband was of age. *The King v. Jacob and others*, sittings at Westminster, Feb. 1826, and several eminent doctors of civil law advised that the marriage could not be set aside. The uncle of the wife and another defendant were convicted of the conspiracy.

CHAP. II.
II. RELATIVE,
&c.

1. Husband and
wife.

perty of the wife ;(*m*) and a Court of Equity has no discretion to mitigate that penalty, but is bound to settle and secure all property, present and future, of the wife for the benefit of herself or the issue of the marriage. (*n*)

The marriage, whether by banns or by license, is to be celebrated in the presence of *two* or more witnesses besides the minister, and immediately after the celebration, an entry thereof is to be made in the *register-book*, in the form prescribed by the act ; and the wilful making, forging, &c., a false entry in such book is felony punishable with transportation. (*o*) But the omission to make, or untruly making, such register would not invalidate the marriage.

(*m*) 4 Geo. 4, c. 76, 23'; *Rex v. Inhabitants of Birmingham*, 8 Bar. & C. 29 ; and the *King v. Jacobs*, *ante*, 53, note (*l*).

(*n*) *Attor. Gen. v. Mulloy*, 4 Russ. R. 329.

(*o*) 4 Geo. 4, c. 76, s. 28, 29.

The following forms relate to marriages by license or by banns:

Form of oath on
applying for a
license. Vicar-General's Office, }

(*Date*) day of A.D. 1833.

Appeared personally A. B. of the parish of St. Mary, Islington, in the county of Middlesex, (bachelor,) of the age of twenty-one years and upwards, and prayed a license for the solemnization of matrimony, in the parish church of St. Mark, Kennington, in the county of Surrey, between him and C. D. of the parish of St. Mark, Kennington aforesaid, spinster, of the age of twenty-one years and upwards, and made oath that he believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenor of such license. And he further made oath, that she the said C. D. hath had her usual place of abode within the said parish of St. Mark, Kennington, for the space of fifteen days last past.

Sworn before me }
E. F., Surrogate. }

Signature, A. B.

Form of license.

William, by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan. To our well-beloved in Christ, A. B. of the parish of St. Mary, Islington, in the county of Middlesex, bachelor, and C. D. of the parish of St. Mark, Kennington, in the county of Surrey, spinster.

Grace and Health. Whereas ye are, as it is alleged, resolved to proceed to the solemnization of true and lawful matrimony, and that you greatly desire that the same may be solemnized in the face of the Church: We being willing that these your honest desires may the more speedily obtain a due effect, and to the end therefore that this marriage may be publicly and lawfully solemnized in the parish church of St. Mark, Kennington aforesaid, by the rector, vicar, or curate thereof, without the publication or proclamation of the banns of matrimony, provided there shall appear no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenor of this license: and likewise, that the celebration of this marriage be had and done publicly in the aforesaid church, between the hours of eight and twelve in the forenoon. We, for lawful causes, graciously grant this our license and faculty, as well to you the parties contracting, as to the rector, vicar, curate or minister of the aforesaid parish, who is designed to solemnize the marriage between you, in the manner and form above specified, according to the rites of the Book of Common Prayer, set forth for that purpose, by the authority of Parliament. Given under the seal of our Vicar General this twenty-ninth day of November, in the year of our Lord one thousand eight hundred and thirty-two, and in the fifth year of our translation.

John Moore, Registrar.

(L. S.)

By stat. 4 Geo. 4, c. 76, this license to continue in force only three months from the date hereof.

Marriages of British subjects in *foreign* countries are valid, if made according to the local law of those countries; (r) so a marriage in Ireland, performed by a clergyman of the Church of England in a private house, was held valid, although no evidence was given that any license had been granted to the parties; (s) but the foreign law, as well as the compliance with its requisites, must be proved when it is necessary to establish a legal marriage; (t) and in a Court of Equity, where an affidavit verifying the law may be received, it must be made by a professional man, and be positive as to the law, and not to mere hearsay or belief. (u)

The Ecclesiastical Court will not annul a marriage by banns, unless there were fraud in the publication, as by false names used for a fraudulent purpose. (x) And in that court it is not every assumption of a fictitious name that will invalidate, but it must have been assumed for the purpose of defrauding the other party. (y) Error or misrepresentation about the family or fortune of the individual, though produced by disingenuous representations, will not at all affect the validity of the marriage. (x) But under the 4 G. 4, c. 76, a marriage is void where persons knowingly and wilfully marry in any other

CHAP. II.
II. RELATIVE,
&c.

1. Husband and wife.

I publish the banns of marriage between A. B. of bachelor, and C. D. of spinster. If any of you know cause or just impediment why these two persons should not be joined together in holy matrimony, ye are to declare it. This is the first [second or third] time of asking.

Form of publication of banns, see 2 Burn's Ecc. L. 461.

I do hereby certify that the banns of marriage between A. B. of the parish of Orton, in the county of Westmoreland, bachelor, and C. D. of the parish of Ravens-tondale, in the county aforesaid, spinster, have been duly published in the parish church aforesaid, on three several Sundays, to wit, Oct. 27, Nov. 3, and Nov. 10, now last past, and that no cause or just impediment hath been declared why they may not be joined together in holy matrimony. Witness my hand, Nov. 13, 1762.

Form of certificate of publication of banns, see 2 Burn's Ecc. L. 462.

Ri. Burn, Vicar of Orton aforesaid.

A. B. of [the, this] parish, and C. D. of [the, this] parish, were married in this [church, chapel] by [banns, license] with consent of [parents, guardians] this day of in the year 1833,

Form of register of marriage, whether by banns or license, as enjoined by 4 Geo. 4, c. 76, s. 28, and see 2 Burn's Ecc. L. 483.

This marriage was solemnized between us {

By me J. J. [Rector, Vicar, Curate.]

A. B.,
C. D.,

In the presence of E. F., G. H.

(r) 10 East, 282; *Centaur and others v. Tausdale*, 8 Taunt. 830; 2 Marsh. 243, S. C.; *Lacom v. Higgins*, 1 D. & R. Ni. Pri. 38; 3 Stark. R. 176, S. C.; 1 Roper, 337; and see cases under Indictment for Bigamy, Carr. Cr. L. 253, &c.

(s) *Smith v. Maxwell*, Ry. & Mood. C. N. P. 80; 1 C. & P. 271, S. C.

(t) See 1 Roper, on Husband and Wife, 333; *Evans's Col. Stat. In Lacom v. Higgins*, 1 D. & R. Ni. Pri. Cas. 38; 3 Stark. R. 176, it was held, that the validity of a marriage celebrated in a foreign country, must be determined by the *lex loci*

where the marriage was solemnized. And a printed copy of the Cinq Codes produced by the French vice-consul resident in London, purchased by him at a bookseller's shop at Paris, was received as evidence of the law of France upon which the courts here would act.

(u) *Hill v. Reardon*, Jacob's R. 89, 90.

(x) 1 Phil. Ecc. C. 133, 298, 224, 230, 375; 2 Phil. Ecc. C. 14, 104, 367.

(y) 3 Mau. & Sel. 250; 1 Phil. 47; 2 Phil. 12; but see 1 B. & Adolp. 144.

(s) *Wilson v. Brockley*, 1 Phil. E. C. 137.

CHAP. II.
II. RELATIVE,
&c.

1. Husband and
wife.

place than a church or chapel wherein banns may be lawfully published, unless by special license; or *knowingly* and wilfully intermarry without due publication of banns, or license from a person having authority to grant the same; or knowingly and wilfully consent to solemnization of marriage by a person not being in holy orders. But in all other cases of fraud or false swearing, or other irregularity, the *marriage itself is valid*, though the parties offending are liable to punishment, and a forfeiture of property. The 10th section prohibits any license being granted to solemnize any marriage in any other church or chapel than the parish church or chapel, &c. belonging to the parish, &c. wherein such person shall have been resident fifteen days immediately before granting such license. It is not necessary that the license should contain any description of the parties. (a) The 26th section provides, that proof of actual residence of the parties is not necessary to the validity of the marriage, whether after banns or by license. (b) The 30th and 31st sections provide, that the act shall not extend to the royal family, or to marriages of Quakers or Jews. (c) And by the 53d section the act extends only to England, and marriages on elopements to Scotland are valid. (d)

In an action for criminal conversation, and in support of an indictment for bigamy, an actual marriage according to law must be proved. (e) But in an action of trespass by husband and wife, for the battery of the wife, it is sufficient to prove mere reputation of marriage, (f) and that evidence *a fortiori* suffices in an action against the supposed husband for necessities furnished for the wife.

A *verbal promise* to marry is sufficient, notwithstanding the statute against frauds, to subject a party to an action for the breach; (g) and when in writing it need not be stamped; (h) and a bill lies to compel a party to admit his promise to marry. (i) A promise of marriage *by* an infant does not subject him to an action, though a promise *to* an infant enables the latter to sue for the breach. (k) No bill in equity or other proceeding lies

(a) *Mayhew v. Mayhew*, 2 Phil. E. C. 13.

(b) See *Tres v. Irwin*, 2 Phil. E. C. 14.

(c) See *Jones v. Robinson*, 2 Phil. E. C. 285; Sel. N. P. Adultery, 3, notes 15, 16.

(d) Bul. N. P. 113; and Dodson's Rep. of Sir Wm. Scott's judgement in *Dalrimple v. Dalrimple*, and 1 Vcs. & B. 112,

114; 2 Hagg. 54; 1 Rep. 334; Selw. N. P. Adultery, 3, note 14.

(e) 4 Burr. 2057; Phil. Ev. 7th ed. 206; Selw. N. P. 14, 16.

(f) 1 Stra. 480.

(g) 1 Stra. 34; 1 Ld. Raym. 316.

(h) 2 Stark. R. 351.

(i) Forrest's R. 42.

(k) 2 Stra. 937; 2 M. & S. 205; 6 Taunt. 118.

to compel the specific performance of a promise to marry, (l) and a discovery that the intended husband or wife is of bad character, is of itself a sufficient legal excuse for rescinding the engagement, though a mere suspicion of the fact is not. (m) In order to support an action for the breach of a promise of marriage, there must be evidence of an *offer* to marry on the part of the plaintiff, and of a *refusal* by the defendant, or there must be proof that the latter dispensed with any formal offer by declaring that it would be unavailing; as where the plaintiff's father went to the defendant and asked him if he meant to fulfil his engagement to his daughter, and he replied "certainly not," this will suffice, and render any other offer or request unnecessary. (n)

When there is considerable property in possession or expectancy, it is usual by *marriage settlement*, or at least by articles, to vest the property in trustees upon specified terms, usually for the benefit of the husband during their joint lives, and then for the benefit of the survivor for life, and afterwards for the benefit of children. If the feme fraudulently, after the commencement of a courtship followed by marriage, conceal her property from her husband, and have it conveyed to separate uses for her own benefit or at her disposal, the husband, even after ten years' delay, and after her death, may by bill in equity recover such property. (o) If, as usual, by the terms of the marriage settlement the wife is to be *absolutely* entitled to jointure, she does not forfeit it by adultery, (p) though she would, independently of such jointure, forfeit *dower* and all right to maintenance, (q) and by express stipulation, jointure and separate maintenance may be forfeited by any prohibited intercourse with a third person. (r) Parties, before they marry, should well consider the proper terms of settlement, to prevent subsequent

Settlements.

(l) 4 Geo. 4, c. 76, s. 27.

(m) Holt's C. N. P. 151; 4 Esp. R. 256; 1 Car. & P. 529.

(n) 2 C. & P. 634; 2 D. & R. 55. If the intended defendant wholly withhold any communication whether he will fulfil his promise, then it may be necessary for some friend of the lady to address a letter to him, fixing and notifying time and place for celebrating the marriage ceremony, and that the lady will attend accordingly at some named house in the neighbourhood of the church ready to proceed there, and which notice should be accompanied with a request, that in case such time and place will not be convenient to him, then that he will appoint and notify some other time and place, within a

named period; and in case he should still remain silent, it may be expedient to obtain a license, and that the lady attend at the first-named time, place, and house, ready to complete the ceremony, the clergyman being requested to be ready at his parsonage to attend upon notice. If the promiser should take no notice of the appointment, nor attend, then the cause of action will be complete.

(o) 1 Russ. R. 485.

(p) 3 Cox's P. Wm. 277; 2 Bar. & C. 547; 4 D. & R. 11.

(q) 1 Stra. 647; 2 Stra. 706, 875; 6 T. R. 603; 1 B. & Adolp. 227.

(r) *Lord Dormer v. Knight*, 1 Taunt. 417.

CHAP. II.
II. RELATIVE,
&c.

1. Husband and
wife.

Deeds of sepa-
ration illegal.

discussion, so injurious to family union and harmony; and though it might be difficult for the intended husband to suggest the possibility of the lady's frailty, it would be expedient for his friends or professional adviser to provide for the possibility of so disastrous an event. (s)

When once the contract of marriage has been solemnized, it is not legally competent to either party to *bind* themselves by a deed of separation; and no legal separation can take place except by act of parliament (that by sentence of divorce in the Ecclesiastical Court being only *a mensâ et thoro*), and though it has been frequently decided otherwise at law, (t) it appears now to be settled by the decision of the House of Lords that a prospective or any deed of separation (excepting so far perhaps as it may provide for children), is invalid, and may be set aside or treated as void. (u) This most important decision materially alters the supposed law relative to deeds of separation, and in other collateral respects.

A covenant not to sue for restitution of conjugal rights would

(s) Jointure or pin money should be made payable only *dum casta se gesserit*, or to that effect, or that it shall continue payable only so long as the husband shall have no just cause to sue for a divorce; or it should be provided, that if the wife do any act which would *forfeit dower*, the whole jointure, or all but a small part, sufficient merely for maintenance, should cease. Such a stipulation would remove one powerful temptation to a profligate seducer, whilst the unqualified right to pin money or large jointure is calculated to render many women too self-sufficient and independent of their moral duties towards their husbands, and the certainty to support their seducer frequently leads to the completion of ruin, which but for that temptation might be prevented by mere prudential considerations. The intended husband himself might not venture to suggest such a qualification, which might suppose his suspicion of the character of his intended, but his professional adviser might insist upon the propriety of the stipulation, and no part of the lady's family could well take umbrage, for women as well as men may be perfectly virtuous and wholly averse to vice at one period of their lives, when by circumstances they may at another become more prone to err, and may require protection even against themselves; and all marriage settlements should be so framed as to guard against future indiscretion, as well of the wife as of the husband. Adultery forfeits *all* right to maintenance and all right to dower at common law, and there is no reason or principle why jointure should not also be

forfeited; 1 B. & Adolp. 227. As, however, upon a divorce in the Lords, on account of adultery of the wife, the husband is always required to make provision for her maintenance, lest by total destitution she should be driven to continue in a course of vice, it would be expedient to provide in the settlement in any event for a small allowance for that purpose; 4 D. & R. 17.

(t) 2 Bar. & Cres. 547.

(u) *Westmeath v. Westmeath*, 1 Dow. R. New S. 519; Jacob's R. 141, S. C.; *Hendley v. Westmeath*, 6 Bar. & Cres. 200; *Durant v. Titley*, 7 Price, 577. It was held by the House of Lords, "That according to the law of this country, marriage, as far as concerns the *vinculum matrimonii*, is indissoluble, and can only be dissolved by act of parliament. The contract between husband and wife is of the most solemn and sacred nature, not merely as regards themselves, but with reference to their children; and it is by so much the more strange, that the doctrine should have prevailed, that the parties might, by agreement between themselves, destroy all the duties and obligations of that important and sacred contract, not only as respected themselves, but their offspring also." *Westmeath v. Westmeath*, 1 Dow. R. New S. 519. This decision confirmed the reasoning of the Chancellor in the Court of Chancery, in Jacob's Rep. 141, 142, 143; and overruled *Elworth v. Bird*, 2 Sim. & Stu. 372, in equity; and *Jee v. Thurlow*, 2 Bar. & Cres. 547, and other cases at law, in which actions on covenants or deeds of separate maintenance were sustained.

be equally invalid as a deed of separation. (v) Ecclesiastical Courts will not divorce on account of bad temper, harshness, or insulting language, except when accompanied with actual or threatened personal violence; on the principle that when people understand that they *must* live together, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of *remaining* husbands and wives; necessity being a powerful master in teaching the duties which it imposes. (x) And therefore the only sufficient grounds of separation are *adultery* or *intolerable cruelty*, or guilt of an *infamous* crime, (y) or *pre-existing* disabilities, which are considered as equivalent to frauds. Nor can a husband obtain a divorce on account of the adultery of his wife, if she recriminate and establish a cross charge. (z)

CHAP. II.
II. RELATIVE,
&c.

1. Husband and
wife.

As regards the protection of the person of the wife from injury by *third* persons, the same remedies and punishments are provided on *her* behalf as in the case of single individuals, excepting that in all civil proceedings her husband must be a party. But besides these, the husband has his separate rights by virtue of the marriage. He may justify the defence of his wife by force, and when the wife's life or person is in danger he may even kill the assailant, (a) and if she be injured so as to occasion his loss of her society or assistance, or expense, he may sue *per quod consortium amisit*, &c. (b). In respect of his interest in her fidelity and assistance, he may sue for criminal conversation, and if he were to detect the wrong-doer *flagrante delicto*, the instantly killing him would at most constitute manslaughter. (c) If she be taken away or harboured she may be retaken, and he may have an *habeas corpus*, unless he has been formally separated; (d) or an action, after demand and refusal, may be supported for the detention. (e) If her chastity be solicited, the offender may be prosecuted in the Ecclesiastical Court; (f) or if there were a conspiracy to effect the same object, the parties may be indicted; (g) and a suit may be instituted by her husband against her for restitution of conjugal

Protection, &c.

(v) Id. 1 Jacob's R. 187.

(x) Per Sir William Scott, in *Evans v. Evans*, 1 Haggard's R. 36; and see *Oliver v. Oliver*, Id. 364; *Kirkman v. Kirkman*, Id. 409; *Holden v. Holden*, Id. 458; *Harris v. Harris*, 2 Hagg. R. 148; *Warring v. Warring*, Id. 154, 168; 2 Phil. Ec. Cas. 152, S. C.; and per Dr. Lushington, in *Neeld v. Neeld*, 6 Dec. A.D. 1831; and see selections from those cases in 3 Bla. Com. by Chitty, 94, 95, in notes.

(y) 3 Bla. C. 94, note (15); and see

Mr. Christian's note of a decision to that effect, Feb. 1794, *ante*, 41, note (f).

(z) 1 Ought. 317; Burn's Ecc. L. Marriage, XI.; see 1 Bla. Com. by Chitty, ch. xv., and notes *per tot.*

(a) 2 Rol. Ab. 546; 3 Bla. C. 3.

(b) 3 Bla. C. 140.

(c) 1 Hale, 486; T. Raym. 212.

(d) *Rex v. Mead*, 1 Burr. 342.

(e) Willes' Rep. 578; 6 T. R. 221.

(f) 1 T. R. 6; 3 Bla. C. 645.

(g) 3 State Tr. 519.

CHAP. II.
II. RELATIVE,
&c.

1. Husband and
wife.

Rights of wife.

rights, and the sentence is in effect perpetual imprisonment until she submit. (*h*)

A *wife* also, notwithstanding her coverture, *has* in all cases some *rights*, even as *against* her husband, and the injuries to which are remediable even at law. If her husband, by ill usage or threats, place her life or person in danger, she may obtain sureties to keep the peace, either by application to a justice of the peace or at the Sessions, or to the Court of King's Bench, or to the Chancellor by articles of the peace and supplicavit; (*i*) and she may even subject her husband to the payment of an attorney's bill in enforcing such security against him, the same being considered necessary; (*k*) and his implied contract to pay is therefore so violently presumed, that no evidence to the contrary will be admissible. So, an *habeas corpus* may be obtained at her own instance, if under *improper* restraint (though not at the instance of others,) to make her will or an appointment of her property. (*l*) She may also subject him to liability for necessaries, by purchasing them on his credit, if wrongfully withheld, (*m*) though not if she voluntarily leave her husband without adequate cause, such as cruelty, (*n*) nor if she be guilty of adultery; (*o*) or she may obtain an order of maintenance from magistrates, unless guilty of adultery; (*p*) or she may compel restitution of conjugal rights, by suit in the Ecclesiastical Court, (*q*) and alimony may be obtained in that court, (*r*) and which is also allowed by the legislature in passing a divorce bill on account of the adultery of the wife, for otherwise, from want, she might be driven to continue in a course of vice. (*s*) If a wife sue her husband in the Consistory Court, and obtain a decree for alimony, and the husband then remove the cause into the Arches Court, the decree ceases to be legally binding, and a new decree for alimony must in strictness be obtained, but which will be granted by a short process without any fresh allegation of faculties, if the husband discontinue paying the alimony. (*t*) If, under such circumstances, the husband continue making payments under such inoperative original decree, he will not be liable also to be sued at law for necessaries supplied to the wife while such payments

(*h*) 3 Bla. C. 94.

(*i*) Tunnicliff's Case, 1 Jac. & Walk. 348; and *post*, ch. viii.

(*k*) 3 Campb. 326; 1 M'Clel. & Y. 269; 1 P. Wms. 482.

(*l*) 13 East, 173; 1 Chit. R. 654; 1 Jac. & W. 94.

(*m*) 2 Stra. 1214; 3 Bar. & Cres. 631.

(*n*) 2 Stra. 1214; 2 Stark. R. 87.

(*o*) 1 Bar. & Adol. 227.

(*p*) *Id.* *ibid.*; 5 Geo. 4, c. 83, s. 3.

(*q*) 3 Bla. C. 94.

(*r*) 1 Bar. & Adolp. 851; 1 Bla. C.

441; 3 Bla. C. 94.

(*s*) 4 Dowl. & R. 17.

(*t*) 1 Bar. & Adolp. 801, 802.

were going on, though, if no such original decree of alimony had been made, the payments might have been considered voluntary; and in the latter case, a Court of Law and jury might inquire and determine whether or not the payments were sufficient in proportion to the husband's means. (u)

CHAP. II.
II. RELATIVE,
&c.

1. Husband and wife.

A married woman also may acquire *beneficial* interests in property quite independently of her husband, by the intervention of trustees, either before or after marriage; and in that case, in a Court of Equity, she is considered in respect of that property as a *feme sole*, so that she may by her contract (considered as an appointment of the property) charge it; and it is settled, that if a married woman give a bond or bill for a debt of her own, or of her husband or other person, her separate property will be liable in equity to pay it; (v) though at law she can in no case be sued upon a contract entered into by her during coverture, unless her husband be *civiliter mortuus*, as where he has been transported; (w) though, if after the death of her husband, she expressly promise to pay, in consideration of forbearance of a suit against her in respect of her separate estate, she might be sued upon such promise even at law. (x)

In general, every contract made with, or security given to a married woman, vests in her husband, and he may sue alone to enforce the contract; (y) but if a note be given to a married woman as administratrix, even by her husband and others, then, after her husband's death, she may sue the latter. (z) If a gift or legacy, whether specific or otherwise, be given to a married woman "*for her own use, and at her own disposal*," without other words, this vests the beneficial interest separately in her; (a) and, in these cases, if no other trustee be appointed, a Court of Equity will treat the husband merely as a trustee, and compel him to act accordingly.

The rights between parent and child result only from *legal* marriage, though, in some cases, as in that of a marriage between persons too nearly related, the children are legitimate, unless the marriage be decreed void by the Spiritual Court during the joint lives of the parents. (b) In general, it is a settled rule, that a child born before marriage, whether in Scotland or England, does not become legitimate by subsequent

2. Parent and child.

(u) 1 Bar. & Adolp. 801, 802.
(v) 17 Ves. J. 366; 1 Bro. P. C. 16;
3 Madd. R. 387; *Bingham v. Jones*, at
Rolls, A. D. 1832; *Chitty on Bills*, 8 ed.
791; 4 Russ. R. 112.
(w) 8 T. R. 515.

(x) 5 Taunt. 362; 1 Bar. & Adolp. 811.
(y) 10 Bar. & C. 558.
(z) 2 Bar. & Adolp. 447.
(a) 1 Turner and Russel's R. 222.
(b) Cro. Jac. 186; 7 Co. 43; 1 Bla. C.
440.

CHAP. II.
II. RELATIVE,
&c.

2. Parent and
child.

Registers and
entries of mar-
riages, births,
&c.

marriage of the parents, so as to enable such child to inherit lands in *England*; (c) and the term "*child*," in a deed or will without other words, is always considered as confined to "*legitimate children*." (d) And, therefore, although an illegitimate child has been expressly named and described in a will as "Elizabeth, the *daughter* of A. B.," yet if a subsequent independent bequest of the residue to all the *children* of A. B. generally, without expressly repeating the name of such illegitimate child, she could not take any part of the residue. (e) Hence the necessity for great care in bequests to illegitimate children, very distinctly to designate the precise objects, and also to provide for the maintenance of such children until they attain full age.

For *legal* purposes, *registers* of marriages, births, christenings, and deaths, are not essential in trial; and important only to *assist in evidence* in case of future discussion, whether or not the event has taken place; and they are only receivable in evidence when made by recognized authority; and it has been held, that the entry of the birth of a dissenter's child, in a register kept for that purpose at a public library, is not evidence; and entries in the Fleet books are not received except as declarations, nor an entry in the register of an ambassador's chapel; and Lord Kenyon is said to have rejected a register of baptism in Guernsey, on the ground of the ecclesiastical jurisdiction not extending to that island. (f) Shortly after the *birth* of a child, it is expedient, though not legally necessary, to *register* in the parish books the time and place of its birth and name, and sometimes the particular additions of his parents, and to have two or more young and disinterested relations to write their names, attesting the truth of the entry; to which, for purposes of pedigree, resort may afterwards be had in evidence. But such entry in the parish books will not be in general allowed, unless a regular christening has taken place, upon which certain fees are paid, and which may be one reason why the production of the entry made by proper authority, or of a verified copy, may be received as *primâ facie* evidence of a

(c) 4 Wils. & Shaw, 289; 5 Bar. & Cres. 438. The attempt to alter this rule gave rise to the celebrated declaration of the Barons, "*Nolimus leges Angliæ mutari*."

(d) 1 Russ. & Myl. 581; *Harris v. Lloyd*, 1 Turner & R. 313, 314, where the Chancellor said, "I have not the least doubt that this testator by the words 'all and every the child and children of my son, S. H.,' meant his illegitimate children;

but I am clearly of opinion, that there is not enough upon the face of the will to authorize me to carry that intention into effect." And see 5 Vesey, 530.

(e) 1 Russ. & Mylne, 581; but see *Wilkinson v. Adams*; 1 Vesey and Beames, 469; and see *Harris v. Lloyd*, 1 Turn. & Russ. 310.

(f) *Ex parte Taylor*, 1 Jac. & W. 483, and cases there cited.

regular christening having taken place at the time therein mentioned. But it has been held, that a statement in the entry of the time of the *birth* is not of itself evidence to fix the precise time of that event, because such entry being a mere statement of a past or bygone event, affords mere hearsay proof; (*h*) and the evidence of the mother or the month nurse, or other attendant, is in general required to prove the precise time of *birth*, especially as juries are frequently much inclined not to give effect to a plea of infancy. It is advisable also, to make a correct *entry* in the family Bible of the births and other family events, and have the same simultaneously attested by two or more relations, because they are generally received as genuine evidence, when made by parents at or about the time of the birth, even when made under suspicious circumstances; and the suggested witnesses may refresh their memory, and give more certain and positive evidence as to the precise date, by referring to their own recognized entry made at the very time. (*i*)

CHAP. II.
II. RELATIVE,
&c.

2. Parent and
child.

A father has such an interest in the *person* of his child, that at any age he may justify his defence even by forcible means. (*k*) He has a right to the custody of his infant son and daughter, and may legally retake them, and may have an habeas corpus to restore such custody, (*l*) and may support trespass for taking him away, or detaining or injuring him, or debauching his female child whilst generally resident with him *per quod servitium amisit*, (*m*) but not in respect of the mere parental right; (*n*) and for merely taking away or injuring a child, no action can be supported, unless it occasion an actual loss to the parent, for in strictness no damages are recoverable in any case for an injury merely to parental feelings; (*o*) and yet it has been held to be no ground for a new trial that the judge, in an action for debauching a daughter, admitted evidence of a promise of marriage, though such proof probably increased the verdict, without evidence of any real greater damage to the parent in the character of master. (*p*) So the taking away a daughter under the age of sixteen, (*q*) or the stealing of a child under the age of ten years, (*r*) are punishable, the former as a misdemeanor, the latter as a felony.

Defence, &c.
of a child.

(*h*) 3 Stark. Rep. 63; 5 Bar. & Cres. 500; Roscoe Ev. 92, 93, 195, 196, 197.

(*i*) See a strong case, *Berkley's case*, 4 Campb. 401; Cowp. 591.

(*k*) 2 Rol. Ab. 546.

(*l*) 4 Moore, 366; 7 East, 579.

(*m*) 3 Burr. 1878; 6 Exp. R. 32.

(*n*) 4 Bar. & Cres. 660; 3 Bla. C. 140, note (28), and 143, note (30).

(*o*) *Flemington v. Smithers*, 2 Car. & P. 292; 4 B. & Cres. 660; 7 Dowl. & R. 133, S. C.

(*p*) 3 Wils. 18.

(*q*) 9 Geo. 4, c. 31, s. 20, ante, 40.

(*r*) Id. s. 21, ante, 41.

CHAP. II.
II. RELATIVE,
&c.

2. Parent and
child.

Controul over
parents.

The parent has also in general a right to direct and controul the education and care of his child, as to compel him to receive his education at a particular school or college, and to delegate that care to other proper persons, and a Court of Equity will lend its aid so as to enforce obedience; (s) and it is an established doctrine that a *parent* may justify the correction of his child either corporally or by confinement; and a *schoolmaster*, under whose care and instruction a parent has placed his child, may equally justify similar correction. (t) But the correction must be moderate, and in a proper manner. (u)

At law the judges will, upon an habeas corpus, interfere when the father has been guilty of cruelty or personal ill usage to his child, but unless there is some circumstance of that nature, the judges at law will not interfere. (x) But in Courts of Equity, especially upon a bill filed, or where a suit is pending in that court, a much more extensive jurisdiction and controul over parents exists and is exercised. Such jurisdiction has long been exercised, but was not finally established until the recent decision in the House of Lords, by which it was settled that the Chancellor may not only controul the father's power over, but even his intercourse with his children, in all cases where, in the exercise of his sound discretion, he thinks it essential for the interests of the infant that he should so interfere; as where the parent is guilty of gross immoral conduct, and inculcating bad principles into his child. (y) The King is the *parens patriæ*, and the Chancellor representing him has jurisdiction over the care of *every* infant in the kingdom, although, as it has been judicially observed, the Court of Chancery only, in fact, exercises jurisdiction over infants *having property*, because the court has not funds of which it could take upon itself the *maintenance* of all the children in the kingdom. (z) Nor is the exercise of this essential jurisdiction limited to instances in which the conduct of the parent has been cruel or immoral; it is also exercised in cases in which their general education or their pecuniary interests are concerned. (a) And such regulations may be imposed as, under each particular case, may be

(s) 1 P. Wms. 702; 2 P. Wms. 117; 4 Bro. C. C. 101, *post*.

(t) Com. Dig. Pleader, 3 M. 19; Hawk. c. 60, s. 23, and c. 62, s. 2,—ch. 29, s. 5. See valuable observations of Dr. Johnson on the right of a *schoolmaster* to correct his pupil, upon which Boswell made an able argument in the House of Lords in defence of his client, in Boswell's Life of Johnson. But a master has no right to flog a choir boy of a cathedral for

singing at private parties without his leave. MS.

(u) Id. *ibid*.

(x) See 1 Jacob's Rep. 254, note (b).

(y) *Wellesley v. Wellesley*, and *Wellesley v. Duke of Beaufort*, 1 Dow. Rep. New S. 154; 2 Bligh's Rep. New S. 124; 2 Russ. R. 1; 2 Simon's R. 35; 1 Jacob's R. 245.

(z) Per Lord Chancellor, in *Wellesley v. Duke of Beaufort*, 2 Russ. R. 21.

(a) 1 Jacob's R. 245, 254, 264, note (b).

best for the interests of the child, without unnecessarily interfering with the paternal rights of the parent. (b)

CHAP. II.
II. RELATIVE,
&c.

2. Parent and
child.

Where a father applied to the Court of Chancery, praying that his three female children, aged nineteen, fourteen, and twelve, might be delivered up to him by an aunt, who was guardian of their fortunes, under the will of their grandmother, with a discretionary trust for their maintenance, and with whom he had permitted them to reside for a long time, the court under the circumstances refused the application, although there was nothing established against the moral conduct of the father; but it appearing that his situation was such that he could not educate the children in a manner suitable to the property which they derived from the bounty of their grandmother. (c) With respect to the mode of exercising this jurisdiction, although the Chancellor may have jurisdiction upon a writ of habeas corpus, yet it is preferable to proceed by petition, or to constitute the infant a ward of court. (d)

If the father withhold *maintenance*, a magistrate may make an order of maintenance, observance of which may be enforced, or the violation punished by indictment; (e) and if a father withhold proper necessities from his infant child incapable of supporting itself, he might be indicted for his neglect at common law. (f) But the mother, whilst her husband is living, could not be indicted, because she is not legally bound to provide necessities. (g) And no action for necessities can be sustained against a parent (as it may against a husband) unless there has been a contract to pay it, (h) which, however, is usually inferred upon very slight evidence. Where proper maintenance and education are withheld by a parent from a child in the higher ranks of society, the only efficient remedy is by application to the Court of Chancery. (i)

Compelling
maintenance,
&c.

Gifts, bequests, or devises to infants by relations or friends, are too frequently made quite independently of the controul of the parents, and even without any condition, and hence the demoralization of so many young men, who at too youthful an age are induced to consider themselves independent of their parents, and so far from being influenced by their moral injunctions,

Donations to
children.

(b) 1 Jacob's R. 245, 254, 264, note (b), where see several instances of particular modifications.

(c) *Lyons v. Blenkin*, 1 Jacob's R. 245.

(d) *Id.* 254, note (b).

(e) 43 Eliz. c. 2, s. 7; *Burn's J. Poor*; 1 Russ. R. 23.

(f) *Rex v. Friend and wife*, Russ. & Ry. C. C. 20; *Rex v. Ridley*, 2 Campb.

630; *Rex v. Squire and wife*, 1 Russ. C. C. 16.

(g) *Id.* *ibid.*

(h) 4 East, 84; 5 Esp. R. 131; 1 Car. & P. 1, 5; 2 Car. & P. 82; 7 Dowl. & R. 612.

(i) *Wellesley v. Duke of Beaufort*, 2 Russ. R. 23.

CHAP. II.
II. RELATIVE,
&c.

2. Parent and
child.

scarcely treat them with ordinary respect. No such unqualified donations should be made or allowed to have effect, and the actual receipt of any benefit should be made to depend upon proper conduct towards parents and guardians, whether testamentary or appointed by the Court of Chancery, until an age when the influence of education and habit will probably have secured the continuation of good conduct.

When a parent, relation or friend, apprehends that the improvidence of his donee may dissipate any property given to him, he may by *very express terms* in his deed or bequest, so modify his donation as to prevent the benefit passing to creditors; but very great care must be observed to introduce such express terms as will legally operate to deprive the creditors of their general right to the distribution of their debtor's property.^(h) Where a bequest of the dividends of stock to a nephew was *solely for the maintenance of himself and his family*, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate or encumber them; and that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency or otherwise, should be assigned or *become payable* to any other person, or be, or become applicable to any other purpose than for the maintenance of the nephew and his family, *his interest therein should cease, and the stock be held upon trust for his children*, and afterwards the nephew took the benefit of the Lords' Act, (1 Geo. 4, c. 119,) and some years afterwards the testator died; it was held, that such insolvency, under the latter terms of the bequest, operated as a forfeiture of the life interest given to the nephew by the will.⁽ⁱ⁾ But if in a bequest to trustees, for the benefit of a son, there be *merely a prohibition* against *his* alienation, without any clause of *cesser* or *bequest* over, then if he become bankrupt his assignees will be entitled.^(k) And so if the clause of forfeiture extend only to alienations in *fact*, and do not provide against alienations by operation of *law*, then also if he become a bankrupt his assignees will become entitled.^(l) The clause may be, that in the event of any commission of bankruptcy, or any discharge under an insolvent act, or even of process issuing, the annuity shall cease; or in the same form as in

(h) See a form in 6 T. R. 644, and other cases cited 1 Russ. & Mylne's R. 568; where it was held, that in consequence of the *express* stipulation, creditors

took no interest.

(i) 1 Russ. & Mylne's R. 364.

(k) Id. 395.

(l) Id. 690.

B. Leake

clauses of re-entry in leases in case of insolvency, and as also as in the other cases above referred to.

CHAP. II:
II. RELATIVE,
&c.

2. Parent and
child.

Family arrange-
ments, when
sustained in
equity.

It may be proper here to notice some rules observed in Courts of Equity, in giving or refusing effect to what are termed "*family arrangements*," and by which, between a father and a son, or between brothers, an agreement has been made to dispose of property in a different manner to that which would otherwise take place. In these cases frequently the *mere relationship* of the parties will give effect to bargains otherwise without adequate consideration, and though it is an established principle of Courts of Equity, that in dealings between attorney and client, guardian and ward, and in the purchase of reversionary interests, the purchaser is bound to show that he has given the full consideration, (m) yet in *family arrangements* it is otherwise. The Court will not view transactions between father and son in the light of reversionary bargains, but will regard them as *family arrangements*, though with a reasonable degree of jealousy, so as to prevent the influence of a father surprising his child, when just of age, into an improvident arrangement; and they will not look into all the motives and feelings which might actuate the parties in entering into such arrangements. There may be considerations in such cases which the Court could not possibly reach. It might be conducive, for instance, to the best interests of the parties, the son as well as the father, that the father should be enabled to educate all his younger children in a liberal way, and which might justify his requiring his eldest son to give up part of his interest for that purpose, so that his brothers and sisters may be so brought up and educated, and placed in such situation as to do him credit in the world. (n) And therefore, where a father being tenant for life, with remainder over to his first and other sons successively in tail male, persuaded his eldest son, soon after he attained twenty-one, to join in a recovery, and an annuity was secured to him during his father's life, and parts of the estate were limited to the father in fee, and the residue of them were resettled, the son taking back an estate for life, with remainder to his first and other sons in tail general, remainder to his daughter in tail general; it was held, that this transaction was to be considered as a mixed case of bargain and sale, and of family arrangement, and that the eldest son having died without issue, his brother was bound by the

(m) 6 Ves. 266; 17 Ves. 20; 1 Turn. & Russ. 9.

(n) Per Lord Chancellor, 1 Turn. & Russ. 13.

CHAP. II.
II. RELATIVE,
&c.

2. Parent and
child.

arrangement, and the Court of Chancery refused to set aside the settlement as obtained by undue influence. (o) So an agreement between two brothers to divide equally whatever property they might receive from their father in his life-time, or become entitled to under his will, or by descent or otherwise from him or from a third person, is not contrary to public policy, but will be enforced in equity, though it was insisted that it was a fraud upon the intention of the father or third person, to divide that which he might intend one alone should solely enjoy, for the latter might, if he thought fit, have so qualified his donation by express restriction, and not having done so, he left his donee at liberty to do with the property as he thought fit. (p) So in equity, where an agreement has been made in consideration of natural love and affection, or from meritorious motives to save the peace and honour of a family, as with a view to conceal the illegitimacy of an eldest son born before marriage, and his brother afterwards, the execution of it will be decreed. (q)

Child's property.

With respect to *the property of his child*, a parent acquires no interest therein whilst living, and is, if of sufficient ability, bound to maintain such child, though the latter have separate property; but if the father be not of ability to maintain or educate his child on a scale according with such separate property, then, if the infant's income arise out of personal estate, and do not exceed 300*l.* per annum, or if the aggregate income of two infant children do not exceed 600*l.* per annum, the Court of Chancery will, on his or their petition for the allowance of maintenance, and without any formal *bill* being filed, and on its being established that the father is not of sufficient ability, order such proper allowance for maintenance as the Master shall approve; (r) but when the income proceeds from *real* property, maintenance has been refused upon petition without bill, unless the yearly income be under 100*l.* (s) Where a father has deserted his child, and is not of ability to maintain him, the Court of Chancery will, on petition, make an order referring it to the Master to approve a proper person to act in the nature of a guardian, and to inquire whether it will be for the benefit of the infant that a certain sum should be raised out of the property to which he is absolutely entitled under a will, and upon the Master's report that it is for his benefit, and with the consent

(o) *Tweddell v. Tweddell*, 1 Turn. & Tr. Eq. 272.
Russ. 1.

(p) *Wethered v. Wethered*, 2 Sim. 183;
and *Harwood v. Took*, Id. 192.

(q) 1 Atk. 2; 2 Vcs. 11; and 1 Fonbl.

(r) *Ex parte Larkin*, 4 Russ. 307.

(s) *In re Sir Wm. Molesworth*, 4 Russ.
R. 308.

of the executors of that will, the court will order the sum to be raised accordingly, as for the purpose of sending the child over to the East Indies, where his mother resided and was willing to maintain him; but the court would not order the reimbursement to the executors of a sum *previously* expended without the order of the court, though for necessities. (t) But where their mother, who had no fortune, had incurred debts in maintaining her children, an order was made for the payment of such debts out of their property; (u) and a prospective order was made for payment of necessities and education out of dividends, though the principal did not vest till the infants came of age. (x)

CHAP. II.
II. RELATIVE,
&c.

2. Parent and
child.

The *rights* between guardian and ward much resemble those between parent and child. A father may, by 12 Car. 2, c. 24, appoint a testamentary guardian, and it may be advisable therein to prescribe the course of education, unless the parents prefer reposing entire and unlimited confidence in the discretion of the guardian. (y) The Court of Chancery will assist a guardian in compelling his ward to obey his legal desires, and where an infant persisted in going to Oxford University instead of Cambridge, contrary to the direction of his guardian, the court sent a messenger to compel his return to Cambridge, (z) It has been considered to be an indictable offence at common law, and, independently of the above statutes, to abduct a ward from the custody of the guardian with intent to marry her, (a) and the marrying a ward subjects the husband to imprisonment in the Fleet, (b) and from which he will not be released without making a proper settlement; (c) and such release does not necessarily follow even after a proper settlement has been made, (d) nor even on the husband's attaining age. (e)

3. Guardian and
ward.

If the guardian misconduct himself, he may be removed. (f) A guardian having the delegated controul over his ward, may legally detain her clothes, if he discover that she is about to

(t) *In re England*, 1 Russ. & M. 499.

(u) *Ex parte Swift*, 1 Russ. & M. 575.

(x) *Ex parte Chambers*, 1 Russ. & M. 577.

(y) See 3 P. Wm. 51, *post*, where, from want of express direction in the will, a suit in Chancery became necessary, the father, a Presbyterian, having appointed a clergyman of the Church of England and two Presbyterians testamentary guardians to one of his children, and the former thinking it his duty to inculcate church principles, and the two latter their own, and the Chancellor decreed in favour of the latter, the other near relations of the child being Presbyterians, and the presumption being that the testator must

have intended that the child should be educated in the same.

(z) 1 Stra. 167; 3 Atk. 721.

(a) 1 East's P. C. 459.

(b) 8 Ves. 74; 3 P. Wms. 116; 5 Ves. 15; 6 Ves. 572; 16 Ves. 259.

(c) 1 Ves. J. 154. The costs of such settlement may be allowed out of the ward's property, if the husband were not guilty of any aggravated misconduct, and have no property. *Anonymous*, 4 Russ. R. 473.

(d) 8 Ves. 74.

(e) *Id.* 386.

(f) 1 Bla. C. 462, note 8; *Id.* note 11; 2 P. Wms. 561.

CHAP. II.
II. RELATIVE,
&c.

3. Guardian
and ward.

elope; (g) and, in the case of a ward in Chancery, the court retains jurisdiction after the ward comes of age as long as property remains in court; (h) and when two guardians of an infant have been appointed by the court and one dies, the guardianship does not survive, but fresh guardians must be appointed. (i)

When the personal property of infants is very small, as pensions of 15*l.* per annum each, the Court of Chancery will, upon affidavit that the children are living with their aunt, and on her petition, appoint her to be guardian, with liberty to receive the pensions, without incurring the expense of a reference to the Master. (k)

4. Master and
apprentice.

With respect to the rights and liabilities between *master and apprentice*, and their injuries and remedies, this relation should be constituted by deed, and with more care and explicit stipulation than are usually adopted, and in such deed an adult party should covenant for the good conduct of the apprentice, who, being himself usually under age, could not be sued for his misconduct. (l) Unless the relation of master and apprentice be duly constituted, there are cases in which the former cannot sue for the abduction of the latter; (m) though in general a third person cannot protect himself from liability to an action for seducing away or detaining an apprentice or servant *per quod*, &c. by setting up any formal objection to the contract of apprenticeship or hiring whilst the service under it was continuing, (n) and the apprentice himself is liable to be punished for running away, although the indenture be voidable, as he ought to have first avoided them by a reasonable notice. (o) The master has such an interest in his apprentice, that he may defend him with force, (p) and he may maintain an action for the battery, debauching, or injury of his apprentice, if any loss of service ensue; (q) so if the apprentice be harboured after request, he may retake him or support an action for the detention, (r) or he may sue the third person who covenanted for his services. (s) But a master cannot at his own instance have an *habeas corpus* for his apprentice who has been impressed, (t) for the statutes only authorize that writ at the instance of the *party imprisoned*. (u) When, however, an apprentice has been impressed, the Chief

(g) 1 Car. & P. 101.

(h) *Austen v. Halsey*, 2 Sim. & Stu. 123.

(i) *Bradshaw v. Bradshaw*, 1 Russ. R. 528.

(k) *Ex parte Jones*, 1 Russ. R. 478.; and see *ante*, 68, 69, and 4 Russ. 307, 308.

(l) Cro. Car. 179; Dougl. 518; 3 B. & Ald. 59; 6 B. & C. 686.

(m) 4 Taunt. 876.

(n) 2 Hen. Bla. 511; 7 T. R. 310;

1 Anstr. 256.

(o) 6 T. R. 652; Cald. 26; 3 M. & S. 189.

(p) 2 Rol. Ab. 546.

(q) 6 T. R. 652.

(r) *Id.*; 7 T. R. 310, 314.

(s) Dougl. 518.

(t) 6 T. R. 497; 7 T. R. 545; 5 East, 38.

(u) *Id. ibid.*; 31 Car. 2, c. 2; 56 G. 3, c. 100.

Justice has power to issue his warrant on the application of the master, especially when no access can be had to the apprentice himself. (v)

If an apprentice be disobedient, he may be moderately *corrected* by the master himself, (w) but not by any delegated party; (x) and the master is entitled to all the apprentice's earnings, however considerable, in case he should wrongfully absent himself. (y)

As one of the objects of apprenticeship is correction and amelioration of morals, as well as continued instruction, the absence or other misconduct of an apprentice is no adequate ground for the master wholly discharging him, and upon the apprentice's return the master's covenant to instruct continues in full force till the end of the term, unless specially provided otherwise; (z) and which provision should be introduced. (a) But in case of robbery by an apprentice, or any continued gross misconduct, magistrates will, on the application of the master, usually discharge him from continuing liability. (b)

On the other hand, an apprentice has rights and duties. He may defend his master with force. (c) If his master withhold maintenance a magistrate will enforce it; (d) magistrates at sessions may also enforce proper instruction; (e) and disputes between them may be settled, with the consent of the master, either by a single magistrate or at sessions; (f) and magistrates and a Court of Equity will, in some cases, enforce a return of premium or a just proportion. (g) If a master, by cruelty or starvation, cause the death or endanger the life of his appren-

(v) *Ante*, 70, note (t), and *post*.

(w) 1 Bar. & C. 469; Cro. Car. 179; 2 Show. 289; *ante*, 64, as to the correction of a child.

(x) 9 Coke, 76.

(y) 1 Taunt. 112; 3 M. & S. 1; 4 Taunt. 870; 1 Bla. C. 453.

(z) *Winston v. Lewin*, 1 Bar. & Cres. 460; 2 Dowl. & R. 465.

(a) A clause might be inserted as follows, "Provided always nevertheless, and it is hereby covenanted and agreed by and between the said parties, that in case the said apprentice shall at any time or times hereafter be wilfully guilty of disobedience or misconduct towards his said master, or any of his family or servants, and his said master shall give notice thereof in writing to the said E. F. (the person bound for the apprentice) then if the said apprentice shall, after the said E. F. shall have received such notice at least twenty-four hours, again be wilfully guilty of the like, or any other misconduct towards his said master, or any of his family or ser-

vants, then it shall be lawful for his said master immediately wholly to discharge such apprentice from his said service, and it shall or may be lawful for him, thenceforth, during the residue of the said term, wholly to refuse to maintain, instruct, or receive his said apprentice, and shall not be required to return any part of the said premium."

(b) See Burn's J. Apprentice.

(c) 2 Rol. Ab. 546.

(d) 20 Geo. 2, c. 19; 4 Geo. 4, c. 29.

(e) Burn's J. Apprentice, VI.

(f) Burn's J. Apprentice.

(g) *Id. ibid.*; Chit. Eq. Dig. 74. In a late case, *Peake v. Sheppard*, in the Mayor's Court, London, 31 May, 1831, after citing "*Bobun's Privilegia Londini*," to show that a master has a right to turn away an apprentice who has been guilty of theft, the court decided, upon a bill filed for restitution of a premium of 20*l.* to the father of the apprentice, that only 5*l.* should be returned.

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apprentice.

tice, he may be indicted; but as there is no obligation on a married woman to provide food for an apprentice, a wife, though *foro conscientiae*, perhaps, equally guilty, would not be punishable for merely withholding requisite food. (h)

5. Relation of
master and ser-
vant, clerks, &c.

The relations of *master and servant*, and *master and clerk*, materially differ from each other, and require distinct consideration. With respect to *servants*, they are of various descriptions. *First*, servants in *husbandry* and labourers: *secondly*, those in particular *trades*; and *thirdly*, *menial* servants. The two former are by particular statutes placed under certain salutary regulations, but unfortunately as yet magistrates have no controul over menial or domestic servants, (i) though a description of persons to whom some summary remedies and punishments might be well applied. There is one general law, however, applicable to *all* servants, namely, that if hired for a year, and if they have duly served during that time, they acquire a *settlement* in the parish in which the last forty days' service and sleeping took place; (k) and, therefore, in order to prevent a charge upon a parish in which a master resides, it has become a practice, legalized by decisions, (l) purposely to hire servants for less than a year; and sometimes leases expressly stipulate that tenants shall so hire, on purpose to avoid burthening the parish with fresh paupers.

1. Servants in
husbandry.

Under controul
of magistrates,
when.

Servants, *labourers*, and workmen in *husbandry*, are placed by several statutes under the controul of magistrates, who have power to regulate their hours of work and amount of wages, and of compelling the payment, and requiring the payment in money and not in goods, and prescribing punishment for misconduct of such servants. (m) The 20 Geo. 2, c. 19, has been considered to extend to every description of *labourer*, (n) yet none of the acts extend to *menial* or *domestic* servants, (o) and those affording magistrates jurisdiction to decide upon the subject of wages seem only to extend to those *labourers* with reference to whom the justices had power to *make a rate of wages*; (p) nor do they extend to any case where work is done under a contract for a certain sum, or when the hours of work are entirely in the discretion of the contracting party. (q) In

(h) *Rex v. Ridley*, 2 Campb. 650; *Rex v. Friend & wife*, Russ. & Ry. C. C. 20, and see *Rex v. Squire & wife*, 1 Russ. 16.

(i) *Rex v. Brampton*, Cald. 11; *The King v. Hullcott*, 6 T. R. 585; 8 East, 113.

(k) See Burn's J. tit. Poor, 318 to 423, 819.

(l) *Rex v. Houghton*, Foley, 137; 1 Stra. 83; Burn's J. Poor, V. ninth sub-

division.

(m) See Burn's J. tit. Servants.

(n) *Lowther v. East Radnor*, 8 East, 113.

(o) *The King v. Hullcott*, 6 T. R. 583.

(p) *Bramwell v. Pennock*, 7 Bar. & Cres. 556.

(q) *Lancaster v. Groaves*, 9 B. & C. 628; *Hurdy v. Ryle*, Id. 603.

cases of that nature magistrates cannot legally interfere, and any balance of wages must be recovered by action. Thus the acts do not extend to a person being employed by an attorney to keep possession of goods seized under a *fieri facias*, (r) nor to a person who has entered into a written contract to do certain work on a road within a certain time, for a certain sum, he not being working for wages. (s)

In cases within the act 4 Geo. 4, c. 34, a magistrate cannot both commit for punishment *and also* discharge the servant, as he is only authorized to discharge from service *in lieu* of punishment. (t) Servants in husbandry are very generally hired by the year, as from Michaelmas to Michaelmas, and this is an entire hiring for a year; (u) and, unless otherwise stipulated, no wages are payable until the end of the year. (x)

A master cannot, by way of correction, even moderately beat his *servant*, or labourer in husbandry, or otherwise, as he might his child or apprentice; and if he do, the servant may lawfully depart, or obtain his discharge, by application to a justice, (y) and support an action for the battery. There is, however, an exception as to two descriptions of servants, *viz.* sailors (z) and soldiers, (a) allowed from the necessity of larger powers to preserve discipline and prevent mutiny. If a *sailor* be guilty of disobedience or disorderly conduct, the captain of a king's ship, or master of a commercial vessel employed in commerce or trade, may lawfully correct him in a reasonable manner. It is said, though incorrectly, that his authority in this respect is analogous to that of a parent over his child, or a master over his apprentice or scholar. (b) A master, on his return to this country, may be called upon by action to answer to a mariner, who has been beaten or imprisoned by him during a voyage; and, for the justification of his conduct, he should be able to show not only that there was a sufficient cause for chastisement, but also that the chastisement itself was reasonable, for otherwise the mariner may recover damages propor-

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(r) *Bramwell v. Pennock*, 7 Bar. & C. 536.

(s) *Lancaster v. Greaves*, 9 B. & C. 628.

(t) *Lancaster v. Greaves*, Chit. Col. Stat. 874, *et supra*.

(u) 2 Stark. R. 257; F. N. B. 168.

(x) 1 Bla. Com. 425; *Rex v. Whittlebury*, 6 T. R. 467, per Lawrence, J.

(y) 1 Bla. Com. 428; F. N. B. 168; 1 Bar. & Crea. 469.

(z) Abbott on Shipping, 160.

(a) Bul. Ni. Pri. 19; 2 Car. & P. 148.

(b) Abbot on Shipping, 160, cites Ca-

saregis Disc. 136, n. 14, cited by Valin on the French Ordinance, tom. 1, 449. See also Ordinances of Phil. 2, A.D. 1563; 2 Mag. 19; Molloy, book 2, c. 3, s. 12; and the case of *Watson v. Christie*, 2 Bos. & P. 224. But there is no such analogy, the implied authority of a parent or master of an apprentice to correct is merely for the moral improvement of the child, or apprentice, that of a master of a ship is merely to secure subordination and prevent mutiny, and not with reference to any improvement of the sailor.

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servant.

2. Servants in
trades.

3. Menial or do-
mestic servants.

tionate to the injury received. (c) And if the master strike a mariner without cause, or use a deadly weapon as an instrument of correction, where moderate correction might legally have been inflicted, and death ensue, he will be guilty at least of manslaughter. (d) The same principles apply to soldiers, who, however, are generally punished under sentence of a Court-Martial.

Servants and workmen in *particular trades* are also subject to the controul of the magistrate, under several acts, some of them confined to particular trades, as the silk, cloth, woollen, linen, fustian, cotton, iron, leather, hat, lace, clock, paper, tailor, shoemaker, and other trades; (e) and disputes between master and servants in husbandry, artificers, calico printers, handicraftsmen, miners, colliers, keelmen, pitmen, and glassblowers, and *other labourers* in general, are regulated by several more general acts. (f)

The 5 Geo. 4, c. 96, relates to *arbitrations* between master and workmen, and entitles either the master or workmen to *demand* an arbitration in certain cases; and in that case appears to be compulsory, and precludes the other party from suing. (g) The same act, and the 6 Geo. 4, c. 129, prohibit and provide punishment for combination amongst masters or workmen, and against persons for compelling journeymen to leave employment, or to return work unfinished, or to prevent them from hiring themselves, or compelling them to belong to clubs, or to pay fines, or to alter the mode of carrying on business. The 9 Geo. 4, c. 31, s. 25, makes assaults, in pursuance of any conspiracy to raise wages, punishable as a misdemeanor, with imprisonment not exceeding two years, &c.; and an assault on a seaman, keelman, or caster, to prevent them from working, subjects the offender to imprisonment for three calendar months. (h)

With respect to *menial* or *domestic* servants, the terms of

(c) To an action of this sort, the master must plead specially that the plaintiff committed such a particular fault, and that he corrected him moderately for it. The plaintiff, by his replication, may either deny the cause of correction, or, admitting the cause, may insist that the correction was excessive. If the master do not plead his justification specially, he will not be entitled to give in evidence, under the general issue, for the purpose of mitigating damages, facts which if pleaded would have amounted to a justification. *Watson v. Christie*, 2 Bos. & P. 224.

(d) Captain Kidd's case, 5 State Tr. 287.

(e) Buru's J. Servants, 370 to 410.

(f) 20 Geo. 2, c. 19; 17 Geo. 2, c. 16; 31 Geo. 2, c. 11; 6 Geo. 3, c. 25; 57 Geo. 3, c. 122; 58 Geo. 3, c. 5; 4 Geo. 4, c. 34; 10 Geo. 4, c. 52.

(g) *Crisp v. Benbury*, 8 Bing. 394, appears applicable in principle.

(h) 9 Geo. 4, c. 31, s. 26. It has recently been well suggested, that it would be highly salutary to pass an act to prevent masters from paying their servants and labourers at a usual *pay-table* at a *public house*, thereby inducing the publican to give too much credit during the week, and the men to get intoxicated when paid off, instead of taking home their money for the benefit of their families.

hiring are either express or implied. It would be expedient, to prevent disputes, to reduce the terms into writing, and the agreement need not be stamped. (i) If no terms be stipulated, it is considered a hiring, with reference to the general understanding upon the subject, that is, a continuing service, until the expiration of a month's warning given by either party, (k) or, as it has been said, until the master pay a month's wages in advance; (l) and, unless so expressly stipulated, the servant has no right to take away livery or other clothes supplied by his master, although he be wrongfully turned away. (m)

A master has no right to correct a menial or domestic servant, otherwise than by words and remonstrance; and if he beat him, though moderately, by way of correction, it is good ground for the servant's departure, and he might support an action against the master. (n)

The rights of a master to *discharge* a servant in husbandry before the expiration of the time for which he was hired, and that of the master of a *domestic* servant to discharge him immediately for misconduct, appear to be governed by the same principle, and the cases may therefore be considered together. With regard to servants in husbandry, it has been considered that a master is justified in immediately dismissing him, if he disobey his orders or be guilty of other misconduct, without first going before a justice of the peace. (o) As where the master, just before the servant's usual hour of dinner, ordered him to take his horses to a small distance before he dined, and the servant refused, and afterwards did not submit, it was held that the master was justified in immediately discharging such servant, and that he could not recover any proportion of his wages. (p) So if any single female yearly servant at any time

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What miscon-
duct authorizes
a master imme-
diately to dis-
charge a do-
mestic menial
servant.

(i) See express exemption, 55 Geo. 3, c. 184, schedule Agreement.

(k) *Cutter v. Powell*, 6 T. R. 326; *Robinson v. Hendman*, 3 Esp. R. 235; 2 Selw. N. P. 1032, S. C.

(l) *Robinson v. Hendman*, 3 Esp. R. 235, and admitted by Ld. Kenyon; S. C. 2 Selw. N. P. 1032, *sed quere*, whether any such contract can be implied. If a servant conduct himself properly, he ought to have reasonable notice to quit; and a month's wages would be but an inadequate compensation for the loss of intermediate board and lodging.

(m) 3 Car. & P. 470; and see *Id.* 349.

(n) 1 Bar. & Crea. 469; F. N. B. 168; 1 Bla. C. 428.

(o) *Spain v. Arnott*, 2 Stark. R. 256; *Res v. Bampton*, Cald. 11.

(p) *Spain v. Arnott*, 2 Stark. R. 256; 5 Burn's J. 361. Assumpsit to recover wages for service from Michaelmas to July. The plaintiff was a yearly servant to the defendant, who was a farmer. The plaintiff usually breakfasted at five o'clock in the morning, and dined at two. One day the master ordered the servant to go with the horses to the marsh, which was a mile off, before dinner, dinner being then ready. The plaintiff said that he had done his due, and would not go till he had had his dinner. The defendant told him to go about his business; and the plaintiff went accordingly, without offering any submission, or to obey his master's orders.

After argument of counsel, Lord Ellenborough, C. J. said, "If the contract be for a year's service, the year must be com-

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during the year appear with child, the master may turn her away. (q) So if a servant repeatedly sleep out at night without leave. (r) And it has been decided in the House of Lords

pleted before the servant is entitled to be paid. If the plaintiff persisted in refusing to obey his master's orders, I think he was warranted in turning him away. He (the master) might have obtained relief by applying to a magistrate, but he was not bound to pursue that course; the relation between master and servant, and the laws by which that relation is regulated, existed long before the statute cited. There is no contract between the parties, except that which the law makes for them, and it may be hard upon the servant; but it would be exceedingly inconvenient if the servant were to be permitted to set himself up to controul his master in his domestic regulations, such as the time of dinner. After a refusal on the part of the servant to perform his work, the master is not bound to keep him on as a burdensome and useless servant to the end of the year. In the present instance, it might be very inconvenient for the master to change the hour of dinner: the question really comes to this, 'whether the master or the servant is to have the superior authority?' A juror was afterwards withdrawn by consent.

Being absent when wanted; sleeping from home at night without his master's leave, &c. is sufficient cause for dismissal; and the servant will only be entitled to such wages as are due at the time of his discharge; *Robinson v. Hindman*, 3 Esp. R. 235.

Where a clerk and traveller, hired by the year, assaulted his employer's maid-servant, with intent to take liberties with her against her consent, it was held to be a good cause of immediate dismissal; *Atkin v. Acton*, 4 Car. & P. 208; and it seems also from that case, that a servant dismissed for such or the like cause, is not entitled to proportionate wages, even for the time he has actually served. *Id.*

(q) *Rex v. Brampton*, Cald. 11, 14; 5 Burn's J. 361, 362, note (a). In the case of *Rex v. Brampton*, Cald. 11, the principal question was, whether a maid-servant hired for a year could be discharged by her master three weeks before the end of the year, (*she being with child*), by his own authority, without the intervention of a magistrate, so as to prevent her gaining a settlement? By Lord Mansfield, C. J. "The question is, has the master done right or wrong in discharging the servant for this cause? I think he has done no wrong. Shall the master be bound to keep her in his house? To do so would be *contra bonos mores*; and in a family, where there are young persons, both scandalous and dangerous." Willes, J. said, that

"this case differs from those of *Rex v. Richmond*, Burr. S. C. 740, and *Rex v. Islip*, 1 Stra. 423, where the cause of the discharge of the servant by the master was not reasonable. Here, if the master had daughters, it would not be fit that he should keep such a servant, though I think he could not avail himself of the authority of a magistrate, the jurisdiction of justices being confined to cases in husbandry."

Upon this case, it has been observed by Mr. Caldecott, that all that seems established by this case, is, that a master may, without the intervention of a magistrate, dismiss his servant for *moral turpitude*, even though it be not such for which the servant may be prosecuted at common law. Whether he may or may not, for any other species of misconduct or general misbehaviour, though there are authorities to show that he cannot, seems, from this case, not to be fully and absolutely settled. By the general practice throughout the kingdom, and particularly in large towns, this power, however warranted, is exercised by masters; certainly, this question has not of late years been brought before the court for argument, except in the case of *Burrow v. Sayer*, T. R. 27 G. 2. But at the sittings at Westminster, 1773, it arose before Lord Mansfield. A wet-nurse, retained for the year, was discharged by her mistress, who tendered her in proportion to the time she had served: this was refused, and the action brought for the whole year. It was proved on behalf of the defendant, that the plaintiff had been frequently *insolent* to her mistress, the defendant's wife, and was subject to violent fits of *passion*, in which she had several times frightened, and once awakened her mistress, while sleeping, before her recovery. It was also proved, that these *fits of passion* must be injurious to her milk: and it was insisted, that all these circumstances amounted to reasonable cause, and even created a necessity of discharging the plaintiff. But *per* Lord Mansfield: "No person can be judge in his own cause, and this first principle could never be meant to be overturned by any law or usage whatsoever." And though it was stated as the general usage or practice in London, Westminster, and the environs, to dismiss servants with a month's wages, it was disregarded by the court, and the servant had a verdict for the whole year; *Temple v. Prescott*." But see the cases in the prior notes, which appear to contradict the doctrines advanced by Lord Mansfield.

(r) *Robinson v. Hindman*, 3 Esp. R. 235.

(reversing the judgment of the Court of Session in Scotland) that a mistress was entitled immediately to dismiss her principal gardener, whose service was to have continued until a subsequent time, on account of his having been absent from his service for four days without leave. (s) The general rule seems to be, that a master may dismiss even a yearly servant before the expiration of the year, if guilty of moral misconduct, pecuniary or otherwise, or wilful disobedience or habitual negligence. (t) A gamekeeper or bailiff guilty of misconduct, may be discharged without previous warning, and he cannot afterwards legally retain possession of a house incident to his service. (u) Other applicable cases, in which a master might discharge a servant, will be found collected, when we presently consider the misconduct for which a *clerk* may be discharged. (x)

But the misconduct of the servant, to entitle a master immediately to discharge him, must be actual disobedience, or such improper conduct as affects the due controul over his domestic establishment, and therefore *previous* immorality, as having had an illegitimate child antecedent to the commencement of the service, would be no adequate ground of discharge, (y) though his debauching his female servant *during* the service would be otherwise. And the discharge of the servant on account of misconduct should be *immediate* or on repetition, for otherwise the master is to be considered as having waived the right to an immediate discharge, and could not by after-thought assign the antecedent imputation as an excuse for suddenly turning him away, without fresh cause. (z)

A servant marrying is no ground of discharge, and he must serve out the time; (a) nor is *sickness* an adequate reason for turning away a servant before the expiration of the time of service, or even for abatement of wages, (b) though the master is not legally bound to provide medicine or medical advice; (c) but if he interfere, a contract may be inferred, so as to subject him to liability to the medical attendant, and in that case the

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(s) *Crauford v. Reid*, 1 Shaw's Rep. 124.

(t) *Culto v. Brouncker*, 4 Car. & P. 518.

(u) Moore's Rep. 8, 9; Littleton's Rep. 139; 16 East, 33.

(z) *Post*.

(y) *Rex v. Westmeon*, Cald. 129.

(z) *Semble*, see *Winstone v. Linn*, 1 Bar. & C. 460, and 2 D. & R. 465, S. C.

(a) Com. Dig. Justice, Peace, B. b. 3; Dalt. c. 58.

(b) Dalt. c. 58; 2 H. Bla. 606; *Rex v. Winter*, Cald. 298; *Rex v. Sudbrooke*, 1 Smith's R. 59.

(c) *Wennall v. Adney*, 3 Bos. & Pul. 247; *Sellen v. Norman*, 4 C. & P. 80; *Watling v. Walters*, 1 C. & P. 132; *Newly v. Wiltshire*, 2 Esp. R. 739.

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master could not deduct the amount of his payments from the wages. (d)

Insanity of the servant would not, in strictness of law, determine the contract of hiring. (e) But it might be an adequate ground for a magistrate discharging a servant in husbandry; (f) or if the servant thereby became dangerous to go at large, proceedings might be had under the statute against lunacy, which would at least relieve the family from all present danger. (g)

In the case of a domestic servant hired in the general way, it appears to have been considered that he is entitled to his wages up to the time he actually serves, though he die or do not continue in the service the whole year, either from misconduct or otherwise, (h) but not to any wages after the time of such discharge; though in case of felony or embezzlement, or other gross misconduct by a clerk, he forfeits an arrear of unpaid salary; (i) and a master cannot, without express stipulation, deduct from the wages the value of articles broken or lost by the servant's want of care, however gross. (k) In many cases therefore it is expedient, and the practice in hiring waiters at inns and taverns is for the servant to make a deposit, or expressly to provide against such loss, for though a cross action for gross want of care would unquestionably be sustainable, (l) yet it would scarcely ever be advisable to sue a servant on such a claim.

In general, in cases of domestic servants, regular payment of the wages will be presumed, after a lapse of time subsequent to leaving his service, and without claim, it not being usual to allow such claims to go long unsatisfied, or to take receipt for the payment. (l)

A gamekeeper, guilty of disobedience, may be discharged forthwith without any previous notice, (m) and his residence in a house by permission of the lord of a manor, is lawful only whilst he is gamekeeper (n)

Giving characters.

It is not legally compulsory on a master or mistress to give a discharged servant any character, and no action is sustainable for the refusal; (o) but if a character be given, it must accord

(d) *Ante*, 77, n. (c.)

(e) *Rex v. Sutton*, 5 T. R. 659; *Rex v. Hullcott*, 6 T. R. 587.

(f) *Quere*, see *id.* *ibid.*

(g) 39 & 40 Geo. 3, c. 94, s. 3; 7 Bar. & C. 669.

(h) *Cutler v. Powell*, 6 T. R. 326; *Robinson v. Hindman*, 3 Esp. R. 325.

(i) *Post.*

(k) 4 Campb. 134.

(l) *Sellon v. Norman*, 4 C. & P. 80; and see 3 Campb. 10; 1 Stark. R. 136; where it was presumed that a servant to a milkman had every week paid over monies collected by him.

(m) *Moore*, 8.

(n) *Litt. Rep.* 139; 16 East, 33.

(o) *Carrol v. Bird*, 3 Esp. R. 201, and *Ashover v. —*, Cald. 11.

with the truth, for if a false good character be given, and the servant afterwards rob his new master, the person who gave such false character is liable to an action, and to compensate for the entire loss, (p) and he is liable to punishment in certain cases of false character, under the statute 32 Geo. 3, c. 56. (q) On the other hand, if a bad character of a servant be untruly and maliciously given, the party giving it will be liable to an action for defamation, (r) though until the untruth of a character and express malice have been proved, the communication is presumed to have been privileged, and no action is tenable. (s)

In general there is a reciprocal right in every description of master and servant to defend each other even with force. (t) If a servant be killed, though the master sustain a loss of service, the civil remedy is merged in the felony. (u) But if a person be strictly a servant, (and not a mere performer at a theatre, (x)) the employer may sue for his battery and consequent loss of service, or for a menace *per quod* the servant could not finish his work; so he may sue for abducting or harbouring his servant after request; (y) but after recovering against the servant of a penalty or damages for absenting himself, an action cannot also be sustained against a third person for harbouring him. (z) If several conspire to injure a person in his trade, by enticing away a servant or journeyman, they may be indicted or sued for the conspiracy; (a) an action on the case is also the common remedy for debauching a servant *per quod servitium amissum*, (b) or trespass lies if the seduction were accompanied with an illegal entry into the master's house. (c)

It is incumbent on every master in prudence, before he hires a servant or clerk, well to ascertain his character for care and good conduct, for a master is in general liable civilly, and sometimes criminally, for torts committed by his servant in the course of or under colour of his employ. Thus a baker is indictable for the sale of bread in which his servant had improperly mixed alum, (d) and for a nuisance committed by his servant, as by throwing dirt into the highway; (e) so the proprietor

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Defence of mas-
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master, &c.

(p) See 1 Bla. C. by Christian, 432, in notes, and Barn's J. Servant, XXXI. vol. 5. p. 433.

(q) Id. ibid.

(r) *Puttack v. Jones*, 8 Bar. & C. 578, ante, 45, 46.

(s) Id. ibid.; *Child v. Affleck*, 9 Bar. & C. 403; 4 Barr. 2425.

(t) *Tisbet v. Read*, Loft's R. 215; 2 Rol. Ab. 546, D. pl. 2; *Owton*, 151.

(u) *Styles*, 347; *sed quere* as to com-

pensation for the temporary loss of service, 1 Campb. 193.

(x) 1 Esp. R. 386.

(y) 1 Salk. 380; F. N. B. 167; 6 T. R. 221; 2 Bar. & C. 448.

(z) 3 Burr. 1345.

(a) 2 Stark. R. 489.

(b) 5 East, 45; 6 East, 391; 11 East, 23

(c) 2 T. R. 166.

(d) 3 M. & S. 11.

(e) 1 Ld. Raym. 264.

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of a newspaper is liable, criminally as well as civilly, for the publication of a libel, though he has nothing to do with the publication, and the whole is conducted by his servants. (f)

But a master is not liable for the *wilful* misfeasance of his servant, losing sight of his master's employ, as for *wilfully* driving his master's carriage against that of another, (g) though if the same act had been done negligently or merely injudiciously, the master would have been liable; (h) and where a person, only occasionally employed by the defendant as his servant, having been sent by him on his business, took the horse of another person, in whose service he also worked, and in going, rode over the plaintiff, it was left to the jury whether he acted under implied authority of the defendant, and they having found in the affirmative, the court refused to grant a new trial. (i) But where a postchaise is hired, the postmaster, and not the hirer, is in general liable for any damage. (k)

Clerks are only a superior description of *servants*, whose duties are limited to the particular trade or employment to serve in which they are hired. In hiring these, it is particularly expedient to specify the terms in an express written contract, and to add, "that in all respects not particularly specified, the clerk shall perform the like duties, and observe the same conduct as all faithful and well conducted clerks in a similar station ought to observe." It has been held that a clerk of this nature, hired generally at specified yearly wages, is to be considered as hired for an entire year, and that the service cannot be put an end to before the end of an entire year, unless upon some adequate ground of misconduct on the part of either party. (l) The doctrine of a month's wages or a month's warning does not apply to a clerk. (m) In case the service should continue beyond a year, yet the intendment would be in favour of another year's service; but it is not settled that with analogy to tenancies of real property, half a year's or three months', or any specific notice of the determination of the service at the end of a year, is necessary, (n) probably a quarter's notice would be held sufficient; and in a late case, it seems to have been considered, that

(f) *Rez v. Walter*, 3 Esp. R. 21; *Rez v. Alexander*, M. & M. C. C.

(g) *M'Mans v. Cricket*, 1 East, 106.

(h) *Croft v. Alison*, 4 B. & Ald. 590; and *Boucher v. Moidstram*, 1 Taunt. 568.

(i) *Goodmen v. Kenwell*, 1 M. & P. 241; 3 Car. & P. 167, S. C.

(k) *Smith v. Laurence*, 2 M. & R. 1; and see 5 B. & C. 547.

(l) *Beeston v. Collyer*, 4 Bing. 389; 2 Car. & P. 607, S. C.; *Huttman v. Bullnois*, 2 Car. & P. 510; *Atkin v. Acton*, cor. Lord Tenterden, at Westminster, 16th April, 1830, 4 Car. & P. 208.

(m) *Id. ibid.*

(n) 4 Bing. 409; 12 Moore, 552; 2 Car. & P. 607.

if a clerk be engaged at a salary of 100*l.* a year, and having received his wages up to a certain time, and served some time longer, and then leave the service before the year expires, without due cause, and without any notice, he was not entitled to recover any wages up to the time of his quitting, and, at all events, was liable to a cross action for leaving the service without notice; (o) and on the other hand, if a clerk or person be expressly hired for a year or time certain, and be improperly dismissed before the end of the term, he may, on showing his readiness to complete the service, recover wages for the full time of his hiring, sometimes on general pleadings, and always under special pleadings properly adapted to the case, and showing the contract and the improper discharge. (p)

CHAP. II.
II. RELATIVE,
&c.

5. Master and
clerk.

There is always an implied duty on the part of a steward, clerk, or other person employed to receive and pay money for a principal, to keep and to render just and explicit accounts, and produce vouchers; and though after a dispute has arisen between a person and his steward, a gross sum has been, upon the interference of a clergyman, paid to the latter in lieu of all claims, without vouchers being rendered, the principal has a right to, and may compel the steward to render his accounts and produce vouchers. (q)

With respect to the right of a master *suddenly to discharge* his clerk, the cases in which the dismissal of a domestic servant may be justified, will in general apply; (r) where a clerk and traveller hired by the year assaulted his maid-servant with intent to take liberties with her against her consent, it was held an adequate ground for his immediate dismissal; (s) and it should seem also from the same case, that a servant dismissed for such or the like cause is not entitled to proportionable wages even for the time he had actually served. (t) So where in an action by a shopman for four quarters' wages, it was proved that the defendant was a silversmith, and that the plaintiff had stolen silver spoons, and embezzled some money when received in the trade, Lord Tenterden ruled, that a servant thus habitually embezzling his master's property, the amount was imma-

Discharge of
clerks.

(o) *Huttman v. Bullnois*, 2 Car. & P. 330; and Id. 65, 74, 259; 2 East's R. 145. 510.

(p) *Gendall v. Pontingin*, 4 Campb. 375; 1 Stark. R. 198, S. C.; *Archard v.*

Homer, 3 Car. & P. 349; and see the Pleadings, and 2 Chit. Pl. 5 ed. 324 to

(q) *Jenkins v. Gould*, 3 Russ. R. 385; and post.

(r) *Ante*, 75.

(s) *Atkin v. Acton*, 4 Car. & P. 208.

(t) Id. *ibid.*

CHAP. II.
II. RELATIVE,
&c.

5. Master and
clerk.

Offences of
clerks.

Liability of a
surety for a
clerk.

terial, and though the arrear of wages might exceed the value, he could not recover any part. (u)

A clerk or servant in *trade* may legally, pending his service, solicit business from his master's customers for himself when his service shall be at an end, and he has set up on his own account; (x) and, therefore, if any loss is to be apprehended from such an attempt, it should be specially prohibited, and limited to a certain distance from the place of employment, so as not to constitute too general a restraint of trade. (y)

There are special provisions against *larceny* and *embezzlement* by clerks and servants, and which constitute felonies; (z) the provisions against embezzlement only apply to a clerk or servant, who by virtue of his *ordinary employment* receives any chattel, money, or valuable security for, or in the name of, or on the account of his master; the enactments therefore do not extend to a person who is only employed on a particular occasion; (a) and it is expressly provided that the enactments shall not prejudice any civil remedy at law or in equity; (b) consequently, the remedy by action against the clerk or against a surety on any bond taken for his faithful accounting still continues.

If a bond or covenant be taken from a *surety* for the faithful conduct of a clerk, it should be so framed as to continue to operate, notwithstanding any change in the firm or partners by death or other event, for otherwise it would cease to operate on the retiring or addition of a partner. (c) But it would be otherwise if properly framed, so as to continue to operate after a change of persons. (d) And on the behalf of the surety it should be expressly provided, that he shall be at liberty to withdraw his guarantee, upon giving a certain reasonable *notice*, for otherwise he might continue liable, notwithstanding notice of his desire to determine his liability, and notwithstanding the creditor took a new security, and the original hiring was only as long as the employer and the clerk should think fit. (e) It would be prudent also to stipulate that the obligee or master

(u) *Brown v. Croft*, 3d March, 1828, cor. Lord Tenterden; Gurney for plaintiff; Scarlet for defendant, MS.

(x) *Nichol v. Martyn*, 2 Esp. R. 752.

(y) *Young v. Timmins*, 1 Crompt. & Jer. 331.

(z) 7 & 8 Geo. 4, c. 29, s. 46 to 48.

(a) *Rex v. Prince*, Mood. & M. 21; 2 Car. & P. 517.

(b) 7 & 8 Geo. 4, c. 29, s. 52.

(c) *Weston v. Barton*, 4 Taunt. 673; 8 Moore, 588; *Pemberton v. Oakes*, 4 Russ. 154, 167.

(d) *Id. ibid.*; *Metcalf v. Bruin*, 12 East, 400.

(e) *Calvert v. Gordon*, 3 Man. & Ry. 124; 7 Bar. & Cres. 809, S. C.; 2 Simons' Rep. 253, S. C.; and the same doctrine was entertained in equity, *sed quere*.

shall, at stated periods, ascertain and communicate to the surety the state of the clerk's account, for otherwise it will happen that the master confiding in the surety will let the clerk proceed in his irregularities to a ruinous extent, and then sue the surety for the whole defalcation; (f) and unless it be expressly so stipulated, delay in examining the clerk's accounts, or any conduct short of stipulated indulgence, will not release a surety from liability, even in equity. (g) There are other precautions to be taken by all sureties, which extend also to the case of a surety for a clerk, (h) and will be noticed in the next chapter.

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II. RELATIVE,
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5. Master and
clerk.

(f) *Trent N. Company v. Harley*, 10 East, 34; *Orme v. Young*, Holt's C. N. P. 84.

(g) *Id. ibid.*; 5 Bar. & Ald. 187.
(h) *Post*, c. iii.

CHAP. III.
I. RIGHTS TO
PERSONALTY.

CHAPTER III.

RIGHTS TO PERSONALTY, INJURIES, AND REMEDIES IN GENERAL.

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Division of the
subject.

WE will consider Personal Property, *first*, with respect to the *Right* therein; and *secondly* and *thirdly*, the *Injuries, Offences, Remedies*, and Punishments.

I. THE RIGHTS
TO
PERSONALTY.

RIGHTS to Personalty are to be considered, *first*, with respect to the *nature of the thing*; *secondly*, the *extent of interest* therein; *thirdly*, the time of actual enjoyment; *fourthly*, the *number of the owners*; *fifthly*, the several *modes* by which a *right* to tangible personal property may be *acquired*; and *sixthly*, *contracts*, or how a right to choses in action may be acquired.

*First. The nature
of Personalty,
and several
kinds.*

Personalty is principally distinguished from Realty by its actual or supposed *mobility*, and the want of that *durability* which accompanies *all real* property and *all permanent* rights issuing out of it, and which are therefore considered to be and are in their nature as permanent as the land itself. (a) It is principally on account of the absence of those properties of real property that the owner of personalty is *not* entitled to many privileges, such as voting at elections for members of parliament, (except in right of certain leaseholds,) nor is he qualified for certain stations in life; and personal property is distinguished from realty by its liability to seizure and absolute sale of the entire interest to satisfy the debt of the

Incidents dis-
tinguishing per-
sonalty from
realty.

(a) *Leases for years* and tenancies at will or at sufferance have not such durability, and are therefore *personalty*. That

leases, though for a term perpetually renewable, are not an interest in *real estate*, see *Waldron v. Howell*, 3 Russ. R. 376.

owner, when only a part of the annual value of real property can be taken; and in respect of its being absolutely forfeited upon attainder of felony; when real property is only forfeited during life; and by the circumstance of its not in general being rateable to the relief of the poor; (b) and by the modes of acquiring and transferring it without deed, which is essential even at common law to the transfer of any permanent or freehold interest in real estate, or any easement relating thereto; (c) and by its passing, upon the death of the owner, to his executor or administrator for, the benefit of creditors or legatees, or the next of kin, and not to the heir. There are, however, cases in which some kinds of personal property in some respects resemble realty, and partake of its incidents, and *vice versâ*. Thus an *heir-loom* and *title deeds* relating to an estate in the hands of the owner for the time being, are in some respects in the nature of personalty, and regarded as moveables, and recoverable in an action of detinue; but they descend to the heir with the real estate; whilst a lease for years of land, although for a 1000 years, yet, as creating only a temporary interest in the realty, and being liable to forfeiture and sale under an execution and other contingencies, is mere personal assets in the hands of an executor, on account of its want of that durability in point of time which is supposed to exist in the case of a freehold interest, though merely for the life of another. (d) These and other peculiarities are essential to be kept in view, and will be more fully noticed as we proceed.

Personal things are principally of two descriptions: *first*, such as are tangible, and actually separated from real property, or readily so, and therefore in legal consideration supposed to be *moveables*, and are or may be in the actual visible possession of the owner; or *secondly*, such things as are considered *choses in action*, where the owner has not the actual occupation or possession of the thing, whether money or other specific chattel, but *must* resort to *an action* to enforce actual possession.

Another important rule generally prevails, particularly in the construction of *criminal statutes*, namely, that when a ship or other article is named, it imports a thing perfect and complete, (e) unless, as sometimes is the case, the statute expressly declare that the provision shall extend to an unfinished article, as in

(b) Burn's J., Poor, 63 to 68.

(c) 5 B. & Crcs. 221.

(d) 3 Russ. R. 376, ante, 84, n. (a).

(e) In larceny of a bill of exchange, it must have been a valid instrument, or it will not answer the description, *Rex v. Pooley*,

2 Leach, 887; *Rex v. Yates*, Ry. & Mood. 170; 2 Stark. R. 67. If only the half of a bank note be stolen, it should be described accordingly, *Rex v. Mead*, 4 Car. & P. 535.

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whose hive they had proceeded. And it may be taken as a general rule, with respect to such description of personal property, that a civil action might be supported for *taking* the same out of, or injuring the same *whilst in* the actual possession of the qualified owner. But with regard to *wild animals or fish* when alive in a state of nature, or at large either on land or in water, and not recently escaped from the *usual place of confinement*, there is not at common law any such property as would enable any supposed owner to *indict* a party for *larceny* in taking the same; and an indictment for stealing a pheasant value 40s. of the goods and chattels of R. S. was held insufficient, for in cases of larceny of animals *feræ naturæ*, the indictment must show that they were either dead, tamed, or confined, for otherwise it will be presumed they were alive and in their original wild state of nature, and that it is not sufficient to add, of the goods and chattels of such a one, (x) though an action of trespass might be supported for taking game when dead, or when upon the land or out of the actual possession of a particular person, when he is considered the *qualified* owner; and modern acts expressly provide pecuniary penalties for taking game or fish under such circumstances. (y) *Trespass* in general lies for taking any animal or bird whatever out of the *actual possession* of a person who has secured the same; but no action lies for enticing from the premises of the owner and afterwards killing or injuring a *cat*, which is not considered of any value in law, or any *naturally wild* animal. And no *indictment* lies for stealing a *dog, cat, bear, fox, monkey, or ferret*, although taken out of the possession of the owner; (z) though whilst in actual possession, even a ferret and other animals, however inferior, would pass as part of the personal estate to the executors. (a)

As this absence of *criminal punishment* in many cases of animals (the possession of which, for purposes of sport or pleasure, become in a degree valuable to mankind,) was found to encou-

(x) *Rex v. Rough*, 2 East's P. C. 607.

(y) 7 & 8 Geo. 4, c. 29, and 1 & 2 W. 4, c. 32.

(z) 2 East's P. C. 614; *Rex v. Searing*, Russ. & Ry. C. C. 350; Burn's J. Larceny. Indictment for stealing "five live tame ferrets, confined in a certain hutch," of the price of 15s. the property of *Daniel Flower*. The jury found the prisoner guilty, but on the authority of 2 East's P. C. 614, where it is said that *ferrets*, amongst other things, are considered of so base a nature, that no larceny can be committed of them, the learned judge respited the judgment until the opinion of the judges could be

taken thereon. In E. T. 1818, the judges met and considered the case: they were of opinion that ferrets, though tame and saleable, could not be the subject of larceny, and that judgment ought to be arrested.

A summary jurisdiction is now given to justices of the peace by 7 & 8 G. 4, c. 29, sect. 31. And *tamed* or *confined ferrets* would also pass to an executor as part of the personal estate of the owner. Toller, Executors, 2 ed. 148.

(a) Toller, Executors, 2 ed. 148; Off. Exc. 58; 3 Bac. Ab. 57; 2 Bla. Com. 393.

rage small injuries in the nature of larceny, it has been recently provided, that to steal any *dog*, or *any beast or bird ordinarily kept in a state of confinement*, and not constituting the offence of larceny at common law, may be punished by *summary proceeding* before a magistrate with a conviction in 20*l.* penalty, and the punishment is to be increased on repetition of such an offence. (b) And the killing or taking away *pigeons* or *house-doves* when at large and under circumstances not amounting to a felonious taking at common law, subjects the offender to the penalty of two pounds; (c) and the taking *fish* is by the same act especially prohibited under certain penalties. (d) The taking *deer*, (e) and *hares* and *conies* in warrens or places used for breeding or keeping the same, (f) also is prohibited and punishable under the same act. With respect to *game* in general, full provisions are enacted by a still more recent act. (g)

Decoys (being a preserve for wild fowl) are merely protected at common law; and if they, by long permission of, or without interruption from the owners of adjacent property, become established, such owners may so far become restrained in the free enjoyment of their own adjacent land, that they could not legally, at least after twenty years' quiescent enjoyment, fire off a gun so near the same as to frighten away the fowl, and would be liable to an action for so doing; (h) but the recent acts against larceny and malicious injuries, and for the protection of game, do not contain any enactments for the protection of decoys or wild fowl, though there are enactments relating to *snipes* and the *eggs* of wild fowl. The law recognizes no property whatever in *rooks*, and therefore no action lies for maliciously firing off guns so near to a *rookery* as to frighten the birds and deter them from breeding in the plaintiff's trees. (i)

2. With respect to *inanimate* tangible property, either actually moveable or capable of being removed or separated without great injury to the realty, they are generally known by the appropriate technical terms "*goods and chattels*," and which include for some purposes, money, valuable securities, and other mere personal effects. (k) But there are other expres-

2. Inanimate moveable personal property; and what are "goods and chattels."

(b) 7 & 8 Geo. 4, c. 29, s. 31.

(c) *Id.* s. 33.

(d) *Id.* s. 34, 35.

(e) *Id.* s. 26, &c.; 9 Geo. 4, c. 69; 5 Car. & P. 135. *Deer*, in a private inclosure, may be distrained, 3 Thomas's Co. Lit. 261, note (11); Co. Lit. 47, a., note (11); Hargreave's 3 Bla. Com. 8;

and Willes's Rep.

(f) 7 & 8 Geo. 4, c. 29, s. 30; and see the Game Act, 1 & 2 W. 4, c. 32.

(g) 1 & 2 W. 4, c. 32.

(h) 11 East, 574; 2 Bar. & C. 934.

(i) 2 Bar. & C. 934; 4 Dowl. & R. 518.

(k) 2 Bla. C. 384, 387; 7 Taunt. 188; 4 Moore, 73; 4 B. & Ald. 206, *post*.

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sions which have from time to time been used, especially in wills and in acts of parliament, which have received particular construction. The term "*goods and chattels*" include not only personal property in possession, but also choses in action; presently enumerated. (l) The term "*chattel*" is more comprehensive than that of "*goods*," and will include all animate as well as inanimate property, and will also include a *chattel real*, as a lease for years of house or land, which, though issuing out of land, is not, as we have seen, considered to be real property, and does not descend to the heir, but passes like other personality to the executor of the owner, (m) and as personality, not *real* property, under the insolvent acts. (n) So *trees* sold or reserved upon a sale, (o) and *emblems*, (p) pass under the term "*chattel*." The term "*goods*" will not, in a deed or contract, in general, include "*fixtures*," but the word "*effects*" would embrace them, (q) and even invalid Exchequer bills are *effects* within the meaning of 15 Geo. 2, c. 13; (r) and the words "*effects both real and personal*," in a will, would even pass freehold estates, and all chattels whether real or personal. (s) The term "*property*" has received various constructions; it has been held, that a bequest of "*all the testator's property*" in a particular house, will not pass a bill of exchange, mortgage bond and banker's receipt, though cash and bank notes would have passed, they being *quasi* cash, because bills and bonds are considered as mere evidence of title to things then out of the house, and not actual things or property in it; (t) nor can a bank note or bill of exchange, or deed, or security, or other chose in action, be taken in execution or as a distress for rent, though in general all visible goods and chattels may be taken. (u) However, bills of exchange are "*goods and chattels*" within the Bankrupt Act, so that the fraudulent delivery of them in preference to a particular creditor has been holden to constitute an act of bankruptcy. (x)

With respect to the meaning and effect of the words "*goods and chattels*" and other expressions in a will, it has been held, that the word "*goods*," and equally the word "*chattels*," used simply and without qualification, will pass the *whole* personal estate, including even stock in the funds; but whether stock will or will not pass under the word "*monies*," or under the

(l) 12 Coke, 1; 1 Atk. 182.

(m) Co. Lit. 118.

(n) 3 Russ. R. 376. Leaseholds, however, as relating to land, will be considered in the next chapter.

(o) Toller, Ex. 2d ed. 194, 195; Hob. 173; 11 Coke, 50; Com. Dig. Biens. H.; 2 Saund. Index. Trees.

(p) Com. Dig. Biens, A. 2. post 90, 2.

(q) 7 Taunt. 188; 4 J. B. Moore, 73; 4 B. & Ald. 206.

(r) 1 New Rep. 1.

(s) 3 Bro. P. C. 388.

(t) 1 Sch. & Lef. 318; 11 Ves. 662.

(u) Hardw. 53, and 9 East, 48.

(x) Cumming v. Baily, 6 Bing. 371.

word "*goods*," or under the word "*chattels*," depends upon the whole context of the will, and it was held, that a bequest of "all monies, goods, *chattels*, clothing, &c. the testator's property, which may remain after paying my funeral charges and debts," will pass the testator's interest in stock and money, (y) but a bequest of "all the rest of my *money*," without other words, will not pass *stock*. (z)

Ships and *Vessels*, in respect of their great importance in commerce, have been distinguished by particular enactments, and in many respects, and principally by the *Register Acts*, relating to their construction, and the *evidence* of their ownership, and the modes of transfer. (a) The Bankrupt Act also expressly exempts ships, the mortgage or transfer of which has been duly registered, from passing under the general law to the assignees of a bankrupt, in respect of his being in possession as reputed owner, (b) and even a new rudder and cordage bought specifically for such a ship, though not actually attached to it at the time of the act of bankruptcy of such mortgagor, will stand on the same footing as the ship, and will pass to the mortgagee as parts thereof; (b) and a contract relating to the sale of a ship need not be stamped. (c) A ship usually is described by name, together with all her tackle, apparel, rigging, sails, yards, and furniture thereto belonging, of the value of so much, and which description is usual and proper in trover. (d) There are several particular provisions against criminal injuries to ships, which will hereafter be noticed. (e)

3. Various growing *vegetables*, termed in law *emblems*, and properly speaking the profits of *sown* land, but extended in law not only to growing crops of corn, but to roots planted, and other annual *artificial* profit, are deemed *personal property*, and pass as such to the executor or administrator of the occupier, whether he were the owner in fee, or for life, or for years, if he die before he has actually cut, reaped or gathered the same; and this, although these being affixed to the soil for some purposes, might be considered, whilst growing, as part of the realty. All vegetable productions are so classed when they

3. Growing plants vegetables, crops and emblems.

(y) *Kendall v. Kendall*, 4 Russ. R. 360. The cases in equity which break in upon the extensive application of the words "goods and chattels," proceeded upon the particular language of the wills upon which they arose, *Id.* 370; 3 Swinb. 930.

(z) *Gooden v. Dotterell*, at Rolls' Court, 14 Dec. 1832; see *post*, 96, 97, title *Stock*.

(a) 6 Geo. 4, c. 109, 110; 7 Geo. 4, c. 48; see *Chit. Col. St. Ships*.

(b) 6 Geo. 4, c. 16, s. 72; and see 5 B. & Ald. 918.

(c) 6 Geo. 4, c. 41; 1 Dans. & Lloyd, 35; 2 Man. & R. 121.

(d) *Morg. Prec. Trover for a Ship*.

(e) 7 & 8 Geo. 4, c. 30, s. 9; and see 4 C. & P. 559, 569, *post*.

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are raised annually by labour and manure, which are considerations of a personal nature. They include *corn* growing and the year's produce of growing *crops*, though from old roots, *(f)* and of saffron, hemp, flax, and as it seems, clover, saintfoin, and every other yearly production, in which art and industry have combined with nature. *(g)* But *natural* meadow grass, though previously manured, and bush harrowed, and shut up for a crop of hay, does not go to the executor, if his testator die before severance; *(h)* nor fruit growing on trees; *(i)* though on the above principle growing melons, cucumbers, artichokes, parsnips, carrots, turnips, and the like, belong to the executor, in respect to the labour and trouble in cultivating and rearing those annual productions. *(k)* Manure in a heap, before it is spread on the land, is also a personal chattel. *(l)* If a tenant for life or *pur auter vie* die, his executor is entitled to emblements, *(m)* and the advantages of emblements are extended to parochial clergy by the statute 28 Hen. 8. c. 11; *(n)* but a parson who resigns his living, or forfeits by his own act, *(o)* is not entitled to emblements, although his lessee is. *(p)* By *devise* the devisee may, without express words, be entitled to the growing crops. *(q)* But a *legatee* of the goods, *stock*, and moveables on a farm, is entitled to growing corn in preference both to the devisee of the *land* and the *executor*. *(r)* So a tenant at will or sufferance, the duration of whose tenancy is uncertain, is, if the lessor suddenly determine the tenancy, entitled to emblements, *(s)* and at common law, *fructus industriales*, as growing corn and other annual produce, which would go to his executor upon death, may be taken in execution, *(t)* but the appraisement and sale thereof are regulated by statute, *(u)* and by statute growing crops may be taken as a distress, and sold when ripe. *(v)* But a crop of *natural* grass, growing at the time of the death of a tenant for life, does not belong to his executor, but goes to the remainderman. *(x)*

(f) Co. Lit. 55 b, note (1); Cro. Car. 515.

(g) Com. Dig. Biens, G. 1; Co. Lit. 55 b; 2 Freem. 210; 2 Bla. C. 122, 123; Toller, 2d ed. 149, 194.

(h) Swinb. 934; Toller's Ex. 194, 2d ed. 192; 6 East, 604; 8 East, 339; 9 B. & C. 577.

(i) Toller's Ex. 2d ed. 192, 193.

(k) Rol. Ab. 728; 4 Burn's Ecc. L. 254.

(l) 11 Vin. Ab. 175; Sty. 66.

(m) Toller, 2d ed. 203.

(n) 1 Rol. Ab. 655; 2 Bla. C. 123; Toller, 2d ed. 207.

(o) 7 Bing. 154.

(p) 2 B. & Ald. 470.

(q) 6 East, 604; 8 East, 339; 2 Bla. C. 122, note 4, 403, 404; Toller, 2d ed. 202, 203.

(r) Id. *ibid.*; Winch, 51, and other cases; Toller, 2d ed. 203.

(s) 10 Bar. & C. 740.

(t) Tidd, 9th ed. 1001; Gilb. Ex. 19; 1 Salk. 368; 1 Y. & J. 398; 3 Atk. 13; 3 Bar. & C. 368; M'Clel. 207.

(u) 56 Geo. 3, c. 50.

(v) 11 Geo. 2, c. 19.

(x) 9 Bar. & C. 577.

At one time it was held that a crop of growing turnips, growing potatoes, or corn, partook so much of the real property where they were growing and continuing to improve, that a sale of them was in effect a sale of an interest in or concerning land, and that unless the contract of sale were in writing, and signed by the vendor, it was therefore void under the statute against frauds, 29 Car. 2, c. 3, s. 4. (y) Afterwards a distinction was taken as to the degree of maturity, and the time of the year when the sale took place; and if a crop of potatoes were sold in November, when they had done growing, the land was considered and termed merely a warehouse, and the sale in effect only of personalty; (z) but, finally, another and more sensible principle was established, and which still prevails, that when the growing crop is of such a nature as that it would constitute *emblems* going to an executor in case of death, the same, in *whatever* state of maturity it might be, is to be considered as *goods*, and not an interest in land, (a) though it might be otherwise in the case of a sale of a growing crop of *natural* grass. (b) A sale of growing *underwood*, to be cut by the purchaser, has been considered a sale of an interest in land, (c) though after the wood or trees have been cut it would be otherwise. (d) And now a sale of such underwood or of growing trees would be considered as merely a sale of goods. (e) It has been observed, that the apparent desire of the courts rather to *escape* from the rule in *Crosby v. Wadsworth*, respecting the sale of a growing crop of meadow-grass, without overruling that case, renders it difficult to apply the law to individual cases. (f)

Growing *plants, vegetables, herbs, and fruits*, are treated like emblems, and are enumerated and protected as if personal property by particular enactments against *criminal* injuries, whether in the nature of larcenies or malicious injuries. (g) Thus the stealing any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, is punishable summarily before a justice by imprisonment and hard labour, for not exceeding six calendar months, or the payment of the value of the article stolen, and a penalty not exceeding 20*l.*; and a subsequent offence is felony; (h) but a young fruit tree is not a plant or

(y) *Crosby v. Wadsworth*, 6 East, 602; *Emmerson v. Ellis*, 2 Taunt. 138; 2 M. & S. 205.

(z) 2 M. & S. 205; 11 East, 362; 5 B. & C. 829; 3 B. & C. 357.

(a) 9 Bar. & Cres. 577; and see 10 Bar. & Cres. 446; Gow, R. 109.

(b) 6 East, 602; but see 1 Ld. Raym. 182; Sugden's V. & P. 76.

(c) 1 Younge & J. 396; but see 1 Ld. Raym. 182; Sugd. V. & P. 75, 76.

(d) 4 Moore, 547; 6 Moore, 114; 3 Bing. 3.

(e) 9 B. & Cres. 561.

(f) Sugd. V. & P. 8th ed. 77, 78.

(g) 7 & 8 Geo. 4, c. 29, 30.

(h) Id. c. 29, s. 42.

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vegetable production within the meaning of this act; (i) and the stealing any cultivated root or plant used for food or medicine, or distilling, or dying, or any manufacture, not being in a garden, orchard, or nursery ground, is a minor offence, punishable summarily, with not exceeding one calendar month's imprisonment, or the value, and 20s. (j) *Malicious injuries* to the like and other properties are punishable even in an higher degree; (k) and though a tree be not *totally* destroyed, yet if it be cut or broken, and *materially* damaged, the case is within the act. (l)

4. Fixtures, &c.

4. *Fixtures*, if annexed to the freehold for the purposes of *agriculture*, or otherwise than for trade, or where there is a covenant to leave all improvements, belong to the landlord. (m) But when put up for the purposes of *trade*, or when what are usually termed *tenant's fixtures*, such as grates, stoves, &c. they are in general removeable by the tenant; (n) and even trees in a garden, when used for the purposes of *trade*, as in nursery grounds, are removeable by the tenant; (o) but then he must remove them during his tenancy, or they become the property of the landlord; (p) or, at least, a tenant strictly at will must remove within a reasonable time; (q) and if a tenant have covenanted to leave all *improvements*, he cannot then legally remove any fixtures that would rank under such general terms; (r) and in case of the sale of a freehold estate, if the vendor do not remove fixtures before he executes the conveyance, they pass to the purchaser. (s) When removeable by the tenant, the fixtures put up may be taken and sold under an execution against him. (t) But fixtures put up by a freeholder could not be so taken. (u)

Fixtures and growing trees, part of the freehold, and when annexed thereto, cannot by common law or statute be taken as a distress for rent, nor if they be wrongfully so taken will replevin be the proper remedy, as that is sustainable only for taking goods and chattels. (x) So trespass for severing and

(i) *Rex v. Hodges*, 1 Mood. & M. 341. 258; 2 East, 88; 8 Bing. 186.
 (j) 7 & 8 Geo. 4, c. 29, 43. (q) 10 B. & Cres. 720.
 (k) 7 & 8 Geo. 4, c. 30, s. 18; felony as to hop binds, and felony in other cases, Id. s. 19 to 29; 2 B. & Cres. 608. (r) 9 Bing. 24; 3 Simons, 450; 1 Taunt. 19; 2 B. & Cres. 608.
 (l) *Taylor's case*, R. & R. 373. (s) 2 Bar. & Cres. 76.
 (m) 3 East, 38; 4 Moore, 281, 440; 2 B. & Ald. 165; 2 B. & Cres. 608; 9 Bing. 24; Amos on Fixtures; 2 Stark. R. 403; 3 Thomas's Co. Lit. 233, 234, note (3). (t) 1 Salk. 368; 3 Atk. 13; M'Clel. 217; 3 B. & C. 368; Tidd, 9 ed. 1001.
 (n) Id. *ibid*. (u) 5 B. & Ald. 625; Tidd, 9 ed. 1002.
 (o) *Panton v. Roberts*, 2 East, 88. (x) *Fixtures*, 4 T. R. 384; 2 Saund. 84; *Machinery fixed*, M'Clel. 217, 218; *Trees*, 3 Moore, 96; 13 Price, 459; 2 Id. 491.
 (p) 1 B. & Adolp. 394; 1 Hen. Bla.

taking away fixtures is the proper remedy, and not trover. In trespass for taking goods, chattels, and *effects*, the plaintiff might recover the value of severed fixtures, but not so for taking goods and chattels only; (y) and unsevered fixtures are not recoverable in trover; (z) and an assumpsit for goods, wares, and merchandize sold, without adding *effects*, the price or value of *fixtures* could not be recovered. (a) These instances show the necessity for keeping in view the distinction between removeable and actually fixed property, although the latter might be readily removed.

It was always a larceny and felony at common law, if the owner, or a stranger, or the thief, sever the fixtures and chattels from the freehold, and the thief *afterwards*, at a subsequent distant time, come and steal them, but not if he severed them and immediately afterwards carried the same away; (b) but such severances and taking at the same time, or attempting to sever from any building, or wherever fixed on any land, are now provided for by 7 & 8 Geo. 4, c. 29, s. 37 to 45; and it should seem that the stealing of brass fixed to any house, church, or other building or land, (c) or even to tombstones in a church-yard, is a felony under that act. (d)

5. There are some description of personal property tangible and moveable of a *mixed* character, or, as Blackstone describes, of a mongrel amphibious nature, such as an *heir-loom*, or *tombstones*, *monuments*, &c. (e) in a church, or the coat of armour of an ancestor there hung up with the pennons and other ensigns of honour suited to the degree, and which Courts of Equity so far regard, that besides an action of detinue or trover, a bill may be sustained for the specific delivery thereof, (f) and they descend to the heir. (g) The title deeds to an estate are of this nature, and follow the legal interest, and belong to the legal owner for the time being; and yet, as being moveable, may be the subject-matter of personal actions, as trover or detinue. (h)

5. Property partaking as well of realty as of personality.

Shares in *canals*, *bridges*, &c., though interests issuing in a degree out of real property, are usually to be considered as personality, and consequently they give no right to vote for a member of parliament, though under a particular statute it was held that

Canal shares, &c.

(y) 4 B. & Ald. 206.
(z) 2 Bar. & Cres. 76.
(a) 2 Marsh. R. 495; 4 J. B. Moore, 73; 4 B. & Ald. 206.
(b) 1 Hale, 510; 3 Inst. 109.
(c) 1 East's P.C. 592; R. & R. C. C. 69.
(d) 4 Car. & P. 377.

(e) As to monuments, *ants*, Burial, ch. ii. p. 50; and Jacob's R. 180.
(f) Chit. Eq. Dig. Chattels personal; and Id. tit. Estate, 1X.
(g) 2 Bla. C. 428, 429.
(h) 3 Bar. & Adol. 174; 4 Bing. 106; 2 Bla. C. 428.

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6. Stock and
property in
funds. (k)

a widow was entitled to dower in respect of such an interest, which in that act was declared freehold.(i)

6. With regard to an interest in *the funds* or *stock*, it is a peculiar description of *personal* property, expressly declared to be such, and not to descend to an heir. (l) It is a property founded on numerous statutes, and sometimes, as in the case of the five *per cent.* bank annuities, is merely a right (though saleable) to receive *interest* in the name of dividends, in consideration of the delivery of a sum of money for the purchase of such interest. (m) It is therefore not subject to a poor rate. (n) It is a mere chose in action. (o) It is devisable, and although a statute has required two witnesses to attest the will, they are not deemed essential in equity. (p) But no interest vests in the legatee of stock before the executor has assented. (q) It cannot be taken in execution, nor can the dividends payable to the owner be sequestrated, (r) though the entire interest is liable to distribution under the statutes against bankrupts (s) and insolvent debtors. (t) Transfers of stock are expressly exempted from the stamp duty; (u) and the better opinion seems to be, that an agreement for the sale of *stock* is not within the statute against frauds, which requires agreements for the sale of "*goods, wares, and merchandize*" to be in writing, though that point seems to be still open to discussion. (v) There is a material difference between a bequest of stock and a devise of land; if a person devise his land to another, and afterwards convey it away and purchase it again, or if he materially change the nature of his estate, the devise is revoked, and the devisee takes nothing; but in case of the bequest of *stock*, if after making his will, the owner sell it out, and afterwards buy it in again, this is no ademption or revocation, for if the selling of the stock was evidence of his having *altered* his intention, his buying it in again is considered evidence equally strong that he means the legatee should have it, and a will of personalty is ambula-

(i) *Hollis v. Goldfinch*, 1 B. & C. 205; *King v. Thomas*, 9 B. & C. 114; but see 2 Ves. J. 651; 4 Ves. J. 542; 1 Geo. 4, c. 24; 34 Geo. 3, c. 90; 45 Geo. 3, c. 70; Rogers on Election, 27; see further, *post*, ch. iv.

(k) See in general Comyns on Contracts, 84 to 86; 3 Chit. Crim. L. 284; Harrison's Index, tit. Stock; and Chit. Eq. Digest, tit. Stock.

(l) 1 Geo. 1, st. 2, c. 19, s. 9; 1 Russell's R. 583.

(m) See in general *Clarks v. Powell*, M. T. 1832, K. B. Newman, attorney for plaintiff; Bailey, attorney for defendant.

(n) 6 East, 182; 1 Nol. P. L. 160,

216; Burn's J. tit. Poor, 67, 68.

(o) *P— v. Capper*, 5 Price's R. 217.

(p) 1 Russell's R. 589; see statutes, 33 Geo. 3, c. 28, s. 14; 35 Geo. 3, c. 14, s. 16; 7 Ves. J. 452; 2 Bla. C. 502, note (18).

(q) 1 Russ. R. 596.

(r) *M'Carthy v. Gould*, 1 Ball & B. 387.

(s) 6 Geo. 4, c. 16, s. 63.

(t) 7 Geo. 4, c. 57.

(u) 55 Geo. 3, c. 184, schedule, tit. Conveyance.

(v) Comyn's R. 354; 2 P. Wms. 307; 6 T. R. 67; 3 Chit. Commercial L. 284.

tory until the instant of death. (x) A bequest of all monies, goods, *chattels*, clothing, &c. will pass the testator's interest in stock, (y) but a bequest of "all the rest of my *money*" will not pass stock. (z)

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With respect to *deeds and other writings* they, as far as respects the money or contract secured by them, are considered to be *choses in action*, for some purposes, so that at common law no indictment could be sustained for taking or damaging them; but which offence, as well as the forging of them, are now made punishable. The recent statute 7 & 8 Geo. 4, c. 29, s. 5, (a) enacts, that if any person shall *steal* certain enumerated *securities*, such as a tally, order, or other security, entitling or evidencing the title of any person or body corporate, to any share or interest in any public stock or fund, whether of this kingdom or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings' bank; or shall steal any *debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money, or for payment of money*, whether of this kingdom, or of any foreign state; or shall steal any warrant or order for the delivery or transfer of any *goods or valuable thing*, he shall be guilty of felony, of the same nature, and in the same degree, as if he had stolen any *chattel* of the like value, and that each of the said documents shall, throughout that act, be deemed for every purpose to be included under and denoted by the words "*valuable security*." Those words, therefore, introduce a new and comprehensive term, as far as regards *such documents* in *criminal* proceedings. But in order to bring either of the enumerated securities within the protection of the larceny act, it must, at the time of the offence, have been an available security; and, therefore, if a bill or note be not properly stamped, or if it be payable upon a contingency, the stealing it

Securities for
money, &c.

(x) *Partridge v. Partridge*, Cas. T. Talb. 226; 1 Russ. & M. 629; Toller, 2 ed. 333; and see 1 Russ. & M. 221, &c.

(y) *Kendall v. Kendall*, 4 Russ. R. 360.

(z) 1 Turn. & R. 260, 272; *Gosden v. Datterell*, in Roll's Court, 14th Dec. 1832. In this case the testator, after giving a pecuniary legacy of 100*l.*, bequeathed to his brother "all the rest of his *money*," and then disposed specifically of certain personal chattels. It appeared there was a considerable sum of stock, which, as well as some articles of household furniture not specifically bequeathed, the testator had not noticed in his will; and the question was, whether the gift of "all the rest of

his money," after the pecuniary legacy, would pass this sum of stock. At the hearing, his Honour had stated that the inclination of his opinion was unfavourable to that construction; and on looking into the authorities his impressions had been confirmed. The term "*money*" could not pass stock without context, and there was no context in this instance to explain that by that term the testator meant the stock to pass. Whatever, therefore, might be conjectured on the subject of intention, the court was not at liberty to depart from its settled principles which applied to cases of this nature.

(a) See Ry. & Mood. C. C. 155.

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will not be punishable under this act, (b) though it would be otherwise as respects forgery. (c)

At common law also actions may be supported for injuring or taking away either of those documents, when of any value, precisely the same as if they were any other personal chattel; (d) and when they relate to real estate, the ownership of the latter generally draws to it the property in the deeds; (e) and a person may even be held to bail and arrested in an action of trover or detinue, for a deed sworn to be of a named value, by leave of a judge. (f) So that although these documents are mere *evidence* of a right to receive money or property, and are not the thing itself, and are therefore considered to be choses in action, yet for many purposes they are considered to be of equal value, and, as in the instance of bank notes, are transferred from one to another precisely as money.

2. Personal
rights in possession,
but not
tangible, as copyrights,
&c.

2. There are also a description of personal property which, though in possession as respects the *right*, and consequently not strictly *choses in action*, yet differ from *mere goods*, because they are not tangible or visible, though the thing produced from the right may be perfectly so. Such as *copyrights* and *patent rights*, either in books, music, (g) busts and sculptures, (h) engravings and prints, (i) and patterns for prints for linens, cottons and calicoes, (k) and patents in general. (l) These are protected and regulated by various acts and decisions. (m) In these instances the subject-matter of the right is not the book, the bust, &c. produced, but the *exclusive privilege* of continually, for a certain term, printing or making and vending the article; such right or privilege is obviously not tangible; it is, therefore, a chattel unlike tangible, moveable property; it could not be seized or sold under an execution against the goods of the proprietor, could not be attached, nor be the subject of a *donatio mortis causa*, and, independently of any statute regulation, could not in any case pass by delivery, for it exists only in legal contemplation. The transfer of a copyright in a book or song must, by express enactment, be in writing, and attested by two witnesses, so as to pass the interest, and enable the assignee to maintain an action for pirating

(b) *Rex v. Yates*, Car. Cri. L. 273; R. & M. C. C. 170. S. C; Chit. on Bills, 8 ed. 766, 767.

(c) Chitty on Bills, 8 ed. 742. See present act against Forgery, stat. 11 G. 4, c. 66, id. 735 to 741.

(d) 4 T. R. 229.

(e) Id. ibid. 3 B. & Adolph. 170.

(f) 9 East, 325; 1 Taunt. 203; 8 Price, 507; Tidd, 9th ed. 172.

(g) 8 Anne, c. 19; 54 Geo. 3, c. 156.

(h) 54 Geo. 3, c. 56.

(i) 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57.

(k) 27 Geo. 3, c. 38; 34 Geo. 3, c. 23.

(l) 21 Jac. 1, c. 3.

(m) See the above acts and decisions collected. Chit. Col. Stat. tit. Copyrights, and fully, *post*, *Injunctions*.

it; (n) though, perhaps, an admission of an assignment by a wrong-doer might suffice. (o) In all other respects the interest in the privilege resembles other personal property, and would pass under the Bankrupt Act and Insolvent Act to the assignee and to the executor or administrator, in case of death, under a bequest of goods and chattels.

3. The *next principal description* of personal property are *choses in action*, that is, rights to receive or recover a debt, or money, or damages, for breach of contract, or *for a tort* CONNECTED *with* contract, but which cannot be enforced without *action*, and, therefore, termed *choses*, or *things in action*. (p) Here we must distinguish between the deed, or bill of exchange, or other *security* for a debt, or document affording *evidence and security* of a right, and the thing ultimately to be recovered, though in general both are denominated choses in action. The *deed*, or *writing*, whether on parchment or paper, is itself, for some purposes, a chose in *possession*; and we have seen that the delivery of bills of exchange, by way of fraudulent preference, has been holden to be a delivery of goods and chattels within the Bankrupt Act. (q) But the *money* and *damages*, thereby secured, are strictly choses in action until actually reduced into possession.

3. Choses in action.

The *principal distinctions* between personal tangible property in possession, and choses in action, are several. *First*, the former, whether money or goods, may be taken in execution and sold for the debt of the owner, whilst he either has or is entitled to *immediate* possession; (r) whereas no *chose in action*, or mere security for a debt or performance of a contract, can be so taken or legally seized or transferred, not even a bank note, (s) and *a fortiori*, not a bill of exchange, promissory note or check on a banker, or a deed, or any writing, although the money thereby secured might be immediately received. (t) Nor can a debt or claim upon a third person for damages, though intrinsically as valuable as any goods in possession, be

Distinctions between things in possession and choses in action.

(n) 3 Maule & S. 7; 2 B. & Cres. 866; 2 Stark. R. 382.

(o) 4 Campb. 9; 1 Jac. & W. 481. To pass the *contingent* benefit of survivorship, see *post*, 107, n. (y)

(p) See in general 2 Bla. Com. 396, 397; Com. Dig., Biens; Harrison's Dig. tit. Chose in action; Chit. Eq. Dig. Chose in action. Mr. Justice Blackstone states, that all property in action depends entirely upon *contracts*, express or implied. But it is apprehended that such explanation of the term *chose in action* is too li-

mitted; they certainly include rights to recover *damages* for a *tort*, though a contract is the most usual *instance*.

(q) *Per* Tindal, C. J., 6 Bing. 371; *ante*, 90.

(r) Goods and cattle in all cases, and money when in a bag, Dougl. 231; but see 4 East, 510; 9 East, 48; 7 Moore, 127; 3 Bro. & Bing. 294, S. C.; Tidd. 9th ed. 1003.

(s) Rep. T. Hardw. 53; 9 East, 48.

(t) R. T. Hardw. 53.

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taken adversely in execution at the suit of a subject. So an interest in the stocks or funds cannot be seized or sold under a writ of *fiery facias*, or other process, at the suit of a *single* creditor, (u) though in case of *general* insolvency and bankruptcy or discharge under the Insolvent Act it is otherwise. (v.) Secondly, the *transfer* of a chose in action differs in form and effect from that of a personal thing in possession, for though in general the beneficial interest in a chose in action may be transferred by parol and without writing, yet (with the exception of bills of exchange and notes, and a few other particular documents,) the *legal* interest does not pass so as to enable the assignee of the interest to enforce payment or sue in his own name; and he must, in general, proceed in the name of the original proprietor. In order also to *perfect* the transfer, even of the beneficial interest, it is essential that the assignee or purchaser should give notice of the transfer to the debtor, or other contracting party, for otherwise, in case of the bankruptcy of the transferer, the benefit of the intended transfer will be lost, (w) but which notice is wholly unnecessary when the possession of tangible property itself is immediately delivered to the purchaser. A *third* distinction has prevailed between tangible things in possession, and at least some choses in action, namely, that the former always might pass as donations *mortis causa*, (i. e. delivery by way of gift without consideration, in immediate expectation of, and shortly afterwards followed by death. (x) So also some descriptions of choses in action, as bonds and bank notes, were always held to pass by such a delivery; (y) but until recently it was considered that bills of exchange, promissory notes, checks, and other documents, could not so pass; (z) and though it has been recently established in the House of Lords, that the latter securities also may so pass by such gift; (a) yet where there is no written security, it would be otherwise; and a free gift must be most distinctly established to have been made without fraud on the part of the donee. (b)

And here it may be expedient to advert to the construction of the terms of a will or deed, as applicable to *personal* property. Upon a devise in this country, merely of a "farm,"

(u) *Ante*, 96; 1 Ball & B. 387.

(v) *Ante*, 96.

(w) 2 Simons, 257, 570; 3 Russ. R. 12, 13.

(x) See in general Chit. Eq. Dig. *Donatio Mortis Causa*, 323, and *post*, 105.

(y) *Id.* *ibid.*

(z) *Id.* *ibid.* Chit. on Bills, 7 & 8 ed.

page 1 & 2 in notes.

(a) *Duffield v. Hicks*, 1 Bligh's R. New S. 497; 1 Dow. New S. 1; *Ranken v. Weguelin*, at Rolls, 14 June, 1832; Chit. on Bills, 8th ed. 791; and see *Semins v. Cox*, 3 Law J. 44.

(b) *Semins v. Cox*, 3 Law J. 44, and Chit. on Bills, 8th ed. 791.

the *farming utensils* would not pass, (b) though we have seen that a bequest of goods, "stock and moveable," would pass to the legatee "*growing crops*." (c) In Jamaica, negro slaves were considered part of the real estate (though assets for the payment of debts) and they, therefore, passed under a devise of rents, issues and profits of the estate, to the devisee. (d) When in a bequest of personalty there is a doubt in the meaning of technical terms, as in the will of a statuary, they may be explained by extrinsic evidence and examination of artists well informed in the manufacture. (e)

In most descriptions of personal things, the owner may have either the *absolute* and entire interest, or only a *qualified* or temporary interest; as a bailee of various descriptions, or for a special purpose; and, as regards the *time* of enjoyment, his right may be to the *immediate* possession, or only to the possession at a future time. It was formerly held otherwise, but upon the whole, by a series of decisions, it is now settled, that every species of property, whether personalty or realty, is, in substance, equally capable of being settled in the way even of *entail*; and, though the modes of so settling the same vary according to the nature of the subject, yet they tend to the same point, and the duration of the entail is circumscribed *almost* as nearly within the same limits as the difference of property will allow. (g) It is perfectly settled, that whether there be a bequest for life of the thing itself, or of its use only, a limitation over upon the death of the legatee will be supported, and that chattels may be limited in strict settlement by testament, or otherwise, so as to answer all the purposes of an entail, though considerable care and skill are necessary in using proper terms for the purpose. (h) The remedies and punishments frequently depend on the precise nature of these interests, and each of which will be explained in the progress of these pages. It may suffice here to allude to one familiar instance; if the owner of a personal chattel has divested himself of the *right* to immediate possession, as by letting furniture for a term of years, he cannot support an action of trespass or trover for an injury committed to the same during that time, those actions being proper only when the owner has possession in fact, or, at least, the right to immediate possession; but he

Secondly. The extent of interest, and, Thirdly, time of enjoyment of personal property. (f)

(b) *Stuart v. Butts*, 11 Ves. 657.

(c) *Ante*, 92.

(d) 3 Simons, 398.

(e) *Id.* 24.

(f) See division of subject, *ante*, 84.

(g) As to the entails of terms for years of personal chattels, see 8 Co. 94; 10 Co.

46, b.; Sir W. Jones, 15; 1 P. Wms. 1; Fearn, 2nd ed. 122 to the end; see valuable notes on 1 Thomas Co. Lit. 516, n. 7; 2 *Id.* 578, note A; 3 *Id.* 296, note D.

(h) *Id.* *ibid.* See 2 Roper on Legacies, 393; and note (13) in 2 Bla. Com. by Chitty, 398.

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Fourthly, The number of Owners in the same personal thing.

must proceed by action on the *case* for the injury, when it affects his reversionary interest, as by an absolute sale and permanent injury. (i)

Things personal may also belong not only in severalty to one person alone, but in *joint tenancy* and in *common*, as well as real estates; but they cannot be vested in coparcenary amongst females, because they do not *descend* from ancestor to heir like realty, but in the absence of a will vest in the administrator for the use of creditors; and as to any surplus, equally amongst the next of kin. When strictly in *joint tenancy*, then the *jus accrescendi* applies, and the survivor will be entitled, at least at law, to the whole interest. But in cases of *tenancies in common* and *ordinary partnership* in trade, upon the death of a part owner, his share of the stock and debts belong *beneficially* to his executor or administrator, in respect of the maxim, *inter mercatores jus accrescendi locum non habet*; (j) but the *legal* right of action for any past injury, or to recover any debt due to the two or to the partnership, is vested in the survivor; and at law, in the case of a joint debt, the executor of the deceased partner cannot be sued, though in equity he might be (unless he were a mere surety); and hence it may frequently be important for creditors and others to obtain from several partners a security which in its terms is *several* as well as joint, and upon which the executor of the deceased may be separately sued. (k)

Fifthly, The modes by which a right to personal property, whether in possession or in action, may be acquired.

Fifthly, The *Modes* of *acquiring* and *losing* a title to personal things are usually enumerated to be, 1st. Occupancy or mere possession; 2ndly, Prerogative; 3rdly, Forfeiture; 4thly, Custom; 5thly, Succession; 6thly, Marriage; 7thly, Judgment; 8thly, Gift; 9thly, Grant (more properly *assignments*); 10thly, Contract; 11thly, Bankruptcy; 12thly, Insolvency; 13thly, Administration; 14thly, Testament. (l) We will notice each, but only particularly consider those which most frequently are the subjects of litigation.

Title by occupancy or possession.

First. *Occupancy or mere possession.* Under this head may

(i) 4 T. R. 489; 7 T. R. 9; 15 East, 607; and other cases 1 Chit. Pl. 194, 195.

(j) Co. Lit. 3, 282, 182; 1 Meriv. R. 564. But the *good-will* of a partnership trade survives, unless expressly provided otherwise, 5 Ves. J. 539; 15 Ves. J. 218; 1 Jac. & W. 267. If two persons take a farm, though the *stock* will be divisible (2 Bla. C. 299), the *lease* will survive, unless they lay out money jointly in improving its value; and then such employment

of their joint money is considered in the way of trade, so that it alters the estate in the lease at law, and makes it equitable and divisible, 1 Ves. J. 435.

(k) 1 East, 497; 2 Salk. 44; Vin. Ab. Partner, D.; 3 Russ. R. 424.

(l) See 2 Bla. C. 400 to 520, and Chitty's notes as to the modern cases. The 12th head of insolvency is introduced as founded on the General Insolvent Act, 7 Geo. 4, c. 57.

be properly classed those things that become the property of the first *taker* or first *inventor*; the former are lost goods of an unknown owner found. (m) Animals *feræ naturæ*, fish taken from the sea, property wrongfully intermixed with that of the owner, copyrights and other inventions and patents. So, things taken by *capture* from an *alien* enemy, and even emblements are also, though improperly, classed under this head. Questions respecting hostile capture, when supposed to have been illegal, cannot be directly discussed in any court in this kingdom, excepting the Prize Court of the Court of Admiralty, and then not as part of the general jurisdiction of that court, but under a particular commission from the king, (n) though the Court of Chancery still has jurisdiction against a party in whose favour the Prize Court has decided in cases of fraud or trust. (o)

Secondly. Under title by *Prerogative* are classed Taxes and Customs, belonging to the king by virtue of his prerogative. Game also has been classed under this head, though the correctness of that arrangement is questionable; and now by the recent act game is properly made an incident to the land upon which it may happen to be. (p)

Thirdly. Title by *Forfeiture*, as goods forfeited for crimes. (q) Personal property, though not belonging to a felon at the time of his conviction, upon which he was sentenced to transportation, but accruing to him afterwards, but before the term of his transportation has expired, is forfeited to the crown. (r)

Fourthly. Under title by *Custom* are classed (although improperly) heriots, mortuaries, and heir-looms, charters, title deeds, and court rolls, though the latter seem more properly to be incidents to a *real* estate, and pass as belonging to the same by descent or purchase. And even rights to *pews* have been singularly classed under this head, though they certainly seem more in the nature of real property, and pass as such, and will be therefore considered in the next chapter.

Fifthly. Title by *Succession* imports goods and property which pass to the succeeding members of a *corporation* by as it were a political descent.

Sixthly. Under title by *Marriage* are included as well the rights to personal property of a wife, which vests in or may be

(m) See the cases under the law of larceny, 3 Burn's J. Larceny, I. (6) 577, 578.

(n) *Ante*, 2, note (b), *Caur v. Eden*, Doug. 573; *Elphinstone v. Bedreechand*, Knapp's R. 316 to 361; *Hill v. Reardon*, 2 Sim. & Stu. 431; *Advocate G. Bombay v. Amerchand*, Knapp's R. 329.

(o) *Hill v. Reardon*, 2 Russ. R. 608, qualifying, 2 Sim. & Stu. 431.

(p) 1 & 2 W. 4, c. 32.

(q) See in general 1 Chitty's Crim. L. 732 to 738.

(r) 1 Russ. & M. 752, and cases there cited; 2 Bar. & Ald. 258.

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acquired by a *husband* in right of his wife, but also *her* rights, especially when he survives, to her *paraphernalia* and *choses in action*, which the husband did not reduce into possession or recover during the coverture. An assignment by husband and wife of her *reversionary* interest in a personal chattel, though for adequate consideration, will not affect her interest if she survive. (s)

By Judgment.

Seventhly. Title by *Judgment* includes the exclusive right which an *informor* acquires by his first action for a *penalty* given by a popular or penal statute, before the commencement of which action it is not vested in any one in particular, and which right is afterwards perfected by his obtaining judgment therein; (t) and to this are to be added all judgments for a sum certain, or for damages or costs, which a person may obtain in his favour, and which was before contingent or uncertain, but was perfected and rendered a right of a higher nature by the judgment. In order however to give a judgment creditor a perfect right, it must be docketed, so that persons searching in the proper office may always discover its existence; and judgments not docketed have no preference to other debts against heirs, executors, or administrators; (u) and a judgment in the Mayor's Court upon a foreign attachment will not constitute the party a judgment creditor, so as to entitle him to a preference in the administration of assets. (x)

By Gift and
Donatio mortis
causa.

Eighthly. Title by *Gift* includes all *gratuitous* transfers of personal property, and which may be and usually are by parol; (y) but in that case must be perfected by delivery, if the chattel be present and capable of immediate delivery; for otherwise, for want of such delivery, the gift is void, unless made by deed. (z) Though perhaps if a person be at a distant place, as at York, and there give his horse, then in London, to another, the latter might have trespass without other possession. (a)

Gifts in expectation of death (*donatio mortis causa*) may be here referred to, (b) though they are usually noticed under the head of Title by Testament, and are in some respects in the nature of a legacy. To perfect such a gift *actual delivery* must be made by the party in his last sickness to the donee, or some third person (c)

(s) *Purdew v. Jackson*, 1 Russ. R. 1 to 72, where see the rights of a feme covert in her personalty fully discussed.

(t) 4 Burr. R. 2021, 2490; 1 Marsh. 180.

(u) *Landon v. Ferguson*, 3 Russ. R. 349; when otherwise in equity, Tidd, 9 ed. 938 to 941; Sugd. V. & P. 8 ed. 685.

(x) 1 Sim. R. 484.

(y) 3 Maul & S. 7.

(z) 2 Bar. & Ald. 551.

(a) Clayton, 135; F. N. B. 140; Perkins, 39; 1 Rol. Rep. 61; Vin. Ab. Gift.

(b) *Ante*, 100, Chit. Eq. Dig. *Donatio mortis causa*, and Toller's Ex. 2 ed. 232 to 234.

(c) *Drury v. Smith*, 1 P. W. 404.

for his use; and the donee, or third person, must retain the possession up to the instant of death, and the donor must part with all dominion over it. (*d*) If the thing itself be not capable of delivery, as stock in the funds, then the receipt, warrants, &c. must be delivered. (*e*) And where A. on his death-bed desired B. to call at a certain place and fetch away a watch, adding, that he would then make her a present of it, but no possession was resumed by A. and no delivery made to B.; it was doubted if this could be good as a *donatio mortis causa*. (*f*) Such a gift is in the nature of a legacy, though it need not be proved with the will. (*g*) If the donor recover or survive the immediate danger, the property impliedly reverts to him, because the cause for making the gift has ceased; (*h*) and it has even been questioned whether the donation is not avoided or revoked by a subsequent codicil; (*i*) and because such a gift is in nature of a legacy, it may be, and very frequently is, made to or in favour of a wife, though in general she is incapable of acquiring any property from her husband in his lifetime, because it would instantly revert to him; (*k*) and if a chose in action, as a bond or mortgage security, be so delivered to her or any other person, the executor or administrator or heir of the deceased, in whom the legal right may become vested, is bound to sue for the recovery of the money as trustee for the donee. (*l*) It has been long established that a bond or bank note may be delivered as such a donation; but until recently it was supposed that bills of exchange, promissory notes, and checks on bankers, could not be so delivered; (*m*) but it has been recently decided in the House of Lords that they may be so effectually given. (*n*) And it should seem that ordinary debts, for which no written security has been given, might be so transferred by deed or writing. (*o*) But this mode of disposing of property must be clearly proved, to prevent fraud. (*p*) In Scotland there is an

(*d*) *Burn v. Markham*, 2 Marsh. 532; 7 Taunt. 224, S. C.; Holt, C. N. P. 352; *Hawkins v. Blewitt*, 2 Esp. R. 663.

(*e*) *Ward v. Turner*, 2 Vesey, 431.

(*f*) *Spatley v. Wilson*, Holt, C. N. P. 10.

(*g*) *Miller v. Miller*, 3 P. W. 357, 8; see 36 Geo. 3, c. 52, s. 7, expressly subjecting it to legacy duty.

(*h*) *Per Cowper, Ld. Chan. Hedges v. Hedges*, Prec. Chan. 269; Gilb. Eq. R. 12; 2 Vern. 615; *Drury v. Smith*, 2 P. W. 404.

(*i*) 4 Russ. R. 25.

(*k*) *Miller v. Miller*, 3 P. W. 357, 8.

(*l*) *Duffield v. Hicks*, 1 Dow. R., N. S.

1, and 1 Bligh's R., N. S. 497, in House of Lords; *Gardner v. Parker*, 3 Mad. R. 84.

(*m*) See cases collected, Chitt. Eq. Dig. tit. *Donatio Mortis Causa*, and Chitt. on Bills, 7 ed., and id. 8 ed. 2, 3.

(*n*) *Supra*, note (*l*); and see *Rankin v. Weguelin*, 14 June, 1832, Chit. on Bills, 8 ed. 791.

(*o*) *Tate v. Hilbert*, 2 Ves. J. 120; Toller, Ex. 2 ed. 233; and *Duffield v. Hicks*, 1 Dow. R., N. S. 1; 1 Bligh's N. S. 497.

(*p*) *Waller v. Hodge*, 2 Swanst. R. 92; *Jones v. Selby*, Prec. Ch. 300; and *Simere v. Cox*, 3 Law J. 44.

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By grant, or
assignment, and
bill of sale.

express law regarding death-bed gifts, and in general denying effect to the same. Such a donation in England was subjected to the legacy duty by the express terms of 36 Geo. 3, c. 52, s. 7.

Ninthly, is enumerated title by *Grant* as distinguished from *gift*, though that term is now usually confined to a transfer of some easement relating to *land*, as a grant of a right of way or a right of common; and the term *assignment* or *bill of sale*, is usually adopted when speaking of a transfer of *personalty*. It is always supposed to be founded on some *adequate consideration*. A grant, or more properly an *assignment*, when confined to personalty, and not a chattel real, may be by parol. (q) And an assignment of a chose in action need not be by deed, (r) and an equitable assignment of a debt may be by simple writing, or by word as well as by deed. (s) In order to constitute even an equitable assignment, there must be an *engagement* to pay out of the particular fund, or appropriate words *transferring* it, inserted in the letter or other instrument, for otherwise, though the intention might readily be supposed, even a Court of Equity cannot supply the omission. (t) A lien upon personal property may be effectually created by parol, and by a mere deposit of the same, or the security relating to a chose in action, though it is essential to perfect the transfer of the latter, at least as against creditors, by giving immediate notice to the parties to the chose in action or contract. (u) But when a transfer is to be made of personal property of considerable value, as a security for or in satisfaction of a *bond fide* debt, it is safer and more usual to make it in writing reciting the consideration, and enumerating every particular article in a schedule, after having the same duly valued by disinterested and competent persons. A *bill of sale* or assignment does not, at least as against creditors, pass any *after-acquired* personal property, (v) though it may pass any subsequently purchased property intended to be annexed to or go with the principal, as a new rudder or boat of a ship; (x) and where there has been material reparation, or even subsequent changes and substitutions of new articles for old, the former may pass. It requires express words to pass a *contingent* interest in personal property, and where a person entitled to such an interest assigned "all her

(q) 3 M. & S. 7. An assignment of a lease must be in writing, 29 Car. 2, c. 3, s. 4.

(r) *Howell v. M'Ivers*, 4 T. R. 690.

(s) *Heath v. Hull*, 4 Taunt. 326.

(t) *Watson v. Duke of Wellington*, 1

Russ. & Myl. 602, 603, very illustrative of this position.

(u) 2 Simons, 257, 570; 3 Russ. R. 12, 13.

(v) 5 Taunt. 212.

(x) 5 B. & Ald. 918.

furniture, plate, &c. and all other the estate and effects of or to which she was then possessed or *entitled*, to trustees upon trust for creditors," it was held, that such assignment did not pass her then contingent interest in a testator's residuary estate, (y) and it should seem, that an assignment merely of a copyright, without other express words, would not pass the *contingent* interest of an author, upon his surviving twenty-eight years from the time of the first publication of his work. (z) And though in case of personalty an assignment may in general be by parol, it is otherwise as respects a lease or other interest in land, the statute against frauds requiring an instrument in writing, and signed; (a) and the transfer of a copyright should regularly be in writing and attested by two witnesses, though sometimes such a regular assignment will be presumed. (b)

In order to perfect the grant, bill of sale or assignment, the assignee should immediately take possession of the goods, and not suffer any continued, even partial or concurrent, possession by the assignor or his family, or the transfer would be void against creditors ignorant of or not concurring in the transfer, (c) unless in some cases of notoriety of the change of ownership under an execution or otherwise; (d) or where the right to take possession was only in future or contingent, in which case it suffices to take possession immediately the event has happened, though in the mean time creditors may have been misled by the possession having remained in the mortgagor, it being settled that there is no fraud in allowing a continued possession, when consistent with the terms of the deed. (e) If the property assigned be at a distance, as a ship at sea, and cannot be immediately delivered, then possession must be taken of all documents relating thereto, and the transfer be duly registered, and the earliest notice of the transfer forwarded to the party in actual possession; and in the case of a written security, or chose in action, or policy of insurance, not only must possession be taken of the security, but notice of the transfer must be given to the debtor or contracting party, (f) for other-

(y) *Pope v. Whitcombe*, 3 Russ. R. 124. The words of the transfer, to cover any contingency, should be, "and all other rights, titles, interests, trust, property, possession, *expectancy*, *possibility*, benefit, advantage, claim and demand whatsoever, at law and in equity, or otherwise howsoever, of the said A. B. of, in, to, or out of or upon the said [naming the thing transferred, and adding express words adverting to the supposed contingencies]."

(z) 54 Geo. 3, c. 156, s. 8, 9; 2 Stark. R. 385. *Quere*, if the benefit of survivorship should not be expressly assigned.

(a) 29 Car. 2, c. 3, s. 4.

(b) 8 Ann. c. 19, s. 1; 41 Geo. 3, c. 107; 3 M. & S. 7; 2 Bar. & C. 866; 2 Stark. R. 382; 4 Campb. 9; 1 Jac. & W. 481.

(c) *Twyne's case*, 3 Coke, 81; 1 Campb. 333; 5 Taunt. 212.

(d) 2 Bos. & Pul. 59; 8 Taunt. 838.

(e) *Edwards v. Harben*, 2 T. R. 587; *Gross v. Neale*, 5 Moore, 10, where see form of a deed with such prospective rights to take possession.

(f) 2 Simons, 257, 570, and cases there cited; 3 Russ. R. 1, 12, 13.

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wise, at least in case of the bankruptcy of the transferor, his assignees will be entitled to the property; (g) and the same doctrine applies to the assignment of a *post obit* bond, or of a policy of insurance, of which notice should be immediately given to the insurer: (h) A voluntary settlement or assignment of *personal* property, made by a person who was *not* indebted at the time, is valid and sufficient against a subsequent purchaser for valuable consideration. (i)

By Contract. Tenthly. Title by *Contract* being by far the most important of all the means of acquiring a title to or interest in personalty, will be presently distinctly considered.

By Bankruptcy. Eleventhly. Title by *Bankruptcy* is now simplified and founded on two explicit modern acts. (k)

By Insolvent Act. Twelfthly. The Rights of the Assignee of an *Insolvent Debtor* and his Creditors, are also declared by recent acts. (l)

By Administration. (m) Thirteenthly. Title by *Administration* has been treated as a mode by which a right to personal property may be acquired, first by the administrator, and after he has paid all debts of the intestate, and the duty equal to the legacy duty, then by his delivering the same, not (as in the case of *real* property) to the *heir*, but to the *next of kin*, in pursuance of the statute of distributions, 22 & 23 Car. 2, c. 10, explained by 29 Car. 2, c. 30, and in the following order:—

A Table showing how the Personal Estate of an Intestate is to be distributed. (n)

| If intestate dies, leaving | His personal representatives shall take in proportions following: |
|------------------------------|---|
| Wife and child, or children, | { One-third to wife, rest to child or children; and if children are dead, then to their representatives, (that is, their lineal descendants,) except such child or children, not heirs at law, who had estate by settlement of intestate, in his lifetime, equal to other shares. |
| Wife only, | { Half to wife, rest to next of kin in equal degree to intestate, or their legal representatives. |
| No wife or child, | { All to next of kin and their legal representatives. |

(g) *Ante*, 107, n. (f).

(h) *Id.* *ibid.*

(i) 1 Sim. & Stu. 315.

(k) 6 Geo. 4, c. 16; 1 & 2 W. 4, c. 56.

(l) 7 Geo. 4, c. 57; 1 Will. 4, c. 38.

As to what is *personalty*, 3 Russ. R. 376.

(m) As to the *administration bond*, see 8 B. & Cres. 151; 2 Man. & Ry. 136, S. C. Chit. Col. Stat. 324, 325, in notes.

(n) See Bridgman's Index, and Chitty, E. Eq. Dig. tit. Distribution, 319, 320, where see the cases as to the course of distribution collected; see also 2 Bla. Com. 515, 516, and Toller's Executor, 6th ed. 80 to 94, 369 to 403; *Id.* Index, 564,

565. In general, *administration* is to be granted in the same order, viz. to the person next of kin, *Id.* *ibid.*, and see Table, *Id.* 90. Where there are several next of kin in the same degree, the ordinary may grant administration to all, or to any one or more he pleases, 2 Bla. C. 504; Toller, 85; 1 Stra. 552; 1 Salk. 36. But the claim of administration by the party or parties entitled is so usual a claim of right, that a mandamus issues from K. B. in favour of the party entitled to enforce it, 8 East, 408. Administration may be granted to a partner if next of kin decline, 2 Sim. & Stu. 127.

| | |
|---|--|
| If intestate dies, leaving | His personal representatives shall take in proportions following: |
| Child, children, or representatives of them, | All to him, her, or them. |
| Children by two wives, | Equally to all. |
| If no child, children, or representatives of them, | All to next of kin in equal degree to intestate. |
| Child and grandchild, | Half to child, half to grandchild, who takes by representation. |
| Husband, | Whole to him. |
| Father, and brother, or sister, | Whole to father. |
| Mother, and brother, or sister, | Whole to them equally. |
| Wife, mother, brothers, sisters, and nieces, | Half to wife, residue to mother brothers sisters and nieces. |
| Wife, mother, nephews, and nieces, | Two-fourths to wife, one-fourth to mother, and other fourth to nephews and nieces. |
| Wife, brothers or sisters, and mother, | Half to wife, (under statute of Car. 2,) half to brothers or sisters, and mother. |
| Mother only, | Whole, (it being then out of statute of 2 Jac. 2, c. 17.) (m) |
| Wife and mother, | Half to wife, half to mother. |
| Brother or sister of whole blood, and brother or sister of half blood, | Equally to both. |
| Posthumous brother or sister, and mother, | Equally to both. |
| Posthumous brother or sister, and brother or sister born in lifetime of father, | Equally to both. |
| Father's father and mother's mother, | Equally to both. |
| Uncle or aunt's children, and brother or sister's grandchildren, | Equally to all. |
| Grandmother, uncle, or aunt, | All to grandmother. |
| Two aunts, nephew, and niece, | Equally to all. |
| Uncle, and deceased uncle's child, | All to uncle. |
| Uncle by mother's side, and deceased uncle or aunt's child, | All to uncle. |
| Nephew by brother, and nephew by half sister, | Equally per capita. (n) |
| Brother or sister's nephews or nieces, | Whole, nephews and nieces taking per stirpes, (o) and not per capita. |
| Nephew by deceased brother, and nephews and nieces by deceased sister, | Each an equal share, per capita, and not per stirpes. |
| Brother and grandfather, | Whole to brother. |
| Brother's grandson, and brother or sister's daughter, | To daughter. (p) |
| Brother and two aunts, | To brother |
| Father and wife, | Half to father, half to wife. |

It will be observed that this statute secures as just a distribution of the personal assets as under *ordinary* circumstances would probably be directed by the most deliberate will, and in general the word "*relations*" in a testament will be

(m) By statute 1 Jac. 2, c. 17, s. 7, if after death of father any of his children shall die intestate, without wife or children, in lifetime of mother, every brother and sister, and representatives of them, shall have an equal share with mother.

(n) *Per capita*, is where all claimants claim in their own right, as in equal degree of kindred, and not *jure representationis*; as if the next of kin be intestate's three brothers, A. B. and C.; here his effects are divided into three equal portions, and distributed *per capita*, one to each. 2 Bla. Com. 517.

(o) When persons take by representa-

tion, it is called succession in *stirpes*; as if A. dies, leaving three children, B. leaving two, and C., brother of A. and B., surviving; then one-third to A.'s three children, one-third to B.'s two children, and remaining third to C., the surviving brother. 2 Bla. Com. 517.

(p) If grandson's father survived the intestate, but died before distribution made, then his son becomes entitled in distribution with sister's daughter to a moiety, but not otherwise, because son becomes representative of his father, it being vested interest in him, but he must take out administration.

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construed by reference to the statute of distributions. (n) Hence, unless a party wish to *prefer* one or more particular relations, or other persons, so as to *alter* the ordinary course of distribution, any great solicitude to make a will is unnecessary.

The mere circumstance of an administrator having been in possession of and used goods of the intestate for three months after the death, is not sufficient to change the property, so as to subject the goods to seizure for the private debt of the administrator, and therefore if taken under an execution against him, he, in the character of administrator, may support an action of trespass for seizing such goods. (o) No action lies for a distributive share. (p)

By Will or Testament.

Fourteenthly, Title by *Testament*. Here there is a leading distinction between a devise of land and a will or testament of personal property. In the case of *real* property of freehold tenure, the testator must in general not only have his estate or interest therein at the time of making his will, but he must also continue to have the same interest in the same estate until his death, and after-purchased lands, or even the same lands, if he materially change his interest therein, will not pass to the devisee, but will descend to the heir, unless he afterwards republish his will; whereas, as respects personalty, the will is *ambulatory*, and property purchased or vested in the testator after making such will, passes to the legatee, if the testator's intention to that effect can be collected from the will, and there will be no ademption of the legacy unless the intention was clearly to revoke; as, if at the date of a will the testator have certain stock in the funds, and bequeath it to A., and afterwards sell out the stock, but subsequently re-purchase the like or similar stock, the last may pass to A. as a substitution of the original stock, without re-publishing the will; (q) but then the will must be so framed as to import such intention; for where A. being married to B. bequeathed a legacy to "my beloved wife," and B. afterwards died, and A. married C., it was held that the latter was not entitled to the bequest. (r) Another distinction is, that a will of lands and tenements, not copyhold, must, by express enactment, be signed by the testator, and must have three attesting witnesses; (s) whereas a testament of personalty does not require signature or any witness; (t) and even written instructions

(n) *Brandon v. Brandon*, 3 Swan. 319; and see 1 T. R. 161, and as to meaning of term *relation*.

(o) 2 Mood. & Mal. 132.

(p) 7 B. & Cres. 542.

(q) Cas. temp. Talb. 226; 2 Jac. & W.

207; 1 Russ. & M. 629.

(r) 1 Russ. & M. 629.

(s) 29 Car. 2, c. 3, s. 5.

(t) Gilb. R. 260; Comyns, 452; 2 Phil. Ec. C. 213; 2 Bla. C. 501, 502. As to Stock, *ante*, 96, note (p).

taken down by an attorney from the deceased's dictation and not signed by him, but of which he approved, is a sufficient will; (u) and where the testator wrote a paper as his will, but left it incomplete for want of signature and attestation, which requisites it was proved he intended up to the time of his death to add, but was prevented from effecting by the act of God, such paper was established as a will; (v) and even alterations in pencil on a regularly executed and attested will have been admitted to probate. (x) As any paper written by a party or by his directions might operate as his will, unless qualified by some expression, the prudent course, in case of a mere *projected* will, which a person may wish to have by him ready for slight alteration or for signature at any instant, would be to adopt the form recently used by a late very learned Chief Justice, viz. "This paper is *intended* to become and contains the last will and testament of me, A. B., of, &c. *so soon as I shall have signed the same, but not sooner.*" I desire, &c. Then stating the particular directions and bequests as in a perfect and complete will; and the conclusion of such intended will and attestation may be thus! "And I nominate the said E. F. and G. H., &c. executrix and executor of this my will. In witness whereof, I have hereunto set my name and subscribed this paper, this day of , A. D. , (leaving a blank for the signature of the testator's name), and with the following already written attestation. Signed, published, and declared by the said A. B. as and for his last will and testament, in the presence of us, who, in his presence and at his request, have set our names as witnesses hereunto." (y) And when the testator had perfected his will by his signature, three witnesses wrote their names and additions at the bottom of the attestation. It must, however, be remembered that the completion of such a projected will may be prevented by accident or sudden death, and therefore when it is the intention of a party to dispose of his property to persons materially different to the distribution in case of intestacy, the only certain course is actually and completely to execute a concise and explicit short will, and to have another intended will more in detail ready to be executed, if circumstances will allow.

A will of personalty may be valid in part, though obtained by fraud as to the residue, (z) and the bequest of a legacy to a

(u) 2 Phil. Ec. C. 177.

(v) 1 Phil. Ec. C. 12, 58, 59.

(x) 2 Phil. Ec. C. 173; 1 Phil. Ec. C.

22; see further 2 Bla. C. 502, note 16.

(y) See the will of the late Lord Ten-

terden at Registry of the Prerogative Court of Canterbury, proved at London 21 Nov. 1832.

(z) 1 Dow. Rep. New S. 85.

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witness of a will of personalty is not, as in the case of a devise of land, invalid. (a)

Courts of Equity have a concurrent jurisdiction with the Ecclesiastical Courts with respect to wills and intestacy as regards personalty; (b) and therefore in general, in the construction of wills of personal estate, Courts of Equity follow the rule of the canon, which is founded on the civil law, and by the canon law the word "*goods*," and equally the word "*chattels*," taken simply and without qualification, comprise the whole personal estate of every description. (c)

If certain personal chattels be specifically bequeathed, and the meaning of the description be doubtful, parol evidence of scientific persons is admissible to explain the meaning. (d) Under the bequest of a leasehold farm, farming utensils not named will not pass, (e) though we have seen that it is otherwise as to growing crops of corn. (f) No action lies for a legacy, unless upon a promise or new consideration. (g)

Sixthly, Contracts, (h) or how a right in a chose in action may be acquired.

Contracts, we have seen, have been treated as one of the several modes of *acquiring or losing the right* to personal things. But that is too limited a view of contracts. (i) We cannot in this summary consider all the points relating to contracts and every kind of contract. We shall only notice a few *general* rules and some of the principal contracts, with occasional suggestions.

1. General division into contracts of record, specialties, and simple or parol contracts.

Contracts are progressively from a higher to an inferior nature, and on that account are entitled to relative preferences in the administration of assets. They are of *Record*, *Deeds* under *Seal*, or *Simple* Contracts, whether in writing or verbal.

Those of *Record* are *Recognizances* and *Judgments* acknowledged or recovered before a judge or other official person. (j)

Deeds and other instruments *under seal* stand next in order. These are principally money *bonds* in a *penalty* (k) conditioned for the payment of money, or bonds to replace stock, mortgage

(a) 25 Geo. 2, c. 6; 3 Simons, 4; 3 Russ. & R. 436.

(b) 4 Russ. R. 370; 1 Ves. 334; 1 Cox, 342; 2 Atk. 116; *aliter*, in case of a devise of real estate to pay debts, 9 Bar. & Cres. 489.

(c) 4 Russ. R. 370, where see the effect of different words in a will as regards the description of the personal things bequeathed; and see *ante*, 96, 97, when *stock* passes by a bequest; see further *ante*, 100, 101, as to the construction of a will.

(d) 3 Simons, 21, *ante*, 101.

(e) 11 Ves. 657.

(f) *Ante*, 92.

(g) 7 B. & Cres. 542; but see 3 East, 120; 1 M. & P. 209, 215.

(h) See *post*, chap. ix., what contracts will be enforced in equity.

(i) *Ante*, 99 n. (p); 2 Bla. C. 400, 442. It is strictly so in a contract of *sale*, and in all cases of contract one party or the other, by virtue of the engagement, is entitled either to receive money or goods, or have some act performed or omitted; but contracts are by no means limited to the *transfer* of an interest in a personal thing, and therefore, and also in respect of their general importance, they deserve more particular attention.

(j) As to the precaution in docketing, see 3 Simon's R. 301, *ante*, 104.

(k) In equity more than the penalty may be recovered, 3 Simon's R. 129, 340.

bonds, annuity bonds, bail bonds, replevin bonds, or bonds conditioned for the performance of covenants in another indenture, or for performance of any other act; *Mortgage Deeds, Annuity Deeds, Leases under Seal, Indentures of Apprenticeship, Charter-parties, Policies under Seal*, whether insuring life, or houses, or ships, *Articles of Agreement*, and *Deeds Poll*. It is obvious that every contract that can be entered into by simple writing or by parol (excepting, perhaps, bills of exchange and promissory notes) may, if the parties think fit, be under seal, and when so, they have the properties and privileges of specialties; but in that case, in general the formal parts of the instrument differ from the terms of the instrument when not under seal.

Lastly, are *Written Contracts not under Seal*, or mere *Verbal Promises*. These are of infinite variety. The principal are bills of exchange, promissory notes, checks on bankers, policies of insurance not under seal, insuring ships or lives, (l) memorandums of charter, wagers, awards, contracts relating to the loan of money, or relating to the sale, exchange, or use of goods or land, warranties, guarantees, contracts to marry, to serve, or employ, or perform works, or to deliver or accept goods sold or bought, or to indemnify; contracts, express or implied, of *bailees*, or *agents*, *factors*, *wharfingers*, *farriers*, *carriers* by land or water, and of *Attorneys*; and in short all the various bargains, express or implied, which are not usually under seal.

In the case of contracts under seal, no consideration is essential to their validity, unless fraud or illegality can be proved; they are binding upon the party himself, though inoperative against creditors or purchasers, although he received no consideration. Hence, in all cases where the consideration may be doubtful or difficult to state or to prove, or where there is a considerable debt to be guaranteed, it is preferable to have the engagement under seal; and in that case, if the contract itself be clearly expressed, recitals stating the motive for entering into it are in general unnecessary, though, as even a Court of Equity will not enter into the consideration of the motives inducing a party to enter into a contract, unless it be expressed therein or in recitals, (m) it may frequently be advisable, as well in deeds as in other contracts, fully to recite such motives, as explanatory of the object and spirit of the subsequent stipula-

2. Consideration when essential.

(l) An insurance on party's own life becomes void if he be executed for a felony, *Amicable v. Bolland and others*, 2

Dow. R. New S. 1. over-ruling *Bolland v. Disney*, 3 Russ. R. 351.

(m) 1 Jac. & W. 429.

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tions. (n) But with respect to *contracts not under seal*, technically termed *parol*, (though in writing), they can never be enforced unless founded upon sufficient *consideration*, unless, indeed, in the case of bills of exchange and promissory notes, and then only when in the hands of a *bonâ fide* holder for value. (o) In all other cases of parol or simple contracts, the party suing must prove *affirmatively* that there was adequate consideration, and the defendant is at liberty to show that there was none, or that it was illegal. (p) However valid the expressed consideration may be, it is always competent, in the case of a *deed*, though not so of a *record*, for the parties to it to plead and prove that the whole or part of the true consideration was *illegal*. (q)

3. The peculiar
use of records
or deeds. (r)

The principal utility in having the contract for *debts* of record or under seal, is to bind the heir and devisee of the contracting party at law; and though a modern act (s) now subjects the real estate of a *trader*, within the meaning of the bankrupt law, to the payment of simple contract debts as well as specialties, that enactment does not extend to persons who are not such traders, and consequently it is in general still advisable to secure a debt or performance of other contract by *deed* expressly binding the heir, and also to have a judgment docketed, so as to bind the land even in the hands of a purchaser as well as the heir and devisee. Another and very important distinction is, that debts of record, when duly docketed (t) and due on specialty, are to be preferred at law in payment of debts out of personal property by an executor or administrator; so that, upon the whole, in all cases of considerable demands, it is still advisable to have the security of a deed. In case of a bond in a penalty, in a Court of Equity more may be recovered than the amount of the property, though it is otherwise at law. (u)

4. Proposals for
a contract, when
binding.

It is a general rule, that to constitute a complete valid contract not under seal, there must be at least two contracting parties, and each should be reciprocally bound at the *same*

(n) 1 Jac. & W. 422; and see 1 Turner & R. 41, 54, as to *recitals*.

(o) *Ridout v. Bristow*, 1 Tyrw. R. 84; 1 Crompt. & J. 231, S. C., where see lucid remarks of Mr. Baron Bayley.

(p) *Id. ibid.*

(q) 1 Saund. 295; 2 Wils. 347; 3 T. R. 424, 538; 9 Bar. & Cres. 462; 10 B. & C. 826.

(r) See more fully as to the leading distinctions between records, specialties, and simple contracts, 3 Chit. Commercial Law, 3 to 11; and as to judgments, 3 Younge & Jerv. 101.

(s) 1 W. 4, c. 47.

(t) *Ants*, 104.

(u) 3 Russ. R. 598.

time. (v) Therefore, upon a sale by auction, if a party bid for an article a named sum, he is not bound by his offer till the auctioneer on behalf of the vendor has testified his acceptance of the offer by knocking down his hammer, until which instant the bidding may be withdrawn. (x) But that doctrine does not apply to proposals made by letter from one party to another at a *distance* from each other, to purchase any commodity on certain named terms. In such a case, it has been held that the party is bound by his proposal until either the specified time or a reasonable time for answering it has elapsed, and if within that time the proposal be accepted, it is binding, for otherwise no bargain between parties at a distance from each other could well be effected. (y) But if the proposer, before the other party has forwarded his assent, rescind his offer, by sending a special messenger or otherwise, it seems he might effectually do so. (z) If the party receiving the proposal should not entirely acquiesce, but propose *new terms* by letter, then he in his turn would be bound by his proposal, until a reasonable time had elapsed for receiving an answer; but in the mean time the original proposer would not be bound by his first proposition, and so on until there has been a complete assent on one side to the last proposition of the other. (a) But a mere *proposal* in writing to become responsible for the debt of another is not binding, unless the creditor immediately communicate his assent thereto to the proposer. (b)

But the rule that both parties must reciprocally be bound by the bargain, does not either at law or in equity extend to *formal signatures* required by the statute against frauds, provided the paper signed by the party sued express the name of the other party. (c) Therefore a party who has not signed may sue the other party who has, (d) and a Court of Equity will also decree a specific performance against a party who has signed; (e) one reason may be, that the statute in one section only requires that the party to be charged shall sign, but another section is in the plural. (f) But still it has been doubted whether in these cases the party who signed is not at liberty to recede,

(v) 2 Moore & P. 86; 5 Bing. 34.

(x) *Payne v. Cave*, 3 T. R. 149.

(y) 16 East, 45; 1 M. & S. 21; 1 Bar. & Ald. 681; 4 Bing. 658, which seems to overrule 3 T. R. 653.

(z) 4 Bing. 653.

(a) *Scoble*; and see 4 Wils. & Shaw, 20; 4 Bing. 653.

(b) 1 Stark. 10; 1 M. & S. 557; and *quære* if such assent must not be in

writing, 1 Russ. & M. 394.

(c) 1 New R. 252.

(d) 6 East, 307; 2 Smith's R. 389; 3 Taunt. 169; 5 Taunt. 788,

(e) 1 Russ. & M. 391, 394, 625; 2 Jac. & W. 426; 2 Ch. C. 164; 7 Vea. 265.

(f) 29 Car. 2, c. 3, s. 4, 17; see the reason assigned by the court, 5 Taunt. 788.

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until the other party, who has not signed, has done some act to bind himself, such as commencing an action or filing his bill; (g) and where merely a proposal, and not an express undertaking has been offered, it has been considered that it must be *accepted in writing*; but that when there is a positive undertaking, then such written acceptance is not essential. (h)

5. When contract must be in writing, and signed.

With respect to contracts not under seal, the *common law* makes no difference, whether they be in writing or verbal, excepting bills of exchange and promissory notes, which must be in writing or pencil. Nor does the common law require the consideration to be stated on the face of the contract when in writing, but allows it to be supplied by verbal evidence. The exceptions introduced by statute principally relate to contracts by executors, and by third persons for the debt of another, or relating to the sale of an interest in land, or which are not to be performed within a year, and contracts for the sale of goods, wares, or merchandize for the price of ten pounds or upwards; (i) and a recent act requires acknowledgements (excepting by *payments*), to take a case out of the statute of limitations, and contracts of sale of goods to be made and delivered at a future time, to be in writing. (k) And independently of these statutes, it is always advisable, with a view to certainty in evidence, to have all the material representations, considerations, and circumstances connected with the contract, and especially the contract itself, fully and formally stated in writing, and signed by all the parties intended to be liable to perform it. Thus, unless *verbal representations* before or at the time of sale, or other transaction, be expressly made part of the written contract, they will not (however material, and however they may have misled the

(g) 2 Jac. & W. 426.

(h) *Palmer v. Scott*, 1 Russ. & M. 394.

(i) 29 Car. 2, c. 3, s. 4. "And be it further enacted by the authority aforesaid, that from and after the said 24th day of June, no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some me-

morandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. Section 17. And be it further enacted by the authority aforesaid, that from and after the said 24th day of June, no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

(k) 9 Geo. 4, c. 14.

contracting party) be considered as part of the contract, so as to enable him, upon discovering the deceit, to avoid the contract; and at most he could only sue in a cross action to recover compensation for the fraudulent misrepresentation, as Lord Ellenborough expressed, laying asleep his prudence. (*l*) It has however been held, that statements in *printed* papers, and words relative to a ship, are in general an assurance or warranty to the merchant who loads goods on board the ship in pursuance of the advertisement, and became part of the contract, although they be not afterwards contained in the bill of lading or charter-party not under seal. (*m*) So with respect to the sale of an estate; an advertisement in the newspaper misdescribing it may become part of the contract, or at least subject the vendor to an action for deceit. (*n*) When, as in cases within the statute against frauds, it is required that the contract shall be *signed* by the *party* or *parties* to be charged therewith, it is a sufficient *signature*, if the party himself write his name any where, even in the commencement, with intention to give effect to the whole; (*o*) as, "Mr. Wilmot has agreed on," &c.; and though there be only the signature of the party sued to an *express* undertaking, and not of both parties, that suffices; though it would be otherwise if there was merely a signed proposal; (*p*) but unless the signature apply to the *whole* of the stipulations, it is insufficient. (*q*) If a bill, filed for specific performance, state that the agreement was in writing, signatures will, on demurrer, be presumed, though it is advisable to state that it was signed; (*r*) and the same doctrine prevails at law in a declaration on an agreement. (*s*) The memorandum signed must contain *all* the substantial parts of the bargain, leaving nothing in that respect to be supplied by parol evidence. (*t*)

If in the particular cases enumerated by the statute against frauds, the contract be not properly in writing, and signed when requisite, although it may be capable of proof by one hundred witnesses, or by the same number of verbal admissions, it cannot be enforced either at law or in equity, with this exception, that in a Court of Equity, although a contract of sale be wholly verbal, yet if by its terms it was expressly stipulated that it should *be duly reduced into writing* and signed, and that formal

6. When equity will aid want of a written contract in cases of fraud.

(*l*) *Powell v. Edmunds*, 12 East, 6.

(*m*) *Abbott on Shipping*, 4 ed. 224; *Holt on Shipping*, 57; 4 Campb. 243.

(*n*) *Knapp's R.* 344; 1 *Simon's R.* 13; 3 *Id.* 29.

(*o*) *Prosser v. Parker*, 1 *Russ. & M.* 625; *Sugd. V. & P.* 8 ed.; and cases, *Chit. Col. St.* 574, 375, notes (*p*), (*q*), (*r*).

(*p*) *Palmer v. Scott*, *post*, 1 *Russ. & M.* 391; *ante*, 116.

(*q*) *Id. ibid.*; 3 *Meriv.* 53, 62.

(*r*) 1 *Sim. & Stu.* 543.

(*s*) 1 *Saund. R.* 276, n. (*s*); 7 *T. R.* 351; 2 *Brod. & B.* 262.

(*t*) See note (*c*), *post*, 125.

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completion of the bargain was *prevented by fraud of the party who ought to have signed*, then a Court of Equity would enforce the verbal agreement against such a party. (u)

7. When contract may be collected from several documents or letters.

The *whole* terms of the contract, when in writing, need not be expressed on the *same* paper or document, but may be collected from *several letters* containing proposals and ultimate agreements between the parties, (v) but then the last communication must be a distinct and unqualified assent to an equally clear proposal; and if the last letter suggest any new or further proposition requiring the assent of the other party, or some communication from him to complete the transaction, then no contract or agreement is constituted. (x) So under the statute against frauds requiring a written and signed agreement, it has been held that a sufficient contract may be constituted by a letter ascertaining the terms of the agreement, by reference to another document containing them, (y) even though such document has not been signed, (z) or referring to something which is in itself certain, as to the custom of the country in an agreement for a lease; (a) though under the statute against frauds it has been held that *parol* evidence cannot be received to ascertain what is referred to, the subject of the reference not being sufficiently certain or decided and distinct upon the face of the document itself. (b)

8. All proper terms must be expressly specified.

There is one general rule and precaution to be observed in framing or entering into all express contracts whether or not under seal, namely, that all the proposed terms of bargain, and all proper stipulations, be expressly inserted in the written contract; for though there are some cases in which a Court of Law or Equity will *imply* or infer a contract in all proper terms, when the parties themselves have not fixed the terms of contract, yet when they do contract for themselves, no term or stipulation not expressed will be superadded by the court, though the court might readily conjecture what the parties intended, or what would be reasonable; for courts are to *construe*, and not to *make* new contracts for parties which they have omitted to

(u) 2 Bro. C. C. 565; Sugd. V. & P. 106, 107; and see 3 Russ. R. 424; but see 3 Bar. & Ald. 326; 1 Cox, 219; 1 P. Wms. 770; 3 Meriv, 53, 62.

(v) 1 Bing. 9; 7 Moore, 219; 4 Wils. & Sh. 20; 1 Sim. & Stu. 194; 3 Taunt. 169.

(1) *Holland v. Eyre*, 4 Wils. & Shaw, 20; 1 Sim. & Stu. 194; 4 Bing. 653.

(y) 3 Atk. 502; 2 Bos. & P. 238.

(z) 3 Bro. C. C. 318.

(a) 1 Ves. J. 330.

(b) 1 Ves. J. 326; 5 Bar. & Cres. 583; and 9 Bar. & Cres. 561, 569, 570.

make for themselves. (c) Therefore when several parties entered into a written engagement of partnership in a foreign adventure, and one of them was to proceed and reside abroad, and to undertake much more risk and personal trouble than the others, and there were written stipulations for divisions of profits, but no stipulations providing remuneration for this extra trouble, or for the contingency of the undertaking not proceeding; and the party went abroad at great expense and trouble, and commenced the adventure, but which was shortly afterwards put an end to, and he proceeded in Scotland against his copartners to recover remuneration for his extra trouble and expense, it was held in the House of Lords, *reversing* the decision of the Lord Ordinary, that as the contract did not provide for the event, there was no jurisdiction to afford him any compensation. (d) So if a contract of partnership be silent as to the division of profits, then whatever may have been the unexpressed intention of the parties, each will be entitled to an equal moiety, though one of them brought in no part, or a very unequal share of the capital. (e) And in another case in the House of Lords it was on the same principle held (reversing the judgment of the Court of Session) that a clause in articles and conditions regulating the management of a farm, that "the whole fodder to be used upon the ground, and none sold or carried away at any time, hay only excepted, and all the dung to be laid on the farm the last year of the lease," created an effectual prohibition against the tenant disposing or carrying off the farm any part of the straw of the waygoing crops, and that as there was no stipulation on the part of the landlord to pay the value, the tenant could not recover it; (f) and though the custom or usage of the county where a farm is situate would otherwise entitle the tenant to remuneration for his waygoing crops, or for labour or manure from his landlord or incoming tenant, (g) yet if there were any express stipulation between the outgoing tenant and his landlord inconsistent with such custom or usage, then the latter will not prevail. (h) So though a tenant is in general entitled during his term to remove any annexations made by him to the

(c) See explicit cases in the House of Lords, *Campbell v. Beath*, 2 Wils. & Shaw, 37; and *Gordon v. Robertson*, 2 Wils. & Shaw, 115; and *Watson v. Duke of Wellington*, 1 Russ. & M. 602, 605; as to contingencies, 8 Bing. 231.

(d) *Campbell v. Beath*, 2 Wils. & Shaw, 37.

(e) *Peacock v. Peacock*, 16 Ves. J.; *Struthers v. Burt*, 2 Wils. & Shaw, 153.

(f) *Gordon v. Robertson*, 2 Wils. & Shaw, 115; *Allen v. Berry*, 3 Wils. & Shaw, 417, *quare*; 7 Bing. 465.

(g) *Dally v. Hirst*, 3 J. B. Moore, 536; 1 Brod. & B. 224; Holt's C. N. P. 197; 7 Bing. 465.

(h) 16 East, 71; 1 Taunt. 19; 1 Meriv. 15; 2 Bar. & Ald. 716; Holt's Cases, Ni. Pri. 197; 3 J. B. Moore, 536; 8 Bing. 65.

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freehold for the purposes of *trade*, yet if he has covenanted to leave all *erections* or *improvements*, it is otherwise, and he is not in that case entitled to any compensation. (i) So although in a tenant's covenant to repair, damages by fire be excepted, and which protects him from liability to repair, yet, unless expressly stipulated otherwise, he will continue liable to pay rent to the end of his term, and he cannot even compel the landlord, unless perhaps when the buildings are within the bills of mortality, to expend, in rebuilding, the money he has received for the loss from an insurance office; (k) and therefore care should be observed on the part of a lessee to insert a proviso suspending liability to payment, or at least the tenant should effect an insurance sufficient to cover the amount of the rent and loss of the value of the occupation during the residue of the term.

There are however *some* cases of express written contracts, when, if such contract be wholly silent on the subject, *implied* terms of contract may be *superadded*, provided they are not inconsistent with the express stipulation. Thus a custom or usage that tenants shall have the waygoing crops after the expiration of their lease, or be paid for fallows, seeds, or manure, is valid and effectual, if the lease be silent on the subject. (l)

9. Time of performance when the essence of contract.

So, if either party to a contract wish to make performance at a *precise time* material, he should introduce an express and positive proviso to that effect, for otherwise, at least as respects the sale of real property, performance on the very day is not in general considered in a Court of Equity as of the essence of the contract. (m) But that rule, it is said, is not to be extended; (n) and where a day was fixed in a contract of sale of the good-will of a public house and the stock in trade and furniture, at a valuation, and the purchaser was not ready till the next day, when he tendered the amount, the time was held the essence of the bargain, and a Court of Equity refused a specific performance at the instance of such purchaser, though he was only one day too late. (o) And where a purchase is intended with a view to commercial purposes, and not merely as an investment of money, time is frequently considered as the essence of the contract. (p) And where a

(i) 1 Taunt. 19; 9 Bing. 24.

(k) 1 Simons' R. 146; 5 Bar. & Ald. 1.

(l) 1 Hen. Bla. 5; Doug. 201; Holt's C. N. P. 197; 3 J. B. Moore, 536; and see note, *supra*; 7 Bing. 465.

(m) In equity a vendor's undertaking to give an abstract and deliver possession by a *particular time*, does not make such

time the essence of the contract, 1 Jac. & W. 422; 1 Russ. R. 376; Sugd. V. & P. 364 to 383.

(n) 2 Jac. & W. 288, 289; and Sugd. V. & P. 8 ed. 363.

(o) 1 Russ. Rep. 376.

(p) 1 Sim. & Stu. 190.

debtor is to be excused from paying the whole debt, provided he pay certain instalments as part, on named days, and he neglect to make punctual payment, the creditor becomes, even in equity, entitled to sue for the whole debt. In a case *at law*, four days' delay in performing an act, though occasioned by bad weather, was held to deprive the party of his right to 80%, which was to be paid if the act had been done on a fixed day. (q) And *at law* the precise day fixed for completing the sale, or other contract, is, in general, material; and if either party be not *then* ready, the other may immediately treat the contract as no longer binding, and may sue for the breach, provided he himself was ready to perform his part. (r) In the case of a sale of goods, if the purchaser do not fetch away and pay for them at the appointed day, it has been considered that the vendor must give him notice, and allow him a further reasonable time, before he can re-sell; (s) but it seems the sounder doctrine, that *at law* this is not necessary. (t) But in these cases the party must notify to the other his intention to insist on precise, punctual performance, and if he omit to do so, he cannot retain a deposit. (u)

If the contract be with several persons, it should be expressly stipulated that each shall be *severally* as well as *jointly* bound to perform the contract; for if there be no express stipulation to that effect, the contract will be considered as only joint; and in case of death of one, there will be no remedy *at law* against his personal representative; and though the estate of a deceased partner or principal is chargeable in equity, that remedy is not so perfect or speedy as *at law*; and if the contract were joint only, relief will not in all cases be afforded in equity against the estate of a deceased *surety*. This distinction is so important, that where the parties have intended that a security shall be joint and several, but by *mistake* has been only joint, a Court of Equity will compel a surety to sign a joint and several security, according to the original intention. (v)

So if the debt or contract be of considerable importance, it may be advisable to obtain *several* warrants of attorney for security in a large penalty, so as certainly to exceed the principal debt and a great arrear of interest and expenses, (x) so as to enable the

(q) 4 Car. & P. 295; and see 4 Bing. & Cres. 575; Sugd. V. & P. 362.
280.

(r) Sugd. V. & P. 8 ed. 359 to 370.

(s) 1 Salk. 113; but see 3 Campb. 426,
1 Marsh. R. 514.

(t) 4 Taunt. 334; 1 Marsh. 514; 8 B.

(u) 8 Bar. & Cres. 575.

(v) *Hawstone v. Parr*, 3 Russ. Rep. 424.

(x) Why in a penalty, see 3 Sim. R.
299.

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creditor to issue several executions at the same time into different counties against different descriptions of property, which might otherwise be taken by several creditors pending the loss of time when waiting the return of a partial levy upon one writ before any further execution could issue.

So as our English law (which in that respect is defective, and not so just as the Scotch law,) rarely allows *interest* on unpaid debts, unless expressly stipulated for, care should be observed to provide for interest from stipulated periods, and even upon sums that the complainant might have to pay in the shape of damages. (y) A stipulation as to interest is particularly advisable in contracts, whether by auction or private, for the sale of property ; (z) and a vendor who desires to avoid being required to carry evidence of his title beyond a certain time or deed, must so expressly stipulate in the particulars and conditions of sale ; and when he sells only part of his estate, and wishes to avoid covenanting to produce his title deeds when required, he must also stipulate accordingly, or otherwise he may be compelled so to covenant. (a) In cases of *liens*, the law, in the absence of express stipulation, does not in general allow the party holding it to *sell* the thing deposited, although it may be of a perishable nature ; (b) in cases therefore of such a deposit, an express written power of sale should be provided.

From persons who are *traders*, if there be the remotest chance of bankruptcy, it is advisable to obtain an unqualified bill of exchange or promissory note for a sum certain, as a collateral security for the performance of the contract, though no way relating to the payment of money ; because in the event of bankruptcy, the holder may prove or claim for the amount upon such bill or note, when the unliquidated damages for the breach of the contract could not be so proved ; and this precaution should always be observed by *sureties* before they enter into their engagement.

10. Precautions
by sureties by
bond. (c)

Sureties for the fidelity of *clerks*, or any party in any situation, besides taking the best security they can obtain from the person for whose conduct they become responsible, should also stipulate in their bond or guarantee not only for a power to determine it, but also that the master or principal shall at certain times exact from the clerk due statements of account, and

(y) 9 Bar. & Cres. 380 ; 6 Bing. 380 ;
1 B. & Adolp. 577.

(z) 1 Sim. & Stu. 122 ; *Harrington v.*
Hoggart, 1 Bar. & Adolp. 577.

(a) *Farn v. Ayers*, 2 Sim. & Stu. 535.

(b) Holt's C. N. P. 383.

(c) See *post*, guarantees not under seal,
where several or joint.

shall himself carefully examine the same, and give notice of the least default or irregularity on the part of the clerk, and that otherwise the surety shall not be liable. (d) A surety by bond, unless he have a counter-bond to indemnify him, and which it is advisable to obtain, upon paying the principal obligee, is merely a simple contract creditor of the debtor; though, if there were a mortgage, he might, upon paying, obtain an assignment thereof as his own security. (e) He would not be discharged from liability in equity by the creditors taking a warrant of attorney, payable by instalments, if no additional time be given, or he were privy to the arrangement. (f) As between several sureties by the same bond, if one pay more than his just share, he has in general a right to contribution from the co-sureties; (g) but not so where sureties are bound by separate instruments for equal portions of a debt due from the same principal, and the suretyship of each is a separate and distinct transaction. (h)

If a contract be too uncertain in its terms to collect its certain meaning, and the statute of frauds preclude the admissibility of parol evidence to clear up the difficulty, (i) or the parol evidence will not supply the defect, then neither at law nor in equity can effect be given to it; (k) and though an agreement referring to a plan may be rendered perfect, if the identity of the plan intended to be referred to can be established; (h) yet if the latter be uncertain, even a court of equity will not decree specific performance. (k).

If there have been a mistake in drawing up a formal written contract, it is advisable in general for the party prejudiced by the error to apply to a *Court of Equity* to reform the instrument, and which will, in proper cases, be enforced; (l) and this has been effected, although the party applying to the court was in the profession of the law, and himself drew the contract, it appearing clear that it was framed so as to admit of a construction inconsistent with the true agreement of the parties; (m) and even a surety may be compelled to give a joint and several promissory note according to the agreement of the parties, where by mistake a mere joint note had been given. (n) And where trustees have by *mistake* of facts agreed to sell an estate at a sum greatly under the real value, a Court of Equity will

11. Necessary
certainty in con-
tracts.

12. Mistakes in
contracts, and
how reformed in
equity or aided
at law.

(d) *Ante*, 82, 83.

(e) 1 Turn. & R. 224.

(f) *Id.* 395; 2 Sim. R. 12, 155, 253.

(g) 2 Bos. & Pul. 268, 270; 1 J. B. Moore, 8.

(h) 1 Turn. & R. 426.

(i) 5 B. & Cres. 583; *post*, 125, note (c).

(k) 1 Russ. & M. 116.

(l) See in general chap. v. *post*.

(m) 1 Sim. & Stu. 210; 3 Russ. R. 424.

(n) 3 Russ. R. 424.

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not assist the purchaser upon a bill for specific performance, but will leave him to get what damages he can by action at law. (o) But a Court of Equity will reform a deed only where the intention of the parties has been mistaken by the drawer, and will not correct an error in an instrument occasioned by the ignorance of the parties in a matter of law. (p) Sometimes also the consequence of a mistake in drawing up a written contract may be aided *even at law*; as where a material word appeared to have been *omitted* in a lease by mistake, and other words therein could not have their proper effect unless the omitted word were introduced, it was held that such lease must be construed as if that word were inserted, although the particular passage where it ought to stand conveyed a sufficiently distinct meaning without it. (q) But if there be no patent ambiguity on the face of the instrument, nor improper conduct amounting to such fraud as to invalidate the contract, and the terms of the instrument be clear, though contrary to the real intention of the parties, no parol evidence is at law or in equity admissible to controul or contradict the written terms in any suit upon it; (r) and therefore the only course is to file a bill at the earliest instant to have the written contract reformed. (s)

So a conveyance which passes too much may be rectified, and the excess deducted; and it should seem that an issue may be directed with a view to correcting a mistake in a deed. (t) And where a deed affects by its recitals to carry an agreement into execution, and goes beyond such agreement, the Court will rectify it. (u) But a bill to rectify a conveyance alleged to have passed by mistake, and that more was included in a previous agreement, was dismissed, the conveyance reciting a more extended agreement, and the parties being dead, and the agent of the grantor having acknowledged the extended agreement, and the agent of the grantee, who could have given a personal account of the transaction, not having been examined by the plaintiff. (x) And in general great caution is observed by a Court of Equity in cutting down the effect of a formal conveyance. (y)

2. Particular
contracts.

It would be beyond the present undertaking to consider every contract in particular, and we have therefore only stated general rules. However, *contracts of sale* and of *guarantee* are of such general importance, that we will notice at least a few of the points respecting them.

(o) 1 Jac. & W. 74.

(p) *Cockerell v. Cholmely*, 1 Russ. & M. 418.

(q) *Wight v. Dickson*, 1 Dow, 141, 147.

(r) See cases collected and ably commented upon in Sugd. V. & P. 8 ed. 124

to 157.

(s) *Ante*, 123, notes (m), (n).

(t) 1 Turn. & R. 41.

(u) *Id.* 52.

(x) *Id.* 41.

(y) *Id.* 54.

With respect to contracts of *sale of "any goods, wares or merchandise, for the price of ten pounds sterling,"* the statute against frauds, 29 Car. 2 chap. 3, (s) requires that "if the buyer shall *accept part* of the goods so sold, and *actually receive* the same, or give something in *earnest* to bind the bargain, or in part of payment, or that some *note or memorandum in writing* of the *bargain* be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized;" and that provision has been extended to all contracts for the *sale* of goods, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured, or provided, or fit or ready for delivery; or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but the memorandum need not be stamped. (a) When the contract is in writing, and there is a *warranty*, it is advisable to make it part of the written stipulation.

Although this clause in the statute against frauds does not require an agreement *formally* drawn up, but only *a note or memorandum* of the *bargain*, yet the term bargain here is equivalent to the word agreement in the fourth section of the act, (b) and, therefore, the note or memorandum must at least state the *price* for which the goods were sold, and the court will not allow the defect to be supplied by receiving evidence of a *quantum valebat*. (c) The real purchaser may, in general, be sued, although his agent were debited. (d)

A contract of sale of specific goods, complete at the time when paid for, immediately vests the property in the purchaser, and he may take the possession and is responsible for death or loss. (e) But when the contract might be satisfied by delivery of the stipulated quantity out of a *larger bulk*, and the purchased article has not been set apart, or when the vendor is to *make* an article for the purchaser and it is not finished, no property has vested in the purchaser, although he may have advanced the full price to the vendor, unless it has been expressly stipulated otherwise. (f) If the property has passed to the vendor then he may not only take it, but he might support detinue or trover for withholding it. (g)

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1. Precautions
in contracts of
sales.

(s) See decisions on the act, Chit. Col. Stat. tit. Frauds, p. 377 to 383.

(a) 9 Geo. 4, c. 14, s. 7, 8.

(b) *Egerton v. Matthews*, 6 East, 307.

(c) 5 Bar. & C. 583; 8 D. & R. 343; 9 B. & Cres. 561, 569, 570.

(d) 9 B. & Cres. 78, 449.

(e) *Shep. Touch*, 225; Long on Per-

sonal Property, 147, 148; 6 Bar. & Ald. 360.

(f) *Id. ibid.*; 1 Taunt. 318; 2 Campb. 240; 5 B. & Ald. 492; 2 Bos. & P. 584; Cowp. 294.

(g) *Id.*; Fitz. N. B. 138; Willes, 120; 1 Dyer, 24, n. (b.)

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If a *warranty* has turned out false the purchaser may *immediately* refuse to take the commodity, but he cannot return it after once accepting it, excepting where fraud, or express agreement to take back, can be proved. *(h)* But goods ordered generally, if unfit for the understood purpose, may be returned within a reasonable time. If the goods have been properly returned *immediately*, or, in the last case, within a *reasonable time*, then the purchaser may resist payment, *(i)* but otherwise not; *(j)* or in an action against him for the price the purchaser may *reduce* the damages or sum to be recovered, by proving the breach of the warranty, and the amount which in respect thereof ought to be deducted from the price; *(k)* or the purchaser may, in the case of an express warranty, pay the whole price, and bring a cross action of *assumpsit* for the breach of warranty; *(k)* or he may bring an action on the case for the fraud or deceit, *(l)* and which seems the proper action where there has been *fraud*, as concealment, without any express warranty. *(m)*

In case of a contract of purchase of *real* property, the purchaser is not bound to take or accept a conveyance of a part of one undivided share out of seven with compensation. *(n)*

2. Precautions
in regard to
guarantees.

Guarantees are a description of *simple* contract that very frequently becomes the subject of discussion and litigation, and in making them more care and precaution appear to be necessary than is usually observed. The statute against frauds, 29 Car. 2, c. 3, s. 4, enacts, "that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special *promise* to answer for the debt, default, or miscarriage of another person, unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The terms, "*promise*," and "*agreement*," in this act, do not extend to guarantees *under seal*, or to bills of exchange or promissory notes; *(o)* and, therefore, whenever the sum to be secured is considerable, it will be most advisable to require a guarantee under seal, or by bill or note, so as to avoid the questions

(h) 2 B. & Adolp. 456.
(i) 2 Taunt. 2.
(j) 2 Bar. & Adolp. 456.
(k) Id. *ibid.*; 2 East, 451.
(l) Dougl. 21; 2 Stark. R. 163; 2 East, 446; 4 Bing. 72; 5 Bar. & Cres.

605; 5 T. R. 142.
(m) 12 East, 11; 4 Campb. 22; 5 B. & Cres. 605; 5 T. R. 142.
(n) 3 Sim. R. 29; 1 Russ. & Myl. 29;
(o) 1 Tyr. Rep.

which so frequently arise upon the sufficiency of the statement of the consideration in common guarantees not under seal.

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The guarantees must, at all events, be in *writing* and *signed*; further, it must be a promise or agreement; and a mere *proposal* to guarantee, unless the person to whom it is made communicate his acceptance, is not binding, (p) and it is said such acceptance may be by parol. (q)

Under the term "*agreement*," it is settled, that not only the *engagement* itself must be stated in writing, but also the *consideration* upon which it is founded, either expressly, or in terms from which it may be inferred. (r) Thus an engagement in these words, "Messrs. Wain and Co., I will engage to pay you by half-past four this day fifty-six pounds, and expenses, on bill that amount, on Hall, (Signed) Jno. Warlters, (and dated) No. 2, Cornhill, April 30, 1803," was held insufficient; (s) and where the engagement was, "Mr. W. will engage to pay the bill drawn by Pitman in favour of L. S." it was held invalid; (t) and the following letter, addressed by the defendant to the plaintiff, which the defendant dated and signed, was held insufficient— "To the amount of 100*l.*, consider me as security on I. C.'s account." (u) So where the defendants wrote thus, "Messrs. Boothey and Co. we hereby promise that your draft on W. C., due at Messrs. ———, at six months, on 27th Nov. next, shall be then paid out of money to be received from St. Phillip's Church, say amount to 174*l.* 13*s.* 5*d.* W. Clarke, to Boothey;" was holden an insufficient guarantee, for not stating the consideration. (x)

But when the consideration may *fairly be collected or intended* from the words of the agreement, then it is sufficient. Thus, "I guarantee the payment for any goods which T. S. delivers to J. B.," is sufficient, the future delivery of the goods being apparently the consideration. (y) So, "I hereby guarantee the present account of Miss H. M. due to R. T. L. and Co. of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30 Sept. next;" has been considered sufficient. (z) So a guarantee "that P. C. shall faithfully and honestly discharge any duty assigned to or trust reposed in him," and upon which the

(p) 1 Stark. R. 10; 1 M. & S. 557, ante.

(q) *Coleman v. Upcot*, 5 Vin. Ab. 527; but see ante, 1 Russ. & M. 394.

(r) *Wain v. Walters*, 5 East, 10; 1 Smith, R. 299.

(s) 5 East, 10.

(t) 4 B. & Ald. 595.

(u) 6 Moore, 86; 3 Bro. & B. 14.

(x) 3 Bing. 107.

(y) 9 East, 348; 1 Campb. 242; 6 Esp. R. 89; 6 Bing. 201.

(z) 6 Moore, 521; 3 Bro. & B. 211; and see other instances, Holt's C. N. P. 153; 3 Moore, 15; 1 Bing. 216; 15 East, 272.

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When or not
a guarantee is
continuing.

plaintiff employed P. C. is sufficient, the consideration appearing on the face of the instrument. (a)

Questions also frequently arise, whether the guarantee was confined to a single transaction or was *continuing* and extended to all or to some subsequent transactions. (b) Where the defendant engaged in writing to guarantee the plaintiff, "for any goods he hath, or may supply my brother, H. P. with, to the amount of £100," the court held it a continuing or extending guarantee for any debt which might at any time become due for goods supplied, until the credit was recalled, and that the meaning of it was, that the defendant would be answerable at all events for goods supplied to his brother to the extent of 100l. at *any* time, but that he would not be answerable for more than that sum; (c) and so where a guarantee stated, that the defendant had been applied to by his brother, W. W. to be bound to plaintiff for such debts as he might contract with them, and then added, "I consider myself bound to you for any debt he may contract for his business as a jeweller, not exceeding 100l. after this date," it was decided that the defendant was answerable for any debt, not exceeding 100l., which W. W. might *from time to time* contract with plaintiff in the way of business, and that the guarantee was not confined to one instance but applied to debts successively renewed; (d) but a guarantee of the payment to A. B. "to the extent of 60l. at quarterly account, bill two months, for goods to be purchased by him of the plaintiff," is not a continuing or standing guarantee to that extent for goods to be at any time supplied to A. B. until the credit is recalled. (e) So a guarantee for payment for coals to the amount of 50l., which defendant would be answerable for at any time, is not a continuing guarantee. (f)

Nearly the same precautions should be observed on the behalf of a party *guaranteeing* as on the part of a *surety*, and, therefore, reference to that head should be made. (g)

When a party
guaranteeing is
discharged from
liability.

In case of a guarantee of the due payment of a bill or note he ought to have notice, if it be not duly paid, but he is not discharged by want of that prompt and strict mercantile notice to which parties on the bill or note itself are strictly entitled; (h) nor can he resist payment on account of want of notice or other

(a) 2 Dow. R. N. S. 211; and see 6 Bing. 201, observations of Tindal, C. J., as to allowing too much strictness in construing guarantees; and see *id.* 248, 249.

(b) 6 Bing. R. 244, 276.

(c) 12 East, 227; 2 Campb, 436.

(d) 2 Campb. 413.; see 6 Bing. 244.

(e) 3 Bar. & Ald. 593; and see 2 Maule. & Selw. 18.

(f) 2 Chitty's R. 205; and 6 Bing. 276.

(g) *Ante*, 82, 83.

(h) *Warrington v. Furber*, 8 East, 242.

neglect, unless he can prove that he has really sustained damage by the neglect. (i) In general, *mere passive* conduct of an obligee, without expressly granting time to the principal obligor, will not discharge a surety; (k) nor will the circumstance of the principal obligor afterwards executing to the creditor another bond for a larger sum, or of the obligee obtaining a bond from another surety, discharge the surety; (l) and a surety has no right to say he is discharged from the debt if all that he rests upon is the *passive* conduct of the creditor in not suing; he must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue, or to give him, the surety, the means of suing. (m) But *agreeing* to give time and renewing bills without the knowledge or concurrence of a surety, will, at law as well as in equity, discharge the latter, in the case of a surety by simple contract, though in case of a bond he could not plead such agreement as a defence at law. (n) The terms upon which the guarantee was given, must in general be fully and strictly complied with by the creditor. (o) Taking a *cognovit* or warrant of attorney from the principal debtor, without giving him any *extra* time, does not discharge a surety. (p) It has been considered that a surety may, in equity, be discharged by the creditor's negligently losing the benefit of a collateral security. (q) But the signing the principal debtor's certificate does not discharge his surety. (r)

The liability of a surety or guarantee generally ceases upon the death of one of the parties for whose conduct he was to be responsible, unless otherwise provided. (s) Payments made after the death are in general to be applied in reduction of the oldest items of the current account, and not of the more recent items, (t) but in general the appropriation is for a jury. (u) If

Guarantee's
indemnification.

(i) Chitty on Bills, 8th ed. 474, 475, 476.

(k) *Eyre v. Everett*, 2 Russ. R. 381, 384, 416, 600; see other cases, Chit. Com. L. 324 to 330.

(l) 2 Russ. R. 381.

(m) *Id.* 384; and see *Gordon v. Calvert*, 4 Russ. R. 581. B. was hired as a clerk to A. and Co., but not for any definite period, and C. and D. joined with him in a joint and several bond to secure his duly accounting for his receipts, and C. died, and his executrix gave a written notice to A. and Co. that she would no longer remain surety; and thereupon A. and Co. communicated this notice to B., and required and obtained from him the bond of another surety. D. died and also the new surety, and four years and a half after the death of C., B. died, when deficiencies

were found in his accounts, *subsequent* to the notice; and it was held, that the executrix of C. had no equity to restrain A. and Co. from proceeding at law on the bond. See 2 Simons' R. 253; 7 Bar. & C. 809, S. C.

(n) *Coombe v. Woolfe*, 8 Bing. 156; Holt's C. N. P. 84. 399; *Davey v. Pendergrass*, 5 B. & Ald. 187; see the cases when a surety is discharged collected Chitty on Bills, 8 ed. 441 to 456.

(o) 5 Bar. & C. 269; 2 Dowl. & R. 22; 5 Bing. 485; but see Fell on Guarantees.

(p) 2 Sim. 12, 155, 253; 1 Turn. & R. 395.

(q) 2 Sim. & Stu. 457.

(r) *Brown v. Carr*, 7 Bing. 508; 5 Moore & P. 497; 2 Russ. R. 600. S. C.

(s) 4 Russ. R. 154.

(t) 2 Dow. & Clar. 211.

(u) 4 Russ. R. 154.

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the surety or guarantee be called upon to pay the creditor, he should get a third person to *purchase* the security and claim on the principal, and take an assignment thereof and of all securities; for if he himself pay off the debt or security, it having been thus satisfied, he could not afterwards sue the principal debtor in the name of the creditor, although the security might afterwards be assigned to him, (v) and he would be only a simple contract creditor of the principal, (w) though it might be otherwise as to a mortgage security. (x)

II. & III. IN-
JURIES TO PER-
SONAL PRO-
PERTY, AND
REMEDIES AND
PUNISHMENTS.

In a preceding chapter we spoke generally of *Injuries* to Personal Property. We will here more particularly consider them; *first*, as they relate to *tangible* personal property, whether in *actual* or supposed possession of the owner, or whether the right is in remainder or reversion, or vested in several owners, with their appropriate remedies and punishments; and *secondly*, as they affect *choses in action* and their remedies.

First. Injuries to personal property in possession, remedies and punishments.

1. Illegal takings.

Civil takings, without crime.

1. Personal property in *possession* may be injured by *illegally taking* the same out of the possession of the owner, either by means not criminal, or by criminal means, and the latter may be by a *criminal illegal taking*, *felonious* at common law, or by *embezzlement*, where the original taking or obtaining possession was neither illegal nor felonious, or by obtaining goods, money, or valuable security by *false pretence*, or by *threats* of various descriptions, some of which are felonious, and others not so; or the injury may be by *detention*, either with or without criminal offence; or lastly, the injury may be by *damaging* the chattel whilst in the possession of the owner, and which also may be by acts not criminal or by criminal acts; the former by bailees and others, whether by malfeazance, misfeazance or nonfeazance; and the latter may be felonious or malicious to the owner, or malicious towards an animal, as ename- rated in the statute against cruelty to animals, &c.

The *remedies* for injuries to personal property in possession are of three descriptions, viz. *preventive*, *compensation*, and *punishments*. Thus the owner may *prevent by resistance* an illegal taking by force, not using a dangerous instrument; (y) and *recaption* is legal; and if under colour of an execution against the goods of A. the goods of B. in his hands, obtained by fraud, be taken by the sheriff, B. may take them out of the custody of the sheriff, even by stratagem. (z) So goods obtained

(v) 4 Russ. R. 277; 1 Turn. & R. 224.

(w) 1 Turn. & R. 224.

(x) Id. ibid.

(y) 3 Bla. C. 3, 4; 2 Inst. 316.

(z) 3 Bla. C. 4, 304; 1 Bar. & C. 514;
2 Dow. & R. 755; 1 Mood. & M. 107.

by false pretences, under colour of a purchase, may be retaken by the vendor out of the hands of the purchaser or his assignee; (a) and if a vendor discover that the purchaser is insolvent, he may stop them *in transitu*, (b) a right which he himself must exercise, for a Court of Equity will not interfere to stop goods *in transitu*. (c) If the goods cannot be retaken without committing or occasioning a breach of the peace, then the remedy is by replevin, (d) or by action of *detinue*, though taken by force; (e) and sometimes a Court of Equity will compel the delivery of a specific chattel. (f). So an action of trover lies to recover the value of a personal thing illegally taken or detained, (g) or trespass, where the taking was illegal. (h) When the value of the thing taken or the damage done to it does not exceed 5*l.*, and the taking or injury does not constitute a felony, punishment, and sometimes compensation, may be obtained summarily before a justice of the peace, (i) and a summary proceeding is also afforded with respect to game. (k)

If the original taking were *criminal* and *felonious*, (l) the common law as well as the statute (m) subjects the offender to an indictment for *larceny*, whenever the goods and chattels or thing taken were in legal contemplation moveable personalty, and not part of the realty, and also valuable, (n) and also when the original *taking* was not only illegal but also *felonious*; but if the *taking* were legal or not felonious, and only the *subsequent* misapplication of the property was criminal, then at common law no indictment for larceny was sustainable, and that determination occasioned the passing of the statutes to render the embezzlement by servants and others punishable. Thus if a master gave a servant a 5*l.* note to get changed, and the servant absconded with the money, this was not larceny, or punishable at common law, because there was no felonious taking, but under the acts against embezzlement it is now indictable. (o) As to some animals and things of superior value, as horses, cows and sheep, and certain enumerated valuable securities, the larceny was declared capital by statute. (p)

Criminal
takings.(a) 7 Taunt. 59; *post*.(b) *Post*.

(c) 2 Jac. & W. 349.

(d) 2 Stark. 288; 1 Chit. Pl. 188.

(e) 1 Chit. Pl. 139.

(f) Chit. Eq. Dig. tit. Chattels Personal, and tit. Estate, IX., *et post*.

(g) 1 Chit. Pl. 176, 177.

(h) 3 Wils. 336; 1 Chit. Pl. 197.

(i) 7 & 8 G. 4, c. 29, and *id.* c. 30, s. 24.

(k) 1 & 2 W. 4, c. 32, s. 31 to 37.

(l) When not so, see an explanatory case, *Rex v. Alexander*, Burn's J., Horses, I.; *Id.* Larceny; 3 Inst. 316.

(m) 7 & 8 G. 4, c. 29. The halves of country bank notes, 4 Car. & P. 535.

(n) When not, see *ante*, 95, and *Rex v. Searing*, Russ. & R. 350.(o) *Rex v. Sullens*, cor. twelve judges, A.D. 1820, Carr. Cr. L. 318, 319.(p) 7 & 8 G. 4, c. 29, *per tot* altered as to horses, &c. by 2 & 3 W. 4, c. 62.

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Robbery is punishable capitally with death. (q) *Stealing privately* from the person is punishable with transportation for life or seven years, or four years' imprisonment. (r) *Sacrilege* and *burglary* are punishable capitally with death, (s) and so was *housebreaking* in the day-time, (t) but the capital punishment of death for the latter, and for stealing horses, cows or sheep, or killing the same with intent to steal them, is now repealed, and the punishment is only transportation for life. (u) The stealing from particular places is by various provisions in the same act rendered penal, with varying punishment; (x) and felonious stealing by tenants, and lodgers, and clerks, and servants and others, are punishable with transportation; (y) and the taking of *deer*, hares and rabbits, fish, &c. is specially punishable under the 7 & 8 Geo. 4, c. 29. (z)

It will be obvious that as the law allows *resistance* of attempt to take by means not criminal, so it ought to and does permit resistance when the taking would be criminal. (a) But with respect to *recaption* it is not so, for in many cases of *felonious* takings the owner cannot retake his property, or have restitution, until after he has performed his duty to the public, by prosecuting the offender to conviction or acquittal, after which the Court will award restitution, unless where a negotiable security has got into the hands of a *bonâ fide* holder for value. (b)

In general, however, the owner may *retake* the thing stolen, unless sold in *market overt*, (c) and a pawnbroker's shop is not a market overt to prevent such recaption, and trover always lies against a pawnbroker after demand by the owner, (d) and before the above act, in case of a sale in market overt, still after the owner had prosecuted the felon, he was entitled to retake or recover from the person *then* in possession. (e) With respect to *horses*, there is a peculiar law under the statute 2 & 3 Ph. & M. c. 7, and 31 Eliz. c. 12, by which, unless there has been a sale in market overt, with all the precautions required by the acts, the owner may retake or sue at any time; (f) but after a regular sale, pursuant to the acts, the owner cannot maintain trover until after conviction; (g) and although the law thus allows a person in certain cases to retake, yet it is illegal and

(q) 7 & 8 G. 4, c. 29, s. 6.

(r) Id. *ibid.*

(s) Id. s. 10, 11.

(t) Id. s. 12.

(u) 2 & 3 W. 4, c. 62.

(x) 7 & 8 G. 4, c. 29, s. 12; see next Chapter, *post*, as to the description of particular places.

(y) 7 & 8 G. 4, c. 29, s. 45, 46.

(z) Sect. 26. See 5 Car. & P. 135, as to the proper form of conviction.

(a) 3 Bla. C. 4, note 3; 1 Mood. & M. 107.

(b) 7 & 8 G. 4, c. 29, s. 57.

(c) 2 Bla. 449; Burn's J., Horses, II.

(d) 2 Stra. 1187; 1 Stark. R. 472; 2 Campb. 336; 1 Wils. 8; 2 Bla. C. 440.

(e) 2 T. R. 750.

(f) Id. s. 5; Burn's J., Horses, II.; 2 Bla. C. 451.

(g) 2 Car. & P. 41, 43.

punishable to *advertise a reward* for the return of the thing stolen without asking questions, or otherwise stipulating not to prosecute. (*h*) In cases of *horses feloniously* stolen, justices have express power to afford summary relief, (*i*) but that power is confined to horses *stolen*, and does not apply when they have been obtained by false pretence, (*k*) nor do the statutes extend to other chattels whereof felony may be committed at common law.

Other statutes provide *summary punishment*, with power, in some cases, to award satisfaction for criminal takings and injuries to several things, of which larceny or felony could not have been committed at common law, as hares and rabbits, dogs, and beasts, and birds *usually confined*, pigeons, fish, certain trees and shrubs, wood fences, posts and rails, fruit, roots, vegetables, the taking of which did not constitute larceny at common law, but in all which cases justices now have summary jurisdiction. (*l*)

In cases of *felonious* takings in general, the remedy by action, as already observed, is *suspended* until after conviction or acquittal of the supposed offender; (*m*) but in the instance of horses, the civil action of detinue or replevin is expressly reserved, unless there has been a regular sale in market overt, (*n*) and it is expressly provided that when the taking of any chattel or thing is only a *misdemeanor*, as taking wills and writings, being evidence of title to an estate, the power to prosecute for the criminal offence and punishment shall not prevent, lessen, or impeach any remedy at law or in equity for the private injury. (*o*)

An illegal taking by *embezzlement* or *breach of trust* was not at common law punishable; but now, if a clerk or servant, when employed as such, shall, by virtue of such employment, embezzle any chattel, money, or valuable security, he is to be deemed to have *feloniously* stolen the same; (*p*) and if a banker, merchant, factor, broker, attorney, or *other agent*, embezzle money, or securities for money entrusted to them, they are respectively guilty of an indictable misdemeanor; (*q*) but it is expressly provided that that enactment shall not affect trustees or mortgagees, or extend to bankers disposing of any lien; (*r*) and it is expressly enacted that those provisions as to all such agents shall not lessen any civil remedy which the party aggrieved would otherwise have. (*s*) So that a prosecution and also an action might be sustained at the same time against the

Embezzlement.

(*h*) 7 & 8 G. 4, c. 29, s. 59.(*i*) 2 & 3 Ph. & M. c. 7; 31 Eliz. c. 12; Burn's J., Horses, II.(*k*) 2 Stark. R. 76.(*l*) 7 & 8 Geo. 4, c. 29.(*m*) 2 T. R. 750; 2 Car. & P. 41, 43.(*n*) 2 & 3 Ph. & M. c. 7, s. 5.(*o*) 7 & 8 Geo. 4, c. 29, s. 24.(*p*) Id. c. 29.(*q*) Id. s. 49.(*r*) Id. s. 50.(*s*) Id. s. 52.

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agent and his sureties. But these provisions only apply to embezzlements in case of a regular employment in the capacities enumerated, and do not extend to a person gratuitously engaging, on a particular occasion, to procure the discount of a bill, not being in any business within which such an employment regularly falls; for, *per* Lord Tenterden, it is true that for certain purposes a friend is an agent, but it was intended to confine the operation of the statute to persons acting in discharge of their *functions*. (i)

False pretences. Another criminal mode of illegally taking goods from the possession of the owner is by a *false pretence*. This so far invalidates the sale, that re-capture by the owner, even by stratagem, is legal; (u) and an action of trover, or case, or assumpsit against the deceiver may, in general, be sustained. (v) The act is only punishable criminally as a misdemeanor by statute; (w) or, if several concur, they may be indicted for a conspiracy at common law. (x) A representation that the party could or would do a particular act, as that he could or would get a bill discounted, though he knew he could not, is not a false pretence within this act, but rather a breach of promise, and the false pretence must be of the existence of some fact; (y) nor is a false warranty without conspiracy *indictable*, (z) or the obtaining money upon a second sale or mortgage, concealing the prior incumbrance, indictable. (a) A false pretence being only a misdemeanor, the criminal punishment does not affect the right to proceed by a civil action of replevin, detinue or trover.

Obtaining by
threats.

The obtaining personal property by *threats* is, in some cases, by the criminal law, punishable capitally. At common law the extorting money by threat or duress is indictable. (b) An assault, with intent to rob, or menacing, or by force demanding any property, with intent to steal, is felony punishable with transportation for life, or not less than seven years, or imprisonment for not exceeding four years, and whipping, if a male. (c) Any menace or threat to impute an infamous crime, with intent to extort, and thereby succeeding in extorting any chattel, is indictable as robbery, and punishable with death. (d) Sending a letter or writing, demanding with menaces any chattel, money,

(i) *Rex v. Prince*, Mood. & M. 21; 2 Car. & P. 517.

(u) 1 Bar. & C. 514; 2 D. & R. 755; 7 Taunt. 59.

(v) 1 Stark. 20; 9 B. & Cres. 59.

(w) 7 & 8 Geo. 4, c. 29, s. 53; even against a minor, *Burn's J., Cheat, I.* For obtaining enlisting money, 10 Geo. 4, c. 6.

(x) 3 T. R. 98; 5 D. & R. 611; but not at common law, unless there was a

conspiracy of two or more; 1 Stark. R. 402; 4 Car. & P. 592.

(y) *Rex v. Clifford*, A. D. 1824, MS., and *Rex v. Goadhall*, Russ. & Ry. C. C. 461. See Chitty on Bills, 8 ed. 769.

(z) 1 Stark. R. 402.

(a) 1 Car. & P. 661.

(b) *Burn's J., Threats*.

(c) 7 & 8 Geo. 4, c. 29, s. 6.

(d) *Id.* s. 7.

or valuable security, or threatening to accuse of *certain offences*, with intent to extort, is felony punishable with transportation for life, or seven years, or imprisonment for four years, and whipping, if a male. (e) Threats to destroy corn, hay, or straw, are also indictable. (f)

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Illegal *detentions*, where the taking was legal, may be by civil or criminal means. The former may be remedied by recaption when wrongfully detained by a person who ought to restore the thing to the owner, (g) or by replevin, (h) or by action of detinue; (i) or sometimes by summons, as under the Pawnbrokers' Act, or statutes relating to servants detaining materials they have had to work upon, or by bill in equity for specific restoration of the chattel, as in the case of an heir-loom, &c. (k), or to recover compensation by action of trover, (l) or by seizure for a heriot, (m) or for tolls, (n), or by distress where rent, or poor-rate, or highway-rate, is not paid. (o) The criminal proceedings may be those in case of embezzlement, which we have before noticed. (p)

2. Illegal detentions.

The injuries to personal property by *damaging* it whilst in the possession of the owner or a bailee, or of the wrong-doer himself, are of a civil or criminal nature. Those of a civil nature may be all injurious acts committed either forcibly or otherwise, and which render the chattel less valuable; and they may be committed by bailees or others having the legal possession, and constitute either breaches of express or implied contract, or torts independent of contract, and in which the remedy by action may be framed accordingly; (q) or they may be committed by third persons not having the legal or any possession, and when the remedy by action may be either trespass or case, according to the nature of the injury, as whether it were direct and immediate, and with force, in fact, or implied by law, or only consequential, or not even with implied force, and whether a nonfeazance, misfeazance, or malfeazance; and the remedy may also depend on the question whether the owner had an immediate right to the possession of the chattel, or whether his bailee had the right of possession, or his interest

3. Illegal damaging.

Civil injuries not criminal.

(e) 7 & 8. Geo. 4, c. 29, s. 8.

(f) 4 Geo. 4, c. 54, s. 3; Burn's J., Threats.

(g) 1 Bar. & C. 514; 7 T. R. 59; when not, see 8 Bing. 186; 1 B. & Adolp. 394; 1 Mood. & M. 107.

(h) 1 Chit. Pl. 188; 2 Stark. 288.

(i) 1 Chit. Pl. 159.

(k) 1 Chit. Eq. Dig. tit. Chattel Per-

sonal, and Estate, IX. *et post*.

(l) 3 Bla. C. 152; 1 Chit. Pl. 176.

(m) 2 Saund. 168, n. 1; 3 Bla. C. 15.

(n) *Post*, ch. vii.

(o) *Id. ibid*.

(p) *Ante*, 133.

(q) See in general 1 Chit. Pl. 153 to 159.

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Criminal injuries wilful or malicious.

was in remainder or reversion ; an action of trespass is, in general, the proper remedy for a direct injury with force to a chattel in the actual or implied possession of the owner, but *case* is the only proper remedy when the injury was only consequential, or the owner's right of possession was in future ; (r) and *case* is always the proper remedy for negligence or non-feazance, or where the property affected is not tangible, and where it would be obviously an illogical statement of the injury to describe it as committed with force. (s)

Injuries and damage to personal property, without taking the same out of the possession of the owner, and sometimes when committed by the owner himself, are also punishable, and, in some cases, compensated by proceedings under the *criminal law*, some by indictment, and others by summary proceedings before a magistrate. The principal statute against malicious or wilful injuries to property is the 7 & 8 Geo. 4, c. 30. (t) Thus, unlawfully and maliciously cutting, breaking, or damaging any goods or articles of silk, woollen, linen, or cotton, mixed or unmixed, and certain other specified manufactures in hose, lace, &c., is felony transportable for life ; (u) destroying threshing machines, or other machines employed in any manufactory, is felony, and seven years transportation ; (x) pulling down, or destroying or damaging any steam-engine for working a mine is felony, with transportation or imprisonment ; so riotously and tumultuously destroying any machinery, whether fixed or moveable, prepared for or employed in any manufacture ; (y) setting fire to or destroying any ship or vessel, whether or not in an unfinished state, is punishable capitally, (z) and damaging otherwise than by fire is felony, punishable with transportation for seven years, or imprisonment for two years, and whipping, if a male ; (a) and exhibiting false lights or signals, with intent to bring a ship into danger, is felony, punishable capitally. (b) Maliciously killing, maiming, or wounding any cattle, is a transportable felony ; (c) setting fire to stacks of corn, grain, pulse, straw, hay, or wood, is felony, punishable capitally ; and setting fire to any crop of corn, grain, or pulse, whether standing or cut, or to any part of a wood, coppice, or plantation of trees or heath, gorze, furze, or fern, is a transportable felony ; (d) hop-

(r) 1 Chit. Pl. 193 to 200 ; 2 Bar. & C. 934 ; 11 East, 571.

(s) Id. ibid. 1 Chit. Pl. 153 to 159 ; 3 Bla. C. 153, 154.

(t) See in general Burn's J., Malicious Injuries.

(u) 7 & 8 Geo. 4, c. 30, s. 3.

(x) Id. s. 4.

(y) Id. s. 8.

(z) Id. s. 9. How to describe the vessel and injury, and what a vessel, 4 Car. & P. 559, 569.

(a) Id. s. 10.

(b) Id. s. 11.

(c) Id. s. 17 ; Burn's J., Cattle.

(d) Id. s. 17 ; how to describe a stack of *haulm*, 4 Car. & P. 245 ; stack of *barley*, Id. 548.

binds and growing trees, vegetables, &c., are also protected by the same act, (e) but which will be stated in the next chapter respecting real property.

When in feloniously destroying a house, furniture or personal property therein is destroyed or damaged, the hundred is liable to make compensation for the whole of the injuries. (f) In other cases of malicious injuries of various descriptions, punishments are provided; (g) and when the injury does not exceed 5*l.*, a justice may fine or afford compensation summarily. (h) Under the 24th section of the act just alluded to, it has been holden, that if a small dog run after and bark at a party, and he thereupon beat him with unreasonable violence, under colour of self-defence, and thereby materially injure the dog, he may be proceeded against summarily before a justice for such injury; and although he may have left the premises, and gone a mile off, he may nevertheless be immediately pursued and apprehended without warrant, and therefore such imprisonment will be lawful. (i) *Cruelty to animals*, committed even by the owner, is punishable under the 3 Geo. 4, c. 71; but bull baiting is not an offence within that act, which extends only to the enumerated animals. (k) The poisoning fowls by throwing poisoned food, was actionable at common law; and the attempt to poison game or destroy their eggs, is punishable by express enactment. (l) As one of the means of preventing or detecting the stealing or improperly killing horses, &c. slaughtering houses are placed under particular regulations. (m) Injuries to the British Plate Glass (n) and the English Linen Company, (o) and even mere *threats* to destroy corn, grain, hay, or straw, are punishable. (p) And at common law all *conspiracies* to injure the actual property of another person, or his trade, would be indictable; though not a mere conspiracy to commit a trespass, as to enter a preserve and destroy the game. (q)

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In case of personal property, the *general* ownership, when the party is *entitled* to immediate possession, impliedly draws to it the constructive possession, though we have seen that in some cases actual possession is essential, as in that of a gift, or upon the assignment of goods, as against creditors, in which

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juries when in-
terest in remain-
der or reversion.

Civil injuries.

(e) 7 & 8 Geo. 4, c. 30.

(f) Id. c. 31, *post*.

(g) Id. c. 30.

(h) Id. s. 24.

(i) 2 Mood. & Malk. Ni. Pri. R. 15.

(k) 3 Car. & P. 225; 1 Man. & R. Mag. Ca. 105. S. C.; Burn's J. Cattle, 569.

(l) 1 & 2 W. 4, c. 32, s. 3 to 24.

(m) 2 Geo. 3, c. 71; Burn's J. Horses.

(n) 13 Geo. 3, c. 38.

(o) 4 Geo. 3, c. 37, s. 16.

(p) 4 Geo. 4, c. 54, s. 3.

(q) 13 East, 228.

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cases actual possession is essential to perfect the right, with the exception of the mortgage or transfer of a ship. (r) In other cases the right suffices, and therefore the general owner of a personal chattel, though he has never had actual possession, may support trover or trespass for an injury, as if he were in fact in actual possession. (s)

But if the general owner has not the *right* of possession, as where his interest by the terms of grant or bequest is to have it only after the death of another living person, or when on any other ground his possession is only in remainder or reversion, or where he has parted with his right of possession, as by letting furniture for an unexpired term, then the injury to such chattel is not *immediate* to him, but consequential only, and therefore he cannot for any injury sue in trespass or trover, but must declare specially in case for the injury to his reversionary interest. (t) And in these cases an indictment for larceny should state the felony to have been ^{as} against the property of the temporary owner, as of the occupier of a ready-furnished lodging; (u) and this was one reason why at common law a lodger could not be guilty of stealing the furniture of ready-furnished lodgings; (x) but that difficulty was removed by the statute 7 & 8 Geo. 4, c. 29, s. 45, which declares that such a taking shall be felony, punishable as simple larceny; and the indictment may state the goods to have been, at the time of the felony, the property of the landlord. (y) Where however a bailee himself commits an act putting an end to the continuance of his interest, as destroying the thing, trespass or trover may sometimes be sustained; (z) as where certain machinery, together with a mill, had been demised for a term to a tenant, and he without permission of his landlord severed the machinery from the mill, and it was afterwards seized and sold by the sheriff under a *fieri facias*, it was held that the landlord might support trover even during the continuance of the term. (a)

Criminal injuries.

The same rules apply to criminal proceeding; and in case of larceny of things demised by the owner, the indictment should therefore describe the property as that of the lessee, (b)

(r) 5 Bar. & Ald. 918.

(s) 2 Saund. R. 47, and notes; 1 T. R. 480; 7 T. R. 12.

(t) 4 T. R. ; 7 T. R. 9; 1 Ry. & M. 99; 1 Price, 53; 5 Bar. & Ald. 826; 2 Campb. 464; 3 Lev. 209.

(u) R. & B. C. C. 411; R. & M. C. C. R. 26.

(x) Kcl. 24; Show. 50.

(y) Burn's J. Larceny, 556, 557; Collyer's Stat. 334.

(z) 2 Campb. 464; 3 Campb. 187; 5 Esp. R. 35; see in general 1 Chit. Pl. 174, 175.

(a) 5 B. & Ald. 826; 3 Stark. R. 130.

(b) R. & R. C. C. 411; R. & M. C. C. R. 26.

unless he himself were the criminal, in which case, by express enactment, he may be indicted for larceny as of the goods of the lessor ; (c) or except in the case of *fixtures*, when, although the use of them has been demised, they may by express enactment be described as the property of the lessor. (c) It should seem that justices have summary power to fine and award compensation for wilful or malicious injuries, not exceeding 5*l.*, as well to personal property in remainder or reversion as in possession. (d) And we have seen that if a tenant or lodger be guilty of larceny, it may be treated as a common larceny, though in truth the offence is to property in reversion. (e)

Where the owner of personal property in remainder or reversion has reasonable ground to fear that the property will not be forthcoming at the time when his interest will vest in possession, he may, in some cases, by filing a bill in equity, secure the property against waste. (f)

When personal chattels belong to several owners, and one of them injures the same, in general the remedy against him cannot be by the ordinary actions of trespass or trover, unless the thing be destroyed ; (g) as if one tenant in common destroy the whole flight of a dove-cote, or all the deer in their park, in which case trespass might be sustained ; (h) but otherwise the remedy would be only by action on the case. (i) In the case of ships, or other property of considerable value, a Court of Equity will interfere to prevent injury, and regulate the exercise of ownership by each party. (k)

Thirdly. Injuries where the property is in joint tenancy or tenancy in common.

With respect to injuries to things *not tangible*, the right to which is in possession, they may be to copyrights in books or music, busts and sculptures, engravings and prints, inventors of *patterns* for linen, calicoes, &c., and the ownership in *patents* in general. Injuries against these are usually compensated by penalties and actions particularly provided by the statutes, which create or protect the exclusive right of the author or inventor, and will be found in the statutes before referred to. It has also been considered that an action might be sustained at common law. But although not noticed in the statutes, the

Fourthly. Injuries to things in possession, but not tangible.

(c) 7 & 8 Geo. 4, c. 29, s. 45 ; Burn's J. Larceny, 556, 557 ; *ante*, 138.

(d) 7 & 8 Geo. 4, c. 30, s. 24, *sed quære*.

(e) Id. c. 29, s. 45 ; *ante*, 138.

(f) See *post*, ch. viii. ; Chit. Eq. Dig. Chattels Personal and Estate, IX.

(g) Com. Dig. Estate, K. 8 ; 8 T. R. 145 ; 8 Bar. & C. 257, 268.

(h) Id. *ibid*.

(i) Id. *ibid*.

(k) *Post*, ch. viii.

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Fifthly. In-
juries to choses
in action, and re-
medies, and pu-
nishments.

preventive remedy by injunction, obtained by filing a bill in equity, is by far the most efficacious, and therefore will hereafter be very fully considered.

II. The civil injuries to *choses in action* are principally *breaches of contract*; but there are some unconnected with contract, as the nonpayment of legacies, &c.; and there are some injuries of a criminal nature, as forgery, &c. *Contracts*, we have seen, may be of *record*, as recognizances and judgments; or by *specialty*, as bonds, &c. under *seal*; or *simple* contracts not under seal, and whether written or verbal. The subjects of the contract may be infinitely various, and the injuries or breaches equally so. In general the injuries are nonpayment of money, or the omitting to perform or improperly performing some other act, or the doing some act that ought not to have been performed at all, such as deceitful representation. (*l*) It would be beyond the scope of this summary to enumerate all the contracts and injuries which may affect choses or rights of action.

Civil remedies.

The remedies in cases of nonpayment of *debts* may be by *set-off* under the statutes introducing the right of applying cross demands in discharge or satisfaction of each other; (*m*) but these do not enable a party to set off a simple contract debt against a judgment, (*n*) though upon motion the courts will, when the parties are the same, or the cross demands due in the same rights, upon motion, allow one judgment to be set off against the other, (*o*) and sometimes will even suspend execution in one action until the judgment has been perfected in the cross action, so as to be capable of being set off upon motion. (*p*) The *Bankruptcy* Act directs that *mutual credits*, as well as *mutual debts*, shall be set off against each other; (*q*) but the mutual credit must be of a nature that would at maturity end in a debt, and not in a claim for unliquidated damage. (*r*)

Debts for *rents*, when due under an actual demise, and when the creditor has a reversionary interest, may be distrained for, but not otherwise. (*s*)

If payment of money can only be obtained by suit, then the

(*l*) To sustain an action for falsely representing a third person proper to be credited with money or goods, there must have been a written guarantee stating the consideration, pursuant to the statute against frauds, or a *written* deceitful representation under 9 Geo. 4, c. 14, *post*, 142.

(*m*) 2 G. 2, c. 22, s. 13; 8 G. 2, c. 24, s. 4.

(*n*) 6 Taunt. 176; 8 Bing. 202; 7 Bing. 29, 61.

(*o*) Tidd, 9 ed. 911; and see 7 Bing. 435, *et id.*

(*p*) 7 Bing. 435.

(*q*) 6 G. 4, c. 16, s. 50; 8 Bar. & Cres. 105.

(*r*) 9 Bar. & Cres. 744.

(*s*) But not if the occupation be under a mere *agreement* for a prospective demise, Taunt.; or where the claimant has no reversion. See chap. vii.

remedy for a debt on *record* is by action of debt or *scire facias*; the former will be proper if there be a large arrear of interest, which it is probable will be recovered; but if the judgment has been only recently recovered, the plaintiff would obtain no costs without the leave of the judge, which would not be obtained in general; and, therefore, in general, *scire facias*, after a year has elapsed, is most proper. (t) If the debt be secured by *specialty*, then it is to be recovered by action of debt or covenant. If by *simple contract*, then by action of assumpsit, or by action of debt, provided the whole sum payable be completely due, but not if payable by instalments, and one of them be not yet due. (u)

Sometimes also a summary remedy by *arbitration*, or by application to magistrates for wages of labourers and servants in trade, is *compulsory*. (x)

If the contract were to perform affirmatively some other act than the mere payment of money, as if it were to convey an estate or an interest in land, or made upon the transfer of the goodwill of a business, and to deliver certain books relating thereto, (and not a mere ordinary sale of a *personal* chattel, the remedy for the breach of which would be adequately compensated by a verdict for damages at law,) a bill in equity may sometimes be filed to compel *specific performance*. (y) And on the other hand, if the contract were *negatively*, as not to do some act, as upon the sale of a coach concern or other business, not to run an *opposition coach*, or interrupt the concern, then the purchaser may file a bill against the vendor, and restrain him by *injunction* from running any coach, or otherwise violating his express contract. (z)

In cases also of breaches of stipulations in leases, in respect of which a clause of forfeiture or re-entry is expressly provided, effectual redress may be obtained, when the lease is valuable, by entering and vacating the lease. (a)

But in general the remedy for the breach of contract to perform or omit the performance of any act, is an action of cove-

(t) 43 Geo. 3, c. 46.

(u) 1 H. Bla. 547; 5 Bing. 200.

(x) 9 Geo. 4, c. 92, as to *friendly societies*; *Crisp v. Banbury*, 8 Bing. 394; and as to *servants*, 5 Geo. 4, c. 96, *post*.

(y) 1 Sim. & S. 174, 690; Chit. Eq. Dig. Agreement, XI., 42 to 63, *post*. When a bill lies to compel performance of specific agreement to enter into partner-

ship for a term, 16 Ves. J. 49; so to deliver a book used in a trade sold to complainant, 1 Sim. & S. 690.

(z) 2 Swanst. 253; 2 Mad. 198; Chit. Eq. Dig. 1053; 3 Chit. Com. L. 622, 623; and as to the cases when an *injunction* will be granted against a breach of covenant, contract, or trust, *post*, chap. viii.

(a) *Roe v. Galliers*, 2 T. R. 133.

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II. III.
INJURIES
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Sixthly, Injuries
by deceit, but
relating to a
contract.

nant, if the instrument were under seal; (b) and if not, then an action of assumpsit.

There are numerous choses in action or rights to sue, which are in some measure connected with contracts, and yet the remedy is not for a breach of contract, but for *deceit* or *misrepresentation*, which has occasioned damage to a party. Thus if a person assuming to accept a bill for another, represent that he is authorized so to do, and the holder in consequence retain the bill, and sue the supposed acceptor, and be nonsuited, and have to pay costs, he may afterwards sue the pretended agent for the amount of the bill and the costs, though the jury negative fraud. (c) So if a person fraudulently obtain goods on credit, he may be sued specially in case for the fraud before the expiration of the credit, though he could not be sued as for goods sold until after the credit had expired. (d) So if a party be induced to give more for goods sold by written particulars by a verbal misrepresentation of the auctioneer, he must sue specially for the deceit, and is bound to perform his written contract. (e) And whenever there has been actionable deceit, the action should be expressly founded thereon. (f) Actions for misrepresenting the solvency or character of a third person, in order to induce a trader to give him credit, have been restrained by the recent enactments requiring such representations to be in writing, and signed by the party making it. (g)

Choses in action, *independently of contracts*, are claims for *legacies*, *distributive shares*, and rights to receive or recover payment of money or damages, or a penalty under various statutes, such as contribution towards the expense of a party-wall, &c.

In general no action is sustainable even for *specific legacy*, still less for a legacy payable out of general assets, and the same is only recoverable in a Court of Equity or in the Spiritual Court. But in the case of a *specific* legacy of a moveable chattel or a chattel real, if the executor express his assent, the legal interest therein immediately vests in the legatee; and he may take possession or maintain actions as if in actual possession,

(b) Com. Dig. Covenant, A.

(c) 3 Bar. & Adol. 114; 7 Bing. 107; 6 Bing. 396.

(d) 9 Bar. & Cres. 59.

(e) 12 East, 11; 6 Taunt. 522.

(f) 4 Campb. 22, 144, 169; 12 East, 11; 3 Bar. & Cres. 623; 3 Price, 54;

4 Taunt. 488, 647, 779; 6 Taunt. 522.

(g) 9 Geo. 4, c. 14, s. 6. By a singular mistake in printing that clause, the reading is not clear. *Seem*, that it should be "obtain money or goods upon credit," and not "credit, money, or goods upon, unless," &c.

and may maintain ejectment to recover the property if entitled to immediate possession. (h) In case of a legacy or distributive share to be paid out of the general assets of the testator, the mere assent of the executor will vest no legal interest, nor can any action be supported to recover the value, unless the executor expressly promise in writing to pay, and then there also must be a *new consideration*, such as forbearance, to give effect to such a promise, and enable the legatee to sue at law. (i) Unless there be an express new consideration, and express promise thereon, the remedy for such pecuniary legacy is only in equity, (k) or in the Ecclesiastical Courts; (l) or by action on the administration bond after (and not before) decree in the Spiritual Court. (m) If the executor offer to pay the legacy, but impose certain conditions, the performance of which he has no right to require, he will be liable to pay the costs of a suit in equity against him. (n)

With respect to the remedy to compel contribution towards the expense of a party-wall, the building act expressly provides: an action. (o)

The *criminal injuries* relating to choses in action are principally the false making or *forgery*, prohibited and punished by several acts, but principally by the 11 Geo. 4, and 1 W. 4, c. 66; (p) and the act 2 & 3 W. 4, c. 123, taking away the punishment of death, excepting in cases of forgery of certain public documents; and the offences of *larceny*, *embezzlement*, and *false pretences*, as regards bills of exchange and other valuable securities, are also punishable under the 7 & 8 Geo. 4, c. 29. The forging an instrument having the *semblance* of a valid instrument, and likely to deceive, is an offence, though the instrument would not be perfectly valid for civil purposes. (q) But as to larceny and other offences of that nature, they are not committed unless the bill or valuable security stolen would have been valid and duly stamped, and enforceable in a civil action. (r)

Criminal injuries to choses in action, and punishment.

The stealing or *injuring* of records and legal proceedings and

(h) 3 East, 120; 3 Atk. 224; Cowp. 284, 289.

(i) 5 T. R. 693; 2 Lev. 2; Peake's R. 73; 1 Moore & P. 209; 7 Bar. & Cres. 542; ante, 110, 112.

(k) Chit. Eq. Dig. Legacies, 1411, 1414; 3 Ridg. P. C. 243.

(l) Id. ibid.

(m) 8 Bar. & Cres. 151; 2 Man. & R. 136.

(n) 1 Russ. Rep. 375; 1 Russ. & M.

70; a legacy may also be secured by injunction, 1 Russ. & M. 277, &c.

(o) 14 Geo. 3, c. 78, s. 41; Chitt. Col. Stat. Building Act.

(p) See cases and proceedings thereon, Chit. on Bills, 8 ed. 734 to 764.

(q) See Chitty on Bills, 8 ed. 742, 743.

(r) *Rex v. Pooley*, 2 Leach, 887; *Rex v. Yeates*, cor. twelve judges, A. D. 1828; Car. Crim. L. 3 ed. 273.

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documents, (s) and the concealing or destroying any will, codicil, or any testamentary instrument; (t) and the stealing writings relating to real estate, (u) and the stealing bills of exchange and other valuable securities before enumerated, (x) are made criminal. But it does not appear that there is any particular criminal enactment against damaging or injuring any bill of exchange or other valuable security, excepting a record or a will as above prohibited, or excepting where the act amounts to a larceny or forgery; though, where any malicious injury has not exceeded 5*l.* it would be punishable under the general clause against wilful and malicious injuries to any public or private property; (y) and it should seem that an action on the case might be supported for illegally cancelling the acceptance of a bill, or altering the bill itself, so as to render it invalid, unless the owner assented to the alteration. (z)

(s) 7 & 8 Geo. 4, c. 29, s. 21; *Rex v. Walker*, R. & M. C. C. 155.
(t) *Id.* s. 22.
(u) *Id.* s. 23.

(x) *Id.* s. 5.
(y) 7 & 8 Geo. 4, c. 30, s. 24.
(z) 1 Taunt. 420; 6 East, 309.

CHAPTER IV.

RIGHTS TO REAL PROPERTY, THEIR INJURIES AND REMEDIES
IN PARTICULAR.**I. Rights to Real Property.**Nature of Real Property in general.
Distinguished from Personalty.Division of Subject under Seven
Heads.**First.** The different Kinds or Sorts.Must be Land or annexed to or
arising out of same.

Corporeal or Incorporeal.

Ten general Legal Terms consi-
dered.**First.** Corporeal.Distinguished from Incorporeal
Kinds enumerated**Secondly.** Incorporeal.

Distinguished from Corporeal.

Thirteen kinds enumerated.

Secondly. The Tenures by which
holden.

Freehold.

Copyhold.

Other Tenures.

Thirdly. The Estates or Interests
therein.Distinction between an Interest
and a mere Authority.Distinction between an Interest
and a mere License.

Freehold.

Of Inheritance, whether of
Freehold or Copyhold.

In Tail.

For Life.

Less than Freehold.

For years whether of Freehold
or Copyhold.

From year to year.

At Will or Sufferance.

Fourthly. Time of Enjoyment.

In Possession.

In Remainder.

In Reversion.

Fifthly. Number of Owners.

In Severalty.

In Coparcenary.

In Joint Tenancy.

In Common.

Sixthly. Modes of Acquiring the
Right.

1. By Descent.

2. By Purchase, (*the several
modes considered.*)**Seventhly.** Difference between Le-
gal and Equitable estates.**II. & III.** Injuries, Offences, Rems-
dies and Punishments, relating to
Real Property.

REAL Property is legally distinguished from Personalty *prin-* Distinctions
cipally in two respects; *first*, its *permanent* fixed and immove- between real
able quality; and *secondly*, that the *interest* therein must be property and
not less than for the term of the *life* of the owner, or of another personalty in
person or persons; whereas Personalty is either moveable or general.
readily capable of being so, or, as in the case of a lease for years,
is considered as of so inferior a nature that it is not allowed the
incidents and privileges of *real* property.^(a) The several
circumstances which distinguish real property from personalty
are, 1st. Its permanent and immoveable property, and the
necessity for the owner having at least an estate for life therein,
and on which account this property was formerly more regarded
than personalty, and particular laws were more carefully pro-

(a) 2 Bla. Com. 386. Even a long term of years perpetually renewable, is not *real*,
but only personal property, *ante*, 84, n. (a).

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vided for its security. 2ndly. Therefore an alien was not allowed to acquire an interest therein, it being the policy of the law to exclude him from any permanent interest in the soil. 3rdly. In respect, also, of such permanency, its owner has always been entitled, when a freeholder, to vote for representatives in parliament, and on other occasions, which the owner of personalty, until recently, was not. (b) 4thly. It descends from ancestor to heir, instead of becoming the property of an executor or administrator on the death of the owner, as in the case of personalty. 5thly. If freehold property be devised there must be three witnesses to the will, whereas no witness is in general essential to a bequest of personalty. (c) 6thly. In case of alienation it must, in general, be made by deed, (d) and *in presenti*, (e) whereas leases for years may commence *in futuro*, and mere personal chattels may be transferred by parol, or mere delivery. 7thly. Only a part of the annual value can be taken under an *elegit* against the owner, when the whole interest in personalty may be sold under an execution. (f) 8thly. In case of attainder of felony the interest in realty is only forfeited for life, whereas the entire interest in personalty vests in the crown. These, it will be observed, are exceedingly important distinctions between the two descriptions of property.

Mixed property partaking of personalty and realty.

We shall find, however, that there are some interests arising out of or connected with real property, which partake in some respects of the qualities of personalty, being of a mongrel amphibious quality. (g) Such as heir-looms, title deeds, &c. which though in themselves moveable, yet relating to the land, descend from ancestor to heir, or from a vendor to a purchaser. (h)

Personalty to be converted into realty and *vice versa*.

There is also another very important doctrine in equity, according to which substantially the nature of personal property, as money, and goods, &c., may be completely changed, and become as it were, for all the purposes of beneficial enjoyment, real property. Thus in a Court of Equity *money* directed to be laid out in lands will pass by the words, "lands, tenements, and hereditaments whatsoever and wheresoever," (i) it being a maxim in equity, that things to be done shall be con-

(b) But now by the late reform act, 2 W. 4, c. 45, s. 20, a right of voting is conferred on *copyholders*, *leaseholders*, and occupiers of land of a certain annual value.

(c) 2 Bla. C. 501, 502; Comyns, 452, note (16); 2 Phil. Ec. C. 213, 177; 1 Phil. Ec. C. 12.

(d) 5 Bar. & C. 221.

(e) That is when by a common law con-

veyance; but *secus* if under the statute of uses.

(f) But if there be two contemporaneous *elegits*, each plaintiff may take a moiety, and thus the whole, 5 Bing. 327.

(g) 2 Bla. C. 387, 388.

(h) 4 Bing. 106.

(i) *Rushley v. Master*, 3 Bro. C. C. 99; 1 Thomas's Co. Lit. 219, n. T.

sidered as done, (k) and *vice versa*; for trees, though growing, if sold by a tenant in fee, who dies before severance, are considered as personalty, and the executor, and not the heir, is entitled to receive the purchase money from the vendee.

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We have now to take a practical view :—I. Of the *Rights* to Real Property, and these are to be considered as regards, *first*, the nature of *the thing*, or the several sorts or kinds of real property. *Secondly*. The *tenures* by which they are holden, as whether free socage, (being freehold,) or copyhold, &c. *Thirdly*. The *estates*, or extent and nature of the *interests* therein, as whether of inheritance, or only for life, or less than freehold, as for years, or at will, or sufferance, and whether *legal* or *equitable*. *Fourthly*. As respects *the time of enjoyment*; as whether in possession, or only in remainder or reversion. *Fifthly*. As regards the *number of owners*, as whether in severalty, joint-tenancy, coparcenary, or in common. *Sixthly*. The *modes* by which the *title* or right may be *acquired* on the one hand, or *lost* on the other; as by mere possession, or by descent, or by purchase, whether technically or really so, as by alienations of different descriptions, or by devise, and *Seventhly*. The distinctions *between* legal and equitable estates.

General division
of the subject
under seven
heads.

First. A very accurate knowledge of the different descriptions and legal properties of every kind of real property, is essential as well to owners and occupiers, as to conveyancers and every other member of the legal profession, whether practising in the civil or criminal courts; and in particular as regards the construction of conveyances and wills, the poor laws, and civil remedies and criminal punishments. (l) The ownership of some of the most substantial and permanent kinds of real property give a right to vote in elections, and under the now repealed act created a qualification to kill game; and some kinds of real property are rateable to the relief of the poor, whilst others, though equally or more profitable, are not. (m) Again: as regards the modes of describing various kinds of real property in deeds and *civil* pleadings, much accuracy is requisite, as in real actions and ejectment; and though it has been well observed, that probably so much precision would not now be required as in many of the old cases, still it is important to know what are the appropriate names

*First. Nature of
the thing, or the
several sorts or
kinds of real
property.*

(k) Cruise's Digest; 1 Thomas's Co. Lit. 755, note U.

(l) See in general the enumeration of *corporeal real property*, Tidd, 9 ed. 1190;

and Adams on Ejectment, 3 ed. chap. 2; and post.

(m) 43 Eliz. c. 2; Chit. Col. Stat. 768, and notes; and see Burn's J. Poor.

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and legal incidents of each. (n) So as respects *crimes* and *punishments*, and the liability of a hundred to make compensation, they greatly vary according to the precise description of the place in which the offence was committed; the law providing greater protection to dwelling-houses, and some enumerated buildings, and to gardens and land adjoining the same, and to some other descriptions of real property, than to land or other property at a distance; and the legislature has, with the same view, adopted certain terms of description, the application of which is important to be well known. (o)

Buildings, &c.
must answer
description at
time of injury.

We may here premise, as a general rule, that when buildings or lands are particularly named in a statute, they must precisely answer the description at the time when the injury was committed, and that a mere intention to convert a building, or land, &c. to a particular purpose, will not be sufficient unless the building or the land has been completed, and actually used for the particular purpose. (p)

All real property must be part of or annexed to land or proceed out of same, and be permanent.

Another very *general rule* is, that all *real property*, properly so termed, whether corporeal or incorporeal, *must* consist of *land*, or houses and buildings thereon, or of the *profits or easements issuing out of the same*, and must be of a *perpetually continuing* and *permanent* nature, (q) and that nothing can be deemed *real property* but when it is annexed to land or buildings; and, therefore, a mere stall or standing place, or booth placed in a market or fair, and not permanently annexed to the soil, cannot be treated as real property, or the subject of any action for the recovery of realty; and no action of ejectment for a supposed ouster from such a stall is sustainable, although the occupier had hired the exclusive right to use it during several days; (r) nor could such a structure by itself, any more than furniture, be rated towards the relief of the poor; (s) nor could burglary be committed in breaking into a tent or booth, erected in a fair or market, though the owner may usually sleep therein, for the law regards thus highly nothing but *permanent edifices*; and though it may have been the

(n) Adams on Ejectment, 3rd ed. 22 to 42.

(o) 7 & 8 Geo. 4, c. 29 to 31.

(p) 8 B. & C. 461, and *post*, 167, "*Dwelling-house*," as to the offence of burglary, &c.

(q) 2 Bla. C. 384; as to the term *permanent* being an essential part of the definition, see 1 Preston on Estates, 10; and Hen. Chitty on Descents, 11; and no term, even for 1000 years, is in law deemed *real property*, though as it is an interest in

realty, it is properly to be considered in this chapter, *ante*, 84, note (a).

(r) *Per* Lord Kenyon, Guildhall Sittings after Trin. T. 1796; and 1 Car. & P. 123; and see 2 East, 189. But if it had been a permanent building let into the ground, though only a butcher's stall in a market, to be used only on two days in the week, but the door fastened, it would have been otherwise, 4 B. & C. 685; 7 D. & R. 160.

(s) Cald. 262, 266; 1 T. R. 721.

choice of the owner to lodge in so fragile a structure, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon under similar circumstances ;(t) and for the same reason it was held that the destruction of hustings erected for an election was not an offence within the 57 Geo. 3, c. 19, s. 38 ;(u) and the lessee of a stall in a market town, who came there weekly to sell his wares, was held not rateable to the repairs of a church, either as being an inhabitant, or occupier of a house or otherwise, (v) though if it had been a *permanent* building let into the soil the occupation of it might, before the recent acts, have given a settlement. (x) So where a windmill was made of wood and had a foundation of brick, but the wood-work was not inserted in the brick foundation but rested upon it by its own weight alone, and no part of the machinery of the mill touched the ground or any part of the foundation, it was held that the windmill, not being fixed to the freehold, nor to any thing connected with it, was not parcel of a tenement, and consequently that a pauper by occupying it gained no settlement. (y)

But although *personal* property, originally separated from any land or building, such as machinery and engines, cannot for *all* purposes be deemed *real* property, yet the very circumstance of the same being *annexed* to the realty will sometimes give the same some peculiar properties, liabilities, privileges or protections, and therefore they may here be properly noticed. Thus with respect to *liability* to the poor rate, when the annual value of land or houses has been enhanced by the *annexation* of a personal chattel, as a steelyard of a weighing machine, or a carding machine, or any other collateral circumstance, then the same may be rated according to the aggregate annual value, though the greater part may spring from the personal chattel so annexed ;(z) and fixtures, when annexed to a building by a *freeholder*, cannot be taken under an execution against his goods ;(a) and some fixtures would pass to the heir, and not to the executor of the owner, in the nature of heir-looms, being generally chattels which cannot be taken away without damaging or dismembering the freehold ;(b) such as the posts or rails of

Annexations to land, &c. how far privileged as realty.

(t) 1 Hale, P. C. 557 ; 3 Inst. 64 ; Hawk. B. 1, c. 38, s. 17 ; 4 Bla. C. 225, 226.

(u) 3 Dowl. & Ry. 96.

(v) 2 Rol. Rep. 238 ; 1 Bott, 123.

(x) 4 B. & Cres. 687 ; 7 D. & R. 160.

(y) 1 Bar. & Adolph. 161 ; and see 1 Brod. & B. 506 ; 4 Moore, 284, S. C. as to when a windmill is a fixture or not.

(z) Cald. 262, 266 ; 1 T. R. 721.

(a) 5 B. & Ald. 625.

(b) 2 Bla. C. 427.

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an inclosure, furnaces or coppers fixed, (unless severed in the lifetime of the testator or ancestor,) the wainscots to a house, and pictures, or glasses fixed instead of wainscots, the glass in a window, or the doors and locks of a house, and the like. (b) So fixtures in a distillery or brewery, demised or suffered to remain in possession of a trader, would not pass to his assignees as goods or chattels in his possession as reputed owner. (c)

First, CORPO-
REAL Property,
and distinction
between the same
and incorporeal.

The principal divisions and distinctions of Real Property, are those kinds which are *Corporeal* and those which are *Incorporeal*. The former having a *corpus*, and being visible and tangible, and capable of *actual seisin and possession*; the latter not so, but merely *issuing out* of or incident to permanent corporeal property, and not being the thing itself, nor capable of actual visible seisin or possession. Thus a *church*, and the *glebe land* belonging to it, are obviously corporeal and tangible, and capable of actual seisin and possession, and of which the parson, after he has been presented and inducted, has actual possession, and may maintain ejectment or trespass for being ousted therefrom. (d) But the *advowson* (being the mere *right to present* a parson to such church or other ecclesiastical benefice, and the owner of the advowson himself never being in the actual or even supposed possession of the church or glebe) is merely *incorporeal* property, because such *right* is not visible or tangible. This instance of an advowson completely illustrates the nature of an incorporeal hereditament; it is not itself the bodily possession of the church and its appendages, but is a mere *right* to give some *other* man a title to such bodily possession. The advowson is not the object of either the sight or the touch, and yet it *perpetually* exists in the *mind's* eye and in contemplation of law. It cannot be *delivered* from man to man by any visible bodily transfer, nor can corporeal possession or livery of seisin be had of it; such right itself produces no corporeal fruit or advantage to its owner, but is merely a right to place some clerk, whom the patron shall please to nominate, in the possession and enjoyment of the benefits resulting from the church and glebe. (e) Like all other incorporeal real property, in order to convey the *freehold* interest in an advowson, a grant by *deed* under seal is essential. (f) So with respect to another

(b) 2 Com. Dig. 280, 5th ed.; Hen. Chitty's Desc. 257.

(c) 9 East, 215; and see 3 B. & Cres. 368; 5 D. & R. 240, S. C.

(d) 12 Mod. 420, 433.

(e) 2 Bla. C. 21, 22.

(f) 1 Inst. 9; 2 Wood, 64; 1 Saund. 228; 5 Bar. & C. 221. See 2 Bla. C. 22, *contra*, but clearly a mistake as to an advowson passing by *parol*.

incorporeal hereditament, a *right of way*, the party entitled to it has no tangible or visible right, nor any interest in the land itself, but a mere easement over it, and to create which, or any other *freehold* easement, a grant by deed is essential, and if granted by parol it operates at most as a revocable *license*. (g) The distinctions between corporeal and incorporeal property are most important, not only as regards their distinct properties and incidents, but in respect of the modes of creating and conveying the rights therein, and the remedies; ejectment and trespass being in general the proper remedies for injuries to the former, but only actions on the case, *quare impedit*, or other peculiar remedies, for many of the latter. (h)

Before we consider every kind of corporeal real property in particular, there are some *general* terms used in law the meaning of which it is essential to know, and which general words it has been advised by a most eminent conveyancer, it may be advisable to introduce in most conveyances. (k) These are the words, "*tenements*," "*hereditaments*," "*appendant, appurtenant or appurtenances*," "*estate*," "*term*," "*farm*," "*close*," "*field*," "*emblems*," "*fixtures*," &c.

Meanings of certain (ten) general terms relating to real property. (i)

1. The term "*tenements*," though in vulgar acceptation meaning only a house or building, in its legal sense comprehends every thing that may be *holden*, provided it be of a *permanent* nature; and not only lands and inheritances which are holden, but also advowsons, offices, rents, commons, and profits *a-prendre*, wherein a man hath any franktenement, and whereof he may be seised *ut de libero tenemento*. (l) And under the word "*tenement*" in a will, an advowson in gross may pass to the devisee. (m) The import of the term "*tenement*" has been most frequently discussed in questions under the poor laws, especially under the older acts 13 & 14 Car. 2, c. 12, s. 1, and 9 & 10 W. 3, c. 11, relating to the same, which use the word "*any tenement* of the yearly value of 10*l.*," and under these acts it was held, that any person renting an *incorporeal hereditament*, as a fishery, &c. of the yearly value of 10*l.*, was a renting of a tenement, and gained a settlement. (n) But as the renting

1. Tenements. (l)

(g) 5 Bar. & C. 221.

(h) Yelv. 143; Co. Lit. 4, a.

(i) In order very fully to examine these, see the several learned works referred to in 1 Thomas's Co. Lit. 219, note (44).

(k) 1 Prest. on Abstracts, 93; and see post, tit. *Land*.

(l) See in general Co. Lit. 6, a. marginal note (2); 1 Thomas's Co. Lit. 219;

Perk. sect. 114.

(m) 4 Bing. 293; and see Fort. 354, 351; 3 Atk. 464; Ca. Temp. Talb. 143.

(n) 1 T. R. 358; 3 T. R. 772; 3 East, 113; 5 East, 239, and other cases Burn's J., Poor, 525 to 541. But a mere standing place in a mill for a carding machine, was considered not to be a tenement. 2 East, 189.

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of such incorporeal interests was found too much to increase the privilege of settlement, the acts of 59 Geo. 3, c. 50, and 6 Geo. 4, c. 57, and 1 W. 4, c. 18, were passed, limiting the occupation to a more substantial and particular kind of tenement, viz. a "*dwelling-house*" or "*building*," or of "*land*," or of both, at at an entire rent of 10*l.* a year, and under which it has been held, that a demise of a house *and tolls* at an *entire* rent, is not now a tenement within the meaning of the latter acts, (o) and the building must be annexed to and part of the freehold; and it is expressly provided, that the renting of a toll-house shall not be deemed a tenement so as to give a settlement. (p) Under these and other acts it has been holden, that to constitute a tenement under the poor laws, the thing must be part and parcel of the freehold, or annexed to a part of land or buildings, and therefore a wooden windmill placed upon, but not let into a brick foundation, or a barn upon blocks, although demised for a term of years by a landlord who was owner of the soil, cannot be deemed a *tenement* or "*building*" in the legal signification of that term, but only a personal chattel, nor could the so holding the same give the occupier a settlement. (q)

However, provided the tenement arise out of *reality*, it may be of a substantial or unsubstantial kind, and either corporeal or incorporeal; and therefore as an action of ejectment is not sustainable for the latter, (with the exception of tithes and common appurtenant,) the term "*tenement*," unless used in reference to a *previous* description, is too general and uncertain in a declaration in ejectment or trespass, and the particular kind of thing should be stated, as "*a messuage*," "*a barn*," "*an out-house*," though the objection would now be aided after verdict. (r) Nor is the word "*tenement*" a sufficient description in a *fine* of any thing of which it is intended to be levied, as it may consist of a messuage, or land, or any incorporeal property lying in tenure, and therefore not sufficiently particular; (s) but in a *deed* every thing that may be holden, being of a permanent nature, may pass not only houses, buildings or land, but even rents, commons, offices, and the like. (t) The term "*tenements*" and the term "*hereditaments*," whether in a deed, lease or will, is to be understood as intending to describe or allude to

(o) *Rex v. Andrews*, Cambridge, East. 11 Geo. 4; Burn's J., Poor, 541.

(p) 1 B. & Adol. 161; 54 Geo. 3, c. 170, s. 5; 3 Geo. 4, c. 126, s. 51; 4 Geo. 4, c. 95, s. 31.

(q) 1 B. & Adol. 161; 1 Brod. & B. 506, ante, 149, n. (y); 4 Moore, 281, S. C.

(r) 8 Bar. & C. 70, and 1 M. & P. 330.

(s) 1 Leon. 188.

(t) Co. Lit. 6, a.

such *things* as may be subject-matter of tenure, but not the estate or *interest* in such things, and cannot therefore by its own intrinsic force enlarge an estate *prima facie* only a life estate into a fee. (u)

2. The term *hereditaments* is still more comprehensive, and includes whatever may be *inherited*, be it corporeal or incorporeal, real, *personal* or mixed, and including not only lands and every thing thereon; but also heir-looms and certain furniture, which by custom may descend to the heir together with a house. (x) The settled sense of the term "hereditaments" is to denote such *things* as may be the subject-matter of inheritance, but not the inheritance itself, and it cannot therefore by its own intrinsic force enlarge an estate *prima facie* a life estate into a fee, (y) and therefore a devise of "all my *hereditaments*" to A., without other words, gives him only an estate or interest for life in lands, it being then considered merely as denoting the *thing*, and not the *estate* or interest therein; (z) whereas a devise of "all my *estates*" might pass the fee simple. (a). It is a comprehensive term usual and proper in conveyances and wills, and in the latter will pass an advowson, (b) but it is much too general and uncertain to be adopted in pleadings, excepting in reference to a previous more particular description.

3. *Appendant and appurtenant*, "appurtenances" (cum *pertinentiis*.) These comprehensive terms, though different in their legal signification, are very frequently confounded. They are commonly used, the latter term particularly, in deeds and leases, with the intention to include all things, rights, and privileges not enumerated, but belonging to and used with the principal thing conveyed or demised, and intended to pass and to be enjoyed therewith, though not expressly named. But it is most prudent in deeds and leases, as well as wills, carefully and expressly to name in particular every thing intended to pass; for, at least in a *deed*, these words can in no case strictly pass any *corporeal* real property, (c) but only *incorporeal* easements, or rights and privileges, it being a general rule of law that under the word "appendant," or "appurtenant," in a *feoff-*

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2. Hereditaments.

3. "Appendant," "appurtenant," "appurtenances."

(u) See Macdonald's, Ch. B. observations on the term "*hereditaments*," 2 Bos. & Pul. 251, which it is submitted are also applicable to the term "*tenements*."

(x) Co. Lit. 5 b; 1 Thomas's Co. Lit. 219; 2 Bla. C. 17, note 44, ante, 149, n. (b).

(y) Per Macdonald, Ch. B., 2 Bos. &

Pul. 251; and see 8 T. R. 503; 1 Thomas's Co. Lit. 219, note T.

(z) Id. ibid.; 5 T. R. 558; 8 Id. 503.

(a) Post, 159.

(b) Fost. 351, ante, 151, note (r).

(c) Co. Lit. 121, l; 8 B. & Cres. 150.

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ment or *deed*, nothing can be conveyed that was itself *substantial, corporeal real property*, and capable of passing by feoffment and livery of seisin; and one kind of *corporeal* real property cannot be appendant or appurtenant to another description of the like real property: but only such things as can properly and consistently be appendant or appurtenant, as common of pasture to land, or a way, or a pew to a house, &c. Thus land cannot, in the strict legal sense, be appendant or appurtenant to land or to a house, or other corporeal real property, nor *vice versa*. (d) This distinction is of great practical importance: thus, if a wharf, with the appurtenances, be demised, and the use of the water adjoining the wharf were intended to pass, yet no distress for rent of the demised premises could be made on a barge on the water, because it was not in a place that could pass as part of the thing demised. (e) In short, *appendants* are, technically speaking, those things (generally easements, such as commons, ways, &c.) which by *prescription* have belonged to another principal substantial thing, considered in law as more worthy; and strictly the principal thing and the appendant must be *appropriate* with each other in nature and quality, or, in other words, the principal and the accessory must be such as may *properly* and *reasonably* be enjoyed TOGETHER; and if a thing which may be appendant or appurtenant had always passed with a manor, to which it belongs by the words *cum pertinentiis*, it must be taken to be *appendant*. (f)

A thing *appurtenant* is that which may commence and be created at this day; as if the owner of a moor at this day grant to the owner of a manor and his heirs, common in such moor for his beasts *levant* and *couchant* upon his manor, or if he grant to another common of estovers or turbary in fee simple, to be burnt or spent in his houses within his manor; by such grants these commons become *appurtenant* to the manor, and shall pass by the grant thereof without other words, and are what was termed in the civil law "*adjunctum accessorium*," and by logicians "*adjunctum*." (g)

Again: it is laid down, that concerning things appendant and appurtenant, two things are implied, *first*, that prescription

(d) *Ante*, 153, n. (c); *Buzzard v. Capel*, 8 Bar. & Cres. 150; affirmed in error, 6 Bingh. 150, overruling 4 Bing. 137, and see judgment of K. B.

(e) *Id.* *ibid.*

(f) 1 Rol. 230, l. 27; 1 Co. Lit. by

Thomas, 206, 207. What may be annexed, 1 B. & Adol. 761.

(g) How appendant and appurtenant differ from that which is *part* or *parcel* of a thing, is explained in Judge Doderidge's *Treatise on Advowsons*, 38.

cannot make any thing appendant or appurtenant, unless there be the *propriety* of relation between the *principal* and the adjunct, which may be ascertained by considering whether they so *agree* in nature and quality as to be rationally capable of *union* without incongruity, for otherwise there will be no reasonable intendment in support of the prescription, or rather of the original grant which it presumes. (h) Thus, why should a person grant to another as owner merely of *land*, without a house, a right to him and his heirs to sit in a pew in a church? since such a grant could only be reasonably made to the owner of a *house*; and, therefore, a person in general, can only claim a pew in respect of his ownership of a house in the parish. So, why should a grant of common of pasture be made to the owner of a house, *without any land* upon which he could keep cattle? consequently, a claim of common of pasture cannot be made merely in respect of the ownership of a house, but he must allege and prove the ownership of some land, or at least a curtilage. (i) So a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. But things incorporeal, which lie in grant, as an advowson, a right of common, and the like, may be appendant to things corporeal, as to a manor, house, or lands. So things corporeal may be appendant to things incorporeal, as lands to an office. Therefore the appendant must be *appropriate* in nature and quality with the thing to which it is to append; consequently, common of turbary or of estovers cannot be appendant or appurtenant to *land*, but to a *house* to be spent there; nor can a leet that is temporal property be appendant to a church or chapel which is ecclesiastical. Neither can a seat in a church by prescription be claimed as appendant or belonging to land, but to a house. (j) *Secondly*, nothing can be properly ap-

(h) In Co. Lit. 121, b, it is said that prescription doth not make any thing appendant or appurtenant, unless the thing appendant or appurtenant *agree* in quality and nature to the thing whereunto it is appendant or appurtenant: as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. Mr. Butler, in his note to this passage, after adverting to some examples to show that this position is not universally true, says: "The true test seems to be the propriety of relation between the principal and the adjunct, which may be found out by considering whether they so *agree in nature and quality* as to be capable of union without any incongruity." See quotations in *Buzzard v. Capel*, 8 B. &

Cres. 145. But this expression, "*agree*," must not be considered as was argued in that case, to import that the two things are to be of the *same nature*, but rather the *reverse*, and the term "*appropriate*" seems preferable; and all that is required seems to be, that the adjunct be that description of incorporeal easement or privilege that will naturally be advantageous to enjoy with the principal, and therefore the natural object of a separate grant supposed to have been made.

(i) 5 T. R. 46; see note, *infra*.

(j) *Ante*, 154; Co. Lit. by Thomas, 1 vol. 206, 207; 1 Vent. 386; Co. Lit. 121, b, note (7); and see Willes's Rep. 227, 231, as to rights of common, appendant and appurtenant. The case of *Scholes*

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pendant or appurtenant to any thing, unless the *principal* or superior thing be of *perpetual* subsistence and continuance. Thus, an advowson, which is said to be appendant to a manor generally, is in truth appendant to the *corporeal demesnes* of the manor, which are of perpetual subsistence and continuance, and not to any rents or services, which are subject to extinguishment and destruction. (*k*)

Apportionment. • Most appendants and appurtenances which are capable of subdivision, without injustice or inconvenience, may be *apportioned and divided*, as rights of common of pasture for commonable cattle *levant and couchant*, when a part of the land is sold off; and so may be the right to sit in a pew when a mansion-house has been divided into two or more. (*l*)

Severance
and in gross.

Some *appendants* may be *severed* from the principal, and they then become rights in *gross*; and this may be effected either by a separate conveyance of the principal, excepting the appendant, or by a separate grant of the appendant; and this frequently occurs in cases of advowsons appendant. (*m*) When once the principal and appendant have been separated by either of these means, the appendant, in general, never afterwards can be appendant, but continues in *gross*, though there are a few exceptions to that rule. (*n*)

Extinguishment
and words sufficient to create a
fresh grant.

Some appendants and appurtenances also may be *extinguished* and destroyed, as by unity of *seisin*, (sometimes improperly termed unity of *possession*.) (*o*) As if a person have common of pasture appendant to his estate on a waste or other land, and by purchase or descent he becomes also owner in fee of the latter; the right of common is destroyed, because the minor right of common is merged in the superior entire right to the soil, and it would be absurd to claim an easement in one's own land. (*p*) In such a case, upon a subsequent severance in the ownership of the two estates, there should be an express *new*

v. Hargreave, 5 T. R. 46, where it was held that common for cattle *levant and couchant* cannot in point of law be claimed by prescription, as appurtenant merely to a house, without any curtilage or land, is illustrative of this position.

(*k*) Dyer, 70, b; 2 Leonard, 222; Co. Lit. by Thomas, 1 vol. 207.

(*l*) 4 Coke, 37; 8 Coke, 79, a; Willes, 222, 322; and *per* Taunton, J., 2 Bar. & Adolp. 168; see *post*, common of pasture appendant or appurtenant and pews. What annexations cannot be disannexed, 1 B. & Adol. 761.

(*m*) 1 Rol. 252, b. 48; Co. Lit. by Thomas, 1 vol. 208; 2 Bla. C. 22.

(*n*) 2 Mod. 2; 2 T. R. 415; Co. Lit.

by Thomas, 1 vol. 208.

(*o*) Unity of *possession* only suspends prescription, and affects the form of pleading, Co. Lit. 112, b; Vin. Ab. Extinguishment, C. pl. 32; but unity of *seisin* in *fee* merges or destroys the prescription, Id.; Com. Dig. Suspension, B.; Vin. Ab. Extinguishment, C.; 1 East, 377; 2 Peake's C. N. P. 152. When no merger, in case of an *interesse termini*, 5 Bar. & C. 111; Co. Lit. by Thomas, Index.

(*p*) *Cowlan v. Slack*, 15 East, 108; Com. Dig. Suspension, B.; Vin. Ab. Extinguishment, C.; Co. Lit. 114, b; 1 East, 377; see 2 Bla. Com. by Chitty, 35, note (35), as to extinguishment.

grant of the right of common or way, or other former appendant; for otherwise, at law, the right to the easement would be lost; though if the new conveyance be of all commons, ways, &c. *used* with the estate conveyed, those words would operate as a new grant, and the benefit of the right of easement would be in effect continued, or rather granted *de novo*; and after long user, (as twenty years' uninterrupted user,) a proper new grant would be inferred. (q) In leases and other deeds expressing that the lessee or grantee shall have "all commons, ways, &c. *before used or enjoyed*, &c.," the courts will, in general, give effect to such words, so as to continue the benefit of the commons or ways, &c., although no longer strictly appendant or appurtenant; but if there be no such words they cannot assist; (r) and in that case recourse must be had to a Court of Equity to *reform* the deed according to the intention of the parties.

But neither a grant nor a prescriptive right will be extinguished or prejudiced by the pulling down and rebuilding a house or other corporeal thing to which an incorporeal thing is appendant or appurtenant, for the substituted building will retain the same rights and privileges as the ancient had. (s) So, provided after any alteration the enjoyment of the rights be substantially the same, no objection can be made to the alteration, and slight alterations are permitted. (t) Thus, a prescription to use water for *fulling mills*, will sustain an employment of it for the purpose of *corn mills*, and the owner is not bound to use the water in the same precise manner, or to apply it to the same mill, for if he were, that would even stop all improvement in machinery. (u) And if an ancient house be pulled down, it should seem that a new house built on the same estate, though not on precisely the same site, would be entitled to the ancient appurtenances. (v) The precise meaning of the terms "appendant," "appurtenant," and "in gross," will be further shown when we consider rights of common and of way. (x)

What alteration in the principal thing does not prejudice the appendant.

The term "*appurtenances*," commonly used in deeds, is too general and indefinite to be adopted in pleading, unless in connection with some previously particularized corporeal thing, as "land with the appurtenances." Some cases have been re-

Appurtenances.

(q) *Cowlan v. Slack*, 15 East, 108; *Marris v. Edgington*, 3 Taunt. 24; 2 & 3 W. 4, c. 71.

(r) 15 East, 108; 3 Taunt. 24; 1 Dowl. & R. 506; 5 B. & Ald. 830; but see 2 B. & Cres. 100; 3 Dowl. & R. 287, S. C.; 5 Taunt. 548, *post*.

(s) 9 B. & Cres. 671; 2 Vern. 146; 2 B. & Adolph. 164; 1 Campb. 322; 3

Campb. 81, *post*, "Ancient Windows."

(t) *Id.* *ibid.*; 6 Bing. 379; 4 Co. 87; 1 B. & Ald. 258; 2 B. & Cres. 910.

(u) *Id.* *ibid.*; 9 B. & Cres. 671.

(x) *Post*; and see Willes's Rep. 227 to 231, 322; 2 Inst. 86; Cro. Car. 482; Yelv. 159; 1 Bulstr. 47; 2 Bla. C. 32, 33—35, in notes.

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ferred to as importing that the words "*with the appurtenances*," in a *deed*, may have the effect of passing adjacent corporeal real property, as buildings, gardens, &c. adjoining to a house; and that therefore in a deed, as a feoffment "of a house *with the appurtenances*," not only the house itself, but also the *buildings* adjoining, with its orchard, garden, curtilage, and close immediately adjoining to the house, and on which the house was built, will pass; though not any other land at a distance, although usually occupied with the house. (y) But on examination it will be found, that in these cases no such effect could have been legally given to such words, because under the word "*appurtenant*," no buildings, or land, or other *corporeal* property can legally pass; and the effect was given in those cases entirely to the words "*messuage*" or *house*, by either of which words alone, and without more, adjoining buildings, and an orchard, garden, and curtilage, may pass. (z)

So under a *devise* of "a *messuage* with the appurtenances," much effect has been supposed to have been given to the latter words, though perhaps there was no occasion to resort to them. (a) Thus, under those words, it has been holden that not only the house passed, but also land occupied with the same, and highly convenient for the use of it, though held for a different term, that being the inferred intention of the testator; (b) but land occupied with a house will not pass under such a devise, unless it clearly appear that the testator meant to extend the word "appurtenants" beyond its technical sense. (c) And it was held in a recent case, that a devise of "all my capital messuage or mansion-house wherein *I now live*, and the buildings, gardens, grounds, and appurtenances to the same belonging, or therewith used," would not include two cottages of the testator on the side of the road opposite to the messuage, which were let out to tenants. (d)

It should seem, that in construing *deeds* and leases, (which are usually prepared by professional men, and with care,) no effect should be given to the words "appendant or appurtenant" beyond their strict legal meaning; but that those words in a will may be justly regarded and expounded as intended by the tes-

(y) Shep. T. 94; and see cases, 2 Saund. 401, note (2); and 1 Bar. & Cres. 350; 15 East, 109; 3 Taunt. 24, 147; 1 B. & P. 53; 2 T. R. 498, 502; 3 M. & S. 171; 5 Bar. & Cres. 156, as to the effect of the word "*appurtenances*."

(z) Co. Lit. 5, b, 56, b; 2 Co. 32, a; 1 Thomas's Co. Lit. 215, b.; and Id., note (35).

(a) See several cases collected in 1 Thomas's Co. Lit. 215, note 35.

(b) 2 Blac. R. 1146; see observations in 1 Thomas's Co. Lit. 215, note (35).

(c) 1 Bos. & P. 53; 2 Saund. 401; 9 East, 458; 1 Thomas's Co. Lit. 215, note (35).

(d) 2 Sim. 150, 151.

tator as his expressions of desire, that all things, whether corporeal or incorporeal, *usually enjoyed* with the principal thing devised, should pass.

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4. *Estate*. This term is used in two senses; the first and proper meaning is the degree, quantity, nature, and *extent* of the *interest* in real property; as an estate in fee, whether simple or in tail; or an estate for life, or for years. Secondly, the description of the thing itself, as "my estate at B.," when the party, whether in a deed or will, may merely refer to the land or thing, without regard to the extent or nature of his *interest* therein. (e) The distinction is most important. It was formerly considered that where the word "estate" had been used as descriptive of the property, as "my estate at A.," it would only pass a life interest to the devisee; (f) but, according to later decisions, the word "*estate*" in a *will* generally passes the *fee* to the devisee, if not restrained by other words; and that word used in the operative clause of a will, although referring also to locality, as "my estate at B.," passes the fee simple, unless there is in the will other matter to controul that signification; (g) and "personal estates" will carry freeholds, if such intention appear by the will. (h) Whereas, in these cases, if the term "*messuage*," or other name merely descriptive of the real property, had been inserted, instead of the word "estate," then only a life interest would have passed to the devisee; and we have seen that the word "hereditaments" in a will only passes a life estate. (i)

5. The word "*Term*" also in a lease may signify either the *time*, or the estate, or thing, granted or demised. (k) It does not always signify the *time* specified in the lease; and, therefore, if A. grant a lease to B. for the *term* of three years, and, after the expiration of the said *term*, to C. for six years, and B. surrender or forfeit his lease at the end of *one* year, C.'s interest shall *immediately* take effect; but if the remainder had been to C. from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in that case C.'s interest would not commence till the time had fully elapsed, whatever might have become of B.'s term. (l)

(e) See further post, and the lucid general observations of Tindal, C. J. in 8 Bing. 328, 329, as to the effect of the word *estate* in a will.

(f) 2 P. Wms. 335; And. R. 210; 11 East, 220.

(g) 8 Bing. 328, 329; 7 East, 259, 299; 4 Maule & S. 366; 2 T. R. 656; 2 Chit. R. 558; 6 Taunt. 410; 2 Marsh.

115; 3 Moore, 565; 1 Bro. & B. 72; 4 Taunt. 176.

(h) 11 East, 246; see 6 T. R. 610.

(i) *Supra*, note (e); and see as to an advowson, 3 Brod. & B. 27.

(k) 4 B. & Cres. 261; 2 B. & Cres. 216; 1 Burr. 282.

(l) Co. Lit. 45.

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6. Farm.

6. *Farm*, in common acceptation, and for the purpose of description in a deed, means a messuage with outbuildings, garden, orchards, yards and land, usually occupied with the same for agricultural purposes; (*m*) but in law, and especially in the description in a declaration in ejectment, it being derived from the Latin *firma*, denotes the *leasehold interest* for years in any real property, and means any thing which is *held* by a person who stands in relation of a tenant to a landlord, and does not mean a *farm*, in common acceptation, as descriptive of the land, &c. (*n*) The word "farm" or "farms" in a will may be sufficient to pass a freehold, and copyhold, and leasehold estate, if it appear to have been the testator's intention that it should so pass; (*o*) and the devise of goods and chattels and stock of a farm will pass the growing crops to the devisee; (*p*) though a devise of a farm will not pass the farming utensils thereon. (*q*)

7. Close.

7. The term *close*, in common parlance, means a field enclosed all round with hedges or fences, but in law it rather signifies the separate and exclusive *interest* of a party in a particular spot of land, whether inclosed or not; and in that legal sense the same may be in an open common, field, or waste, containing the lands of several persons, without any intervening fence, though usually marked out by certain boundaries or landmarks; (*r*) for which reason it has been considered that ejectment for a close, or croft, or piece of land generally, is too uncertain. (*s*) The term "close," in popular meaning, is that in which it is used in an action of trespass *quare clausum fregit*; and in modern times the term "close," without stating any name or number of acres, would probably be holden a sufficient description in ejectment, though it is more usual to claim land by the description of so many acres of arable land, &c. (*t*)

8. Field.

8. It should seem also that the term "*field*" would be considered as certain a description as that of close, and might be used, but it is not a usual description in legal proceedings. It is, however, expressly named in the general act against larceny, where it is enacted that the stealing, to the value of ten shillings, any goods or article of silk, &c. whilst laid in progress of manufacture in any building, *field*, or other place, shall be felony. (*u*)

(*m*) Plowd. 195; Shep. Touch, 93; 1 Thomas's Co. Lit. 208, 209, note N.

(*n*) 6 T. R. 353; 2 Bla. C. 317, 318; 2 Cbit. Plead. 879, note (*e*).

(*o*) 6 T. R. 345; 9 East, 448; Bro. Grant, 135.

(*p*) 6 East, 604, note; 8 East, 339.

(*q*) Ante, 112; 11 Ves. 657.

(*r*) 7 East, 207; Doct. & Student, 30.

(*s*) See cases cited Tidd, 9th ed. 1191; *sed quare*.

(*t*) 11 Coke, 55; Cro. J. 435; 3 Mod. 98; Cowp. 349.

(*u*) 7 & 8 Geo. 4, c. 29, s. 16.

9. *Emblements*, or growing annual crops, produced or improved by care and industry, we have seen, are, whilst growing, considered, for many purposes, part of the realty, and, unless expressly excepted in a conveyance, would pass to the purchaser as part of the land, in the same manner as fixtures. (x) But as for the most part these are personal estate, and may be taken in execution as *fructus industriales*, and, upon death even of a tenant in fee, belong to his executor, and not to his heir, we have classed them as personal property. (y) A farmer cannot be rated to the poor in respect of his crops or farming stock, because the annual profits of the land in the aggregate having been already rated, the profits of the stock cannot be also separately rated, they having already been virtually assessed in those of the land. (z) Crops sold by a mortgagor belong to, and may be seized and sold by the mortgagee after recovery in ejectment, or even without ejectment, if he can get possession peaceably, or he may maintain trover against a person who takes the crops; (a) and if a lessee sow corn, and commit a forfeiture of his lease, the landlord is entitled to the same. (b)

10. *Fixture* is a term in general denoting the very reverse of the name. It is something not originally constructed as part of a building, but formerly a moveable chattel, and afterwards annexed to the building or land for the more convenient enjoyment thereof, and which, at the will of the owner, is at all times readily capable of being removed, though at the time annexed. We have fully considered these in stating the different descriptions of personal property, and there shown when it becomes part of the realty and passes as such. (c) Questions relating to fixtures arise between the heir and an executor, or the executor and remainder-man, or a landlord and tenant, whether in trade, for agricultural purposes, or for ordinary habitation, and whether or not affected by covenant. Between the heir and the executor, the rule is more strict in favour of the heir than that as between landlord and tenant, and almost every annexation intended for the permanent improvement or better enjoyment of the premises is not removeable, but belongs to the heir. But some things put up by a tenant for life will go to the executor, and not to the remainder-man; and, as between landlord and tenant for agricultural or ordinary purposes, the rule has

(x) See *infra*, Fixtures.(y) See *ante*, 91 to 94.

(z) 2 Ld. Raym. 1280; Burn, J. Poor, 64.

(a) 1 Price, 53; 3 Bing. 11.

(b) *Davis v. Eylon*, 7 Bing. 154.(c) *Ante*, 94; 3 Thomas, Co. Lit. 223, 224, note 3; and see *post*.

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been relaxed in modern times in favour of the tenant; and it has even been held that a *pump* erected by an ordinary tenant, and very slightly affixed to the freehold, is removeable as a tenant's fixture; and stoves, grates, ornamental chimney-pieces, wainscots fastened with screws, coppers, and various other articles, are now clearly removeable by *any* tenant, if they can be separated without injury to the landlord; (d) and tenants may remove any building or annexation for the purposes of *trade*, unless restrained by express covenant. (e)

Fixtures of every description, when annexed to any building whatever, or in squares, or fixed in land, or in the possession of tenants, are, as regards *criminal* injuries, now specially protected by recent acts. (g) The 7 & 8 Geo. 4, c. 29, s. 44, enacts, "That if any person shall steal, or rip, cut, or break, with intent to steal, any glass or wood-work, belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and shall be liable to be punished in the same manner as in the case of simple larceny; and in case of any such thing fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person." The prior statutes, 4 Geo. 2, c. 32, and 21 Geo. 3, c. 68, relating to this offence, are repealed by 7 & 8 Geo. 4, c. 27. This enactment extends the offence much further than the prior acts did, as it includes all utensils and fixtures, of whatever material made, either fixed to buildings or in land, or in a square or street. A church, (h) and, indeed, all buildings, (i) are within the Act. An indictment, therefore, for stealing lead fixed to a certain building, without further description, will suffice; (i) and there is a general provision rendering persons liable summarily to the extent of 5*l.* before a magistrate, for any wilful or malicious injury to any building

(d) 6 Bing. 437.

(e) See more fully *ante*, 94; and see in general, Amos on Fixtures. According to the reasoning of Dr. A. Smith in his *Wealth of Nations*, all annexations for purposes of *agriculture* ought to be equally removeable as when made for purposes of *trade*, but that principle has not been as yet judicially established. *Elwes v. Mawes*,

3 East, 38; see *post*, 174, tit. "*Improvement*."

(g) 7 & 8 Geo. 4, c. 29, s. 44; as to stealing fixtures to buildings, or in land, and as to larceny thereof by lodgers, *id.* 45; and as to malicious injuries, see 7 & 8 Geo. 4, c. 30.

(h) 1 East, P. C. 592.

(i) R. & R. C. C. 69.

or property, whether public or private, and which extends to every injury to any fixture. (k)

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We now proceed to consider the various kinds of *Corporeal real property* with their respective properties and incidents, and the laws for their regulation and protection, and then we will consider the various kinds of *Incorporeal* real property. The former are principally rectories, vicarages, glebe land, churches and chapels, church-yards and monuments, manors with their wastes, messuages and dwelling-houses; other buildings and erections, improvements, curtilages, areas, yards, gardens and orchards, nursery-grounds, hothouses, greenhouses, conservatories, land, acres more or less, *prima tonsura*, aftermath, *beast-gates*, *cattle-gates*, *sheepwalks*, and *wayleaves*, when of *exclusive* enjoyment; hedges, fences and ditches, woods and underwoods, trees when growing, mines, forests, *chases*, *purlieus*, and inclosed grounds for deer, *freewarren*, *warrens*, and grounds for breeding conies, preserves, game, decoys, rookeries, land covered with water of every description, whether ponds, water-courses, rivulets, rivers, water and fish, and fisheries therein, dams of fish-ponds, and private fisheries and mill-ponds, and oyster beds, layings, or fisheries. We will then consider a few kinds of corporeal real property, more of a *public nature*; as sea banks and walls, ports and harbours, lighthouses, beacons, and sea marks, rivers, creeks, and canals, quays, docks, and wharfs, rail roads, highways, bridges, toll-houses, turnpike gates, and weighing engines, and in most of which particular individuals may have a *private* interest.

First. The several kinds of Corporeal real property enumerated and considered. (l)

1. A *Rectory*, consisting of a church, glebe lands, and tithes, is at common law considered to be *corporeal* real property, and ejectment is sustainable for the same, because it includes several substantial and visible things, and in that respect resembles a manor, the church being compared to the mansion-house, the glebe lands to the demesnes, and the tithes to the services. (m) But an ejectment is not sustainable for an *advowson* in *gross*, that being merely an incorporeal intangible right to present to an ecclesiastical benefice, and therefore the disturbance of the right is only remediable by *quare impedit*; (n) though after a clerk has been inducted, and is in full possession of his church and his parsonage and glebe, if he be

1. Rectory or vicarage, glebe lands, &c.

(k) 7 & 8 Geo. 4, c. 30, s. 24.

(l) For the fullest ancient information on each of these, the works referred to in 1 Thomas Co. Lit. 249, note 44, should be examined.

(m) 8 Bar. & Cres. 25; 2 Man. & Ry. 104, S. C.; as to *Advowsons*, see *post*.

(n) Cro. Jac. 146; 3 Bla. C. 246; see 2 Wills. 116, *ante*, 150; see *post*, "*Advowsons*."

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evicted or trespassed upon, he may then sustain ejectment or trespass. (o) When the church is full, that is, when there has been a presentation, institution, and induction of a competent clerk, then *quare impedit* is the proper remedy at the suit of a person who asserts that he ought to hold; but if the clerk were so presented, instituted, and inducted, in consequence of a simoniacal void bargain, then the church is not to be considered full; and the clerk lawfully presented by the king, or bishop, or other lawful patron, may support ejectment against the person who had been so simoniacally presented, and who had obtained possession of the church under colour thereof. (p) The glebe belonging to a parsonage or vicarage cannot be extended under an *elegit*, (q) &c. By the grant of a "rectory" or "parsonage," without other words, the house, the glebe, the tithes, and the offerings belonging to it, will pass. And by the grant of a "vicarage," every thing belonging to it, as the vicarage house, &c. will pass. (r) In the description in fines, parsonages, rectories, advowsons, or tithes impropriate, will not pass by the names of the "advowson of the church," but by the words "the rectory of the church of S. with the appurtenances." But when the fine is of a presentation to a church only, it must be of the "advowson of the church," and not "with the appurtenances;" and of all vicarages endowed the writ must be of the "advowson of the vicarage of the church of S.," and not "with the appurtenances;" and where no vicarage is endowed, it must pass under the words, "the advowson of the church of S.," &c. (s)

2. Church, chapel, and churchyard.

2. A *church* or *chapel*, and *churchyard*, are terms expressly recognised as in themselves correct technical descriptions of the building and place, even in criminal proceedings; (t) and therefore, though it was formerly considered that a church must be described as a messuage, or as *domus Dei*, or as the mansion-house of God, (u) they may now be described in ejectment and in criminal proceedings as a church or chapel, according to the common acceptation; (x) and a parson has a sufficient interest

(o) 12 Mod. 420, 433; 8 B. & Cres. 25; 3 Bla. C. 252, 253.

(p) 8 B. & Cres. 25.

(q) Gilb. Exec. 39; Tidd, 9 ed. 1035.

(r) Shep. T. 93, 94; Bro. Grant.

(s) Id. 12, *post*, "*Advowson*."

(t) 7 & 8 Geo. 4, c. 29, s. 30, 31.

(u) 3 Inst. 64; 1 Chit. Rep. 537; 11 Co. 26; see form of indictment for breaking church windows, upon which the party was at sessions convicted and punished;

2 Chit. Cr. L. 23. *Sed quere*, whether, however indecorous, the act was more than a trespass. Mr. Knapp, a very eminent crown lawyer, considered it to be no punishable offence.

(x) 8 Bar. & Cres. 25; 1 Salk. 256; 11 Co. 25, b; 2 Esp. R. 5, 28. Perhaps ejectment lies for a place called the Vestry in D., or for a prebendal stall after collation, 3 Lev. 96; 1 Wils. 11, 14; Adams's Eject. 3 ed. 19; and see *post*, 168, notes (p) (q).

therein to enable him to support *trespass* against a person for preaching in his church without his leave, (y) although the right of advowson is strictly an incorporeal right, and in respect of which no action of trespass could be sustained. The freehold of the church and churchyard are considered to be vested in the parson for the time being, and he may in general sustain trespass for any injury thereto; (x) but he can convey no freehold right therein either for burial or otherwise, unless by deed under seal; (a) and a grant of part of the *chancel* of a church by a lay impropriator in fee, is not valid in law, and therefore the grantee could not sustain trespass for pulling down his pews there erected. (b) But as to *tombstones* placed in a churchyard by leave of the parson, trespass, not case, is the proper remedy by the person who so placed the same, against a wrong-doer for removing it. (c) The parson is considered as having the freehold of the church and of the soil of the churchyard, and he may bring trespass against such as dig and disturb it; (d) and a parson is in right of his freehold in his church entitled to vote in the election of members of parliament. The statutes 7 & 8 Geo. 4, c. 29, and 30, particularly protect churches from offences in the nature of larceny, termed sacrilege, and from wilful and malicious injuries. (e)

3. The *heir* has a property in the *monuments* and tombstones in the church or churchyard, and the escutcheons and coat armour of his ancestor there hung up, with the pennons and other ensigns of honour suitable to his degree; and if the parson or any other take them away or deface them, he is liable to an action of trespass from the heir; (g) but the heir has no property in the bodies or ashes of his ancestors, nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains when dead and buried; (h) but the offence of disinterring and selling a dead body is indictable as a misdemeanor at common law; (i) and the power to take dead persons for dissection is now regulated by a recent act. (k) And at common law, if any one, in taking up a dead body, steal the shroud or other apparel, it is felony,

3. Monuments.
(f)

(y) 12 Mod. 420, 433.

(x) 3 Bing. 136; 2 Car. & P. 34; 2 B. & A. 478; 1 East, 244.

(a) 5 Bar. & Cres. 221; 8 Bar. & Cres. 293; 7 Bing. 687.

(b) 1 Bar. & Ald. 498.

(c) 3 Bing. 136; 2 Car. & P. 34.

(d) 2 Bla. C. 429.

(e) See observations, post.

(f) Ante, 50 to 52 and 95, and *supra*, note (c).

(g) 3 Bing. 136; 12 Co. 105; Co. Lit. 18, b; 2 Bla. C. 428, 429; ante, 50, 51, 52, *Right of Burial*.

(h) 2 Bla. C. 429.

(i) 2 T. R. 733; 2 Leach, 560, S. C.

(k) 2 & 3 W. 4, c. 75.

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for the property thereof remains in the executor or whoever was at the charge of the funeral. (*l*) A monument cannot be placed in any particular part of a church or churchyard without the rector's consent. (*m*) And where a testator devised his real estates to sell and expend 2000*l.* in erecting a monument in the parish church of St. John, Southwark, and 21*l.* to the rector, on condition of his permitting such erection, and 100*l.* to Dr. Johnson for writing an epitaph, it was held that this was not a devise within the statute of mortmain; and that as the purpose failed by the rector's refusing for many years to allow the monument to be erected, though a succeeding rector was willing to consent, the heir of the testator was entitled to the 2000*l.* and the 21*l.* (*n*)

4. Manor. (*o*)

4. A *manor*, so described, without any other terms, is considered *corporeal* property, and ejectment for it by that name, without other description, is sustainable, it being inferred that besides the incorporeal manorial rights of service, such as quit rent, &c. there is a mansion and demesne lands; (*p*) and yet there may be a manor by reputation, although extinct for the principal purposes by defect of suitors, but sufficient to enable the claimant to appoint a gamekeeper, although there be no demesne lands, or other tangible incorporeal property, nor even any freehold suitors left; (*q*) but as the term "manor" may denote a *mere franchise* and right to hold courts, and have suit and service rendered or quit rents paid by copyholders and others, it has therefore been contended that ejectment is not sustainable for a manor generally, and that the quantity and nature of the land, or other tangible property therein, for which an ejectment properly lies, ought also to be stated; (*r*) and the latter mode of declaring in ejectment for a manor is certainly now more usually adopted. (*s*) It is clear that a lord of a manor, in case of an inclosure, is entitled to an allotment, not only in respect of his demesne lands, but also in respect of his mere right of franchise as lord of the manor. (*t*) It should seem that a manor is not *eo nomine* rateable to the poor under the 43 Eliz. c. 3, s. 2, which, speaking of property, enumerates

(*l*) 3 Inst. 110; 12 Co. 113; 1 Hale, P. C. 515; 2 Bla. C. 429.

(*m*) *Ante*, 50, 51, 52, Burial.

(*n*) *Mellick v. President Asylum*, Jacob's Rep. 180.

(*o*) See *post*, Quit Rents; and see 3 Thomas, Co. Lit. Index tit. Manor; and 1 Id. 659, G.

(*p*) Latch. 61; Lil. R. 301; Run. Eject. 2 ed. and Adams's Eject. 3 ed. 29;

and see 8 Bar. & Cres. 25, *ante*, 163.

(*q*) 10 East, 259. New freehold suitors cannot be created by the lord's granting parts of his demesne lands, so as to revive the courts; Willes, 614.

(*r*) Latch. 61; Lil. R. 301; Hetl. 146; Selw. N. P. 4 ed. 665.

(*s*) 2 Chit. Pl. 878.

(*t*) 2 M. & S. 440.

occupiers of "*lands and houses*," and therefore a lord of a manor is not rateable for the quit rents and casual profits of the manor, and indeed if he were, the property, or at least the quit rents, would be rated twice; viz. in his hands as lord of the manor, and also in the hands of his tenant. (u) The word "manor" in a deed, without the words "with the appurtenances," pass all that is at the time of the grant parcel of the manor and all its perquisites. (x)

5. The wastes and commons of a manor in every respect resemble the private lands of a freeholder, excepting that they are usually not inclosed and are subject to certain easements, such as rights of common, of various descriptions, over the same. In every other respect the lord of the manor may treat them as his "*closes*," and support trespass for entering his close even against a commoner, if he enter for any other purpose than in the legal exercise of his right of common. (y) He has a right to inclose and approve, provided he leave a sufficiency of common, but not otherwise unless by special custom. (z) But such new inclosures cannot, without special custom, be granted out, either as copyhold, (a) or as long leasehold. (b) The recent act especially declares, that a lord of a manor shall be exclusively entitled to the game on the wastes and commons. (c) But a lord of a manor as such can legally sport only over his own demesne lands, and wastes, and commons; and he has no right in that character, either himself, or by his gamekeeper, to enter the lands of freeholders or copyholders, or their tenants, within his manor. (d)

5. The wastes and commons of the manor.

6. The terms, "*mansion*," "*dwelling-house*," "*house*," "*messuage*," and "*burgage*," (in a borough, (e)) are, in general, synonymous, and any distinction between the terms, "*messuage*," or "*house*," in their legal import, has been justly refuted. (f) A *cottage* is the same in law, but importing a smaller and inferior building, at one time prohibited, but now to be encouraged. (g) By the grant of a cottage, it is said, passes a small dwelling house, that hath no land belonging to

6. Mansion, dwelling-house, house, messuage, or burgage.

(u) 2 Burr. 991; 1 East's R. 534; Burn's J. Poor, 63, in notes; id. 70.

(x) Shep. T. 92.

(y) See per Bayley, J., 7 B. & Cres. 364, 365, 369.

(z) 7 B. & Cres. 369, 372, 373; 3 T. R. 445.

(a) 7 B. & Cres. 346.

(b) Id. ibid.

(c) 1 & 2 W. 4, c. 32, s. 10.

(d) 11 Mod. 74; 10 East, 189; 2 Bla. C. 39, 419.

(e) Hard. 173; Poph. 203; 1 Sid. 295.

(f) 2 T. R. 502; 1 Thomas's Co. Lit. 215, n. 35; but see cases cited 9 B. & Cres. 681.

(g) 1 Thomas's Co. Lit. 216.

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it.(h) These terms are respectively very comprehensive, for by a conveyance of a "messuage," or "house," without other words, other adjacent buildings, curtilage, orchard, garden and even an acre or more of land, would pass.(i) For criminal purposes it is essential that the building should have been *used* for residence and sleeping therein;(k) and though to subject the building to assessment towards the relief of the poor, or to the assessed taxes, a very slight and occasional occupation is sufficient;(l) yet to acquire a settlement, a *bonâ fide* occupation is essential.(m) The term, "messuage," it is said, includes a church, and that a church or chapel ought to be described as a messuage, in legal proceedings to recover the possession,(n) though we have seen that now they might properly be described by their usual name, as in indictments for sacrilege.(o) And, indeed, it seems the better opinion that they could not be treated as a dwelling-house, so as to render the stealing from the same technically *burglary*;(p) and the 7 & 8 Geo. 4, c. 29, s. 11, in describing burglary, merely mentions "*dwelling-houses*," and as there is an express clause for stealing chattels in a church or chapel, it seems clear that a church or chapel cannot be treated as a dwelling-house, as regards the offence of burglary.(q)

The term "*mansion-house*," in its common sense, not only includes the dwelling-house, but also all out-houses, as barn, stable, cow-house, dairy-house, if they be parcel of the mansion, though they be not under the same roof or joining contiguous to it.(r) By a devise of "messuages with all houses, barns, stables, stalls, &c. that stand upon or belong to the said messuages;" even the lands belonging to the messuages will pass;(s) and where a person being tenant for years of a house, garden, stables, and coal-pen, bequeathed in these words, "I give the *house* I live in, and garden to B." it was held that the stables and coal-pen, occupied by the testator, together with the house, passed without being expressly named, though the testator used them for the purposes of trade

(h) Shep. T. 94.

(i) Co. Lit. 56, b. n. (1) Hargrave; 1 Thomas's Co. Lit. 5, b. note (1); 2. Id. 215, 216; and note (35) as to the large import of the word *messuage*.

(k) *Rex v. Martin*, Russ. & R. C. C. 108; 1 Leach, 185; 2 East, P. C. 498; 8 B. & C. 461.

(l) 4 T. R. 477; 10 East, 354; Burn's J. Poor, 51; tit. Taxes.

(m) Burn's J. Poor, 574.

(n) 11 Coke, 26; 2 Esp. N. P. 528; 1 Salk, 256; 8 B. & C. 25.

(o) 7 & 8 Geo. 4, c. 29, *ante*, 164.

(p) Hawk. P. C., B. 1, c. 38, s. 17.

(q) 7 & 8 Geo. 4, c. 29, s. 10. It is also to be observed, that *money* is not mentioned in that clause.

(r) 1 Hale, P. C. 558, 559; Burn's J. Burglary; see also, 1 Thomas's Co. Lit. 215, 216.

(s) 3 Wils. 141; 2 Bla. R. 726.

as well as for the convenience of his house ;(*t*) and under a devise of "all his messuage, or dwelling-house, in High-street, and all and every his buildings and hereditaments in the same street," it was held that not only the house in that street, but two cottages in an *adjoining* back street passed, the communication being from the former, and the testator having only one messuage in High-street.(*u*) But it is said that the leading distinction between *buildings* and *land* is this, that by the name of a "castle," "messuage," "toft," "croft," or the like, nothing else will pass, except what falls with the utmost propriety under the terms made use of; but that by the name of *land*, which is *nomen generallissimum*, every thing terrestrial will pass.(*x*) *Fixtures* annexed to a *messuage*, building, or land, have already been considered.(*y*) We may here notice that by a conveyance of a "messuage with the appurtenances," fixtures usually removeable will pass to the purchaser, unless disannexed and removed before the conveyance has been executed.(*z*) A conveyance or demise of a messuage would impliedly pass every part under the same roof, but not so if it be proved that at the time of the demise a room was separated by a wooden partition, and had not been occupied with it for many years.(*a*)

With respect to the criminal law, and the offence of *burglary*, it can only be committed in a "*dwelling-house*," or a building *part thereof*, having a communication between such building and the dwelling-house, either immediate or by means of a *covered and enclosed* passage leading from one to the other."(*b*) It must be a *finished* building intended as a house, and actually used and inhabited as such, and not a mere intended house,(*c*) for the capital punishment of burglary was intended to protect, not merely property, but the actual occupant from the terror of disturbance during the hours of darkness and repose.(*d*) But any *permanent* building, ordinarily used for residence and sleeping, may be a "*dwelling-house*," as respects the offence of burglary; as *chambers* in an inn of court,(*e*) a *loft* over a stable, used as the abode of a coachman, which he *rents* for his use ;(*f*) and a room used by a lodger for residence and

Burglary and other criminal offences, with respect to a *dwelling-house*.

(*t*) 2 T. R. 498.

(*u*) 5 Bar. & Ald. 407; see 2 Simon, 150; and see further, 1 Thomas's Co. Lit. 215, note 35.

(*x*) 2 Bla. C. 18; Co. Lit. 4 to 6.

(*y*) *Ante*, 94, 95, and 161.

(*z*) 2 Bar. & Cres. 76.

(*a*) 2 Stark. R. 508.

(*b*) 7 & 8 Geo. 4, c. 29, s. 11 & 13.

(*c*) 8 Bar. & Cres. 461.

(*d*) 2 Leach, 931.

(*e*) 1 Hale, 556; Cro. Car. 474;

3 Burn's J. Larceny, 574.

(*f*) 1 Leach, 305.

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sleeping, if the landlord does not sleep under the same roof; (g) and a dwelling-house may be so divided as to form two or more dwelling-houses, in the meaning of the word, in the definition of burglary; (h) and if there be several inmates, and they respectively lock the doors of their respective rooms, although they all use one common outer-door, the apartments of such inmates are considered as their respective dwelling-houses, provided the common landlord does not himself reside and sleep in the house. (i) The describing the building in an indictment for burglary merely as a "house" would be defective; (k) and if the burglary were in a building adjoining the dwelling-house, and connected therewith as above, it must be either laid in the dwelling-house generally, (and which seems preferable) or "in a building, part of the dwelling-house, and communicating therewith *immediately*," or "communicating with such dwelling-house by means of a covered and inclosed passage, leading from the same building to the said dwelling-house." (l) So the house must be actually *used as a dwelling and for sleeping* at the time of the burglary; for a house under repair, or a building merely intended and constructed as a dwelling-house, in which no one lives, though the owner's property is deposited there, is not a place in which burglary can be committed, for it cannot be deemed his "*dwelling-house*" until he has taken possession and began to inhabit it; (m) nor will it make any difference if one of the workmen, engaged in the repairs, sleep there at night in order to protect it; (n) nor though the house is ready for the reception of the owner, and he has sent his property into it, preparatory to his own removal, will it become for this purpose his dwelling-house. (o) So if the landlord purchase the furniture of his outgoing tenant, and procure a servant to sleep there, in order to guard it, but without any intention of making it his own residence, a breaking into the house will not amount to burglary (p) And the mere casual use of a tenement will not suffice; (q) and where neither the owner nor any of his *family* have slept in a house, it is not his dwelling-house, so as to make the breaking it burglary, though he had used it for his meals and all the

(g) 1 Leach, 89, 237.

(h) *Id. ib.*; 1 Leach, 537; 2 East, P. C. 504; Salk. 532.

(i) 1 Leach, 237, 427.

(k) 1 Hale, 550.

(l) *Semble*, 1 Leach, 144; 2 East, P. C. 512, 513.

(m) 1 Leach, 185; 2 East, P. C. 498; 1 Leach, 196; 8 B. & C. 461.

(n) 1 Leach, 186.

(o) 2 East, P. C. 498; 2 Leach, 771.

(p) 2 Leach, 876; 2 East, P. C. 497, 498; 1 Leach, 196.

(q) 1 Hale, 557.

purposes of his business.(r) But it is not absolutely necessary to make it burglary that any person should be actually within the house at the time the offence is committed, for if the owner has regularly resided there and leave it *animo revertendi*, though no person reside there in his absence, it will still be his dwelling-house.(s) So if a person go a journey,(t) or have a town-house and country-house, and sleep alternately at each, leaving the other shut up, they both are his dwelling-house as respects the offence of burglary;(u) and though if a person leave his dwelling-house without intent to return, and leave persons in it merely as a warehouse or workshop, it ceases to be his dwelling-house, it would be otherwise if his family continue to reside in a part.(v) In general the occupation of a servant, as part of his master's family, and in that character, and not as a tenant, will be considered the occupation of a dwelling-house by his master.(x)

7. "*Other Buildings and Erections.*" It frequently becomes necessary to ascertain the exact and precise nature, description, and particular name of *other buildings* besides dwelling-houses, not only as referred to in deeds and wills, but also in acts of parliament, especially in those relating to the criminal law, where very frequently the degree of crime and extent of punishment greatly depend on the exact place where the offence was committed, and its particular name and character. Questions sometimes arise upon *civil* statutes, thus a "*counting-house*" is not a house, warehouse, shop, shed, stall or stand, within the meaning of the act, giving extended jurisdiction to the London Court of Requests.(y) But it is principally with reference to the *criminal* law that the precise nature of the building becomes material, as will appear from examination of the recent criminal acts.(z)

7. "Other buildings and erections."

The *Larceny Act*, 7 & 8 Geo. 4, c. 29, as regards the *places* of taking, enumerates "church or chapel," "dwelling-houses," and "other buildings *within* the curtilage," "shop," "warehouse," or "counting-house," "building," "field," or "other place *used* in progress of manufacture." "Vessel, barge or boat in a port of entry or discharge, navigable river or canal,

(r) *Rex v. Martin*, Russ. & R. C. C. 108.

(s) Hawk. c. 38, s. 11.

(t) 2 East, P. C. 496.

(u) Fost. 77; 2 East, P. C. 496.

(v) Russ. & R. C. C. 187, 442.

(x) R. & R. C. C. 115, 185.

(y) 5 Dowl. & Ry. 628.

(z) Larceny Act, 7 & 8 Geo. 4, c. 29, s. 10 to 14, 44, 45; Malicious Injury Act, 7 & 8 Geo. 4, c. 30, s. 2; and Hurdred Act, id. c. 31.

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creek communicating therewith, or dock, wharf or quay adjacent thereto;" and the stealing or ripping, cutting or breaking, with intent to steal any glass or wood-work belonging to "any *building whatsoever*," or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to "*any building whatever*;" or any thing made of metal, "*fixed in any land*," being private property, or for a *fence* to any dwelling-house, garden or area, or in any square, street, or other place dedicated to public use or ornament, is felony. This enactment extends the previous provisions to all utensils and fixtures of whatever material made, and a church and *all* buildings are within the act, and therefore we have seen that in an indictment for stealing lead, it is sufficient to state that it was fixed to a certain building, without further description. (a)

The *Malicious Injury Act*, 7 & 8 Geo. 4, c. 30, s. 2, renders capital the maliciously setting fire to any "*church or chapel, house, stable, coachhouse, outhouse, warehouse, office, shop, mill, malthouse, hop oast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof*;" and section 7, which makes felony the maliciously pulling down, or destroying, or damaging with intent to destroy or render useless, enumerates any steam-engine, or other engine, for sinking, draining or working any "*mine, or any staith, (b) building or erection used in conducting the business of any mine, or any bridge, waggon way or trunk, for conveying minerals from any mine*;" and section 8, for the punishment of persons guilty of riotously and feloniously pulling down or destroying, or beginning so to do, enumerates the same last-mentioned buildings, and extends also to machinery there; and the 14th section relates to the destruction of "*toll houses, buildings, and weighing engines*."

The 7 & 8 Geo. 4, c. 31, (which gives an *action against the hundred* for felonious injuries,) enumerates the same buildings as those above in 2d and 7th sections of chap. 30. It seems, therefore, that these criminal acts do not protect *all* buildings and erections whatever, but only particular specified buildings, and including all buildings which have been used in trade or manufacture, with the exception of the offence of stealing glass or wood fixed to any building, or metal to a fence or in land.

(a) 1 East's P. C. 593; Russ. & Ry. C. C. 69.

in consequence of the decision in Holt's C. N. P. 466.

(b) *Semble*, that word was introduced

It should seem that as well at common law as under these statutes, nothing can be deemed a "*building or erection*" unless it be let into and part of the realty, and not moveable, (c) and consequently mere hustings could not be within the act; (d) and it was held, that a building merely *intended* to be a house or other named erection, but not as yet completed nor inhabited, but in which straw had been placed, was not either a house or a warehouse within the above act, subjecting the hundred to make compensation for the riotous destruction of a house or warehouse; (e) and no building only in part erected, and not previously used for one of the purposes alluded to in the acts, would be within the protection of either of the criminal acts specifying *particular* buildings. (f) And as "*gaol*" is not named in the 7 & 8 Geo. 4, c. 30, the tumultuously pulling down the same, as a *gaol*, would not be punishable under that act, (g) though a common *gaol* was holden a house within the meaning of the 9 Geo. 1, c. 22. (h) With respect to the 7 & 8 Geo. 4, c. 29, and c. 30, it will be observed, "that the goods whilst laid, placed or exposed, during any stage of manufacture, in any building, field or other place, are more fully protected than by the prior repealed act, 18 Geo. 2, c. 27, under which it was necessary to prove that the building had been *generally* used for the purpose of the manufacture, (i) but this evidence would not, it should seem, now be necessary.

8. The term *outhouse* is not used in the Larceny Act; (k) 8. Outhouses. but it is used in the Malicious Injury Act, (l) and in the Vagrant Act, as well as every *deserted or unoccupied building*; (m) and if any person wandering abroad and lodging in any barn or *outhouse*, or in any deserted or unoccupied building, or under a tent, not having any visible means of subsistence, nor giving a good account of himself, and every person found in any *outhouse* for any unlawful purpose, is to be deemed and punished as a rogue and vagabond. (n) It has been held under an enactment similar to the Malicious Injury Act, that a *schoo!-room*, which was separated from the dwelling-house by a narrow passage about a yard wide, the roof of which was partly upheld by that of the dwelling-house, the two buildings, together with

(c) *Ante*; 148, 149; 1 Taunt. 19.

(d) 2 Dowl. & R. 96.

(e) 8 Bar. & C. 461.

(f) 8 Bar. & C. 461; and see 1 Leach, 81, 184; Russ. & Ry. C. C. 295.

(g) Bristol Gaol, Western Circuit, 30 Jan. 1832.

(h) 2 Bla. R. 682; 2 East's P. C. 1020.

(i) Russ. & Ry. C. C. 53; 4 Bla. C. 240, in notes.

(k) 7 & 8 Geo. 4, c. 29.

(l) *Id.* c. 30.

(m) 5 Geo. 4, c. 83, 84.

(n) *Id.* *ibid.*

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some other, and the court which inclosed them, being rented by the same person, was properly described as an *outhouse*; (o) and it has been suggested that a dairy-house or a mill-house would be deemed an *outhouse* within that act, or at least part of the mansion-house. (p) But where a person was indicted for setting fire to an outhouse, commonly called a paper-mill, and it appeared that the building was a loft annexed to the mill, it was held that the offence was not within the act; and it was doubted whether a mill could be deemed an outhouse within the meaning of the act. (q) But it seems that a building, although annexed to a dwelling-house, may be deemed an outhouse for some purposes, though for others it might be part of the dwelling-house. (r)

9. Mills.

9. *Mills.* (s) Ejectment lies for "flour-corn mills," without saying of what kind, whether wind-mills or water-mills, because the precedents in the Register are in that form; (t) but if on the trial the mill should turn out not to be annexed in any respect to the freehold, but a mere moveable chattel, then, although previously demised for a term, the action of ejectment would *pro tanto* fail; (u) and we have seen that unless a mill be *annexed* to the soil, or to some other thing so annexed, it is not part of the realty, and is neither rateable to the poor, nor could the party renting it acquire a settlement. (x) The *maliciously* and feloniously setting fire to any mill, or tumultuously and feloniously destroying a mill, is a capital felony under the Malicious Injury Act, (y) and under that general term no doubt a cotton-mill would be included. (z)

10. Improve-
ments.

10. *Improvements* (a term used in leases) is sometimes of doubtful meaning; it would seem to apply principally to buildings, though generally it extends to the amelioration of every description of property, whether real or personal; but when contained in any document, its meaning is generally explained by other words. Where the covenant by a tenant was to leave all erections and buildings which should be erected during the term, the covenant was held to include only such as had been let into the

(n) Russ. & R. C. C. 295.
(p) 3 Inst. 67; Burn's J. Burning, II.
(q) 1 Leach, 49; 2 East's P. C. 1020.
(r) 2 East's P. C. 1021.
(s) *Ante*, 152, and 1 B. & Adolp. 161;
1 Bro. & B. 501; 4 J. B. Moore, 281,
as to when a mill is a fixture or tenement,

and when not.
(t) 1 Mod. 90.
(u) 1 B. & Adolp. 161, *supra*, note (s).
(x) *Id.*; 1 Brod. & B. 506; 4 J. B.
Moore, 281, *ante*. 152.
(y) 7 & 8 Geo. 4, c. 30, s. 2 and 8.
(z) 2 Russ. Crim. & Mis. 493.

ground or otherwise fixed to the freehold. (a) But where the covenant was to leave at the end of a *term* a water-mill with all fixtures, fastenings, and *improvements*, during the demise fixed, fastened, or set up on or upon the premises, in good plight and condition, reasonable use and wear only excepted, it was held to include a pair of new mill-stones set up by the lessee during the term, although the custom of the country in general authorized the tenant to remove them. (b) And where a tenant covenanted to repair, &c. an injunction was obtained against his removal of *engines*, although the original building had been increased laterally and upwards, and with larger substituted engines. (c)

11. *Curtilage*, (*curtilagium*, from the French *cour*, court, and Saxon *leagh*, *locus*,) has been defined to be a court-yard, backside, or piece of ground lying near and belonging to a dwelling-house; (d) and though it is said to be a yard or a garden belonging to a house, as if the terms were synonymous, yet it seems clear that they are distinct things. (e) In its most comprehensive and proper legal signification, it includes all that space of ground and buildings thereon which is usually inclosed within the *general fence* immediately surrounding a principal messuage and outbuildings and yard closely adjoining to a dwelling-house; but it may be large enough for cattle to be levant and couchant therein; and therefore, although a person cannot prescribe for a right of common appurtenant in respect of a house alone, yet he might so prescribe as owner of a house *and curtilage*; (f) and a feoffment of a "*house with the appurtenances*," we have seen, will pass the curtilage. (g) And it should seem that the curtilage would equally pass by the word "*messuage*," or "*house*," without the words "*with the appurtenances*," for at least in a deed nothing can legally pass that itself lies in livery, and cannot in law be *appurtenant*. (h) Before as well as since the last act against burglary and larceny, (i) the strict meaning of the term *curtilage* was most im-

(a) 1 Taunt. 19.

(b) 9 Bing. 24; 3 Sim. 450; see 2 Ves. & B. 349.

(c) 3 Sim. 450; and see *ante*, 94.

(d) 4 Ed. c. 1; 35 Hen. 8, c. 4; 39 Eliz. c. 10; 6 Co. Rep. 64; *Mihi dici videtur curtilagium a currillium et ago (sil.) locus ubi curtis vel curtilli negotium agitur. Spelm.*

(e) Jac. L. Dic. tit. Curtilage. And again: "Garden and curtilage, i. e. a little

garden, yard, field, or piece of void ground lying near and belonging to the messuage and houses adjoining to the dwelling-house." Shep. T. 94.

(f) 5 T. R. 46; 2 Ld. Raym. 1015; 1 Salk. 169; Co. Ent. 49, b.; but see 5 Taunt. 244.

(g) 2 Saund. 401, note 2; 1 Bar. & Cres. 350; Shep. T. 94, *ante*, 158.

(h) *Ante*, 153 to 158.

(i) 7 & 8 Geo. 4, c. 29.

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portant as respected the *capital* offence of *burglary*, which might be committed as well in a detached outhouse within the curtilage, as in the principal dwelling-house itself; (*k*) but now by that act (7 & 8 Geo. 4, c. 29, s. 11, 13,) it is enacted that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house, for the purpose of burglary, or for any of the criminal purposes mentioned in the act, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other; (*l*) and the 14th section enacts that the feloniously breaking and entering any other building not so connected with the dwelling-house, but being within its curtilage, and occupied therewith, shall be punished with transportation for life, or seven years, or not exceeding four years' imprisonment, with whipping, if a male: so that the term *curtilage* and its strict extent is still very important as regards the degree of punishment, though the capital punishment for burglary can only be inflicted when the building falls strictly within the description in the 11th and 13th sections.

12. Area.

12. *Areas*. As respects the *criminal* law, a person found in or upon an *area* or *inclosed yard*, for any unlawful purpose, may be apprehended by any person, and punished as a rogue and vagabond. (*m*) The fence of an area also is protected, and stealing, or breaking it, with intent to steal it, is felony. (*n*) But the breaking the gate of an area is not burglary at common law, though thereby the offender afterwards enter the house, the outer door thereof being open. (*o*)

13. Yards, and
courts, and
backsides.

13. *Yard* is a common term in *deeds*, and this, together with *courts*, are mentioned in the Highway Act as places which cannot be taken for the purpose of widening a highway. (*p*) It is illegal to keep a ferocious dog in a *yard*, with the gate open, without giving full notice of the danger, and if that be omitted, the owner may be liable to make compensation for damages. (*q*) So persons found in an *inclosed yard* for any unlawful purpose may be apprehended and punished as a rogue and vagabond. (*r*)

(*k*) 4 Bla. C. 225.

(*l*) And see *Rex v. Jenkyns*, Russ. & R. C. C. 244. This enactment materially alters the law in 1 Leach, 337, and in *Rex v. Lithgo*, R. & R. C. C. 357, and properly confines the capital offences of burglary to cases where the resident of a dwelling-house itself may be put in terror, or be

endangered by breaking the outer door or other security.

(*m*) 5 Geo. 4, c. 83, s. 4.

(*n*) 7 & 8 Geo. 4, c. 29, s. 44.

(*o*) *Rex v. Davis*, R. & R. C. C. 322.

(*p*) 13 Geo. 3, c. 78, s. 16.

(*q*) 4 Car. & P. 297, *post*.

(*r*) See Vagrant Act, 5 Geo. 4, c. 83.

Backside was a term formerly used in conveyances and even in pleadings, and is still adhered to with reference to ancient descriptions in deeds, in continuing the transfers of the same properties; it imports a yard at the back part of or behind a house, and belonging thereto; but though formerly used in pleading, (s) it is now unusual to adopt it, and the word yard or preferred.

14. *Gardens and orchards and nursery grounds, hothouses, greenhouses, and conservatories.* (t) An ejectment lies for a garden, or for an orchard, without other name. These are particularly named and protected in the modern acts against larceny and malicious injuries. The power to enter gardens or orchards is also excepted in the highway and other acts, and therefore it is not an unusual expedient to plant fruit trees in a field to prevent the turning a road over the same, (u) and garden grounds used for trade are as much protected by that exception as private pleasure gardens, and an injunction against entering them, for the purpose of a highway, may be equally obtained in the one case as in the other. (x) And where a close had been planted with shrubs within the last six years, and recently with potatoes, it was held to be a garden within the meaning of an exception in an action for entering and searching for minerals in the lands of another, according to a custom, the sites of houses, gardens, orchards, and highways, excepted. (y)

Annual roots and flowers, planted in a garden, may be removed by any tenant; and so may young fruit trees and shrubs in the garden or nursery of a person to whom the same has been let for the purpose of *sale* or *trade*. (z) But unless a garden or orchard or other land has been so let as nursery ground, no tenant can, as between him and the landlord, remove any flower, root, tree, or shrub, not strictly an annual, or not usually taken up at one season of the year, and re-planted at another season; and if, without authority, he should remove the same, he would be liable to an action for the waste. And if a tenant of any description has made strawberry-beds, he cannot, either before or at the expiration of his tenancy, and whilst they are likely to continue productive, remove or destroy the same, without being liable to an action for the injury to the landlord or succeeding tenant. (a)

(s) See 2 Ld. Raym. 1399.

(t) 7 & 8 Geo. 4, c. 29, s. 42; and id. c. 30, s. 21.

(u) 13 Geo. 3, c. 78, s. 16.

(x) Belt's Suppl. to Vesey, sen. 105.

(y) 4 Dowl. & R. 222.

(z) 2 East's R. 88.

(a) 1 Campb. Rep. 227.

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As respects *criminal* injuries, the 7 & 8 Geo. 4, c. 29, s. 42, enacts, that if any person shall *steal*, or destroy, or damage, with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard; nursery-ground, hothouse, greenhouse, or conservatory, he may, on summary conviction, be imprisoned for six calendar months, and the punishment is increased on subsequent offences. And by 7 & 8 Geo. 4, c. 30, s. 19, *malicious injuries*, to the extent of 1*l.*, to any tree, sapling, or shrub, growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground belonging to any dwelling-house, is felony, punishable with transportation for seven years, or two years' imprisonment; and by the 21st section, the *maliciously* destroying, or damaging with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory, is punishable with imprisonment for six calendar months, with hard labour, or forfeiture of the value of the injury, and 20*l.*

15. Ground adjoining or belonging to a dwelling-house, &c.

15. There is another new and rather too loose and undefined a description of ground or land introduced in modern acts, which make it more penal to commit offences there than elsewhere, viz. *ground adjoining or belonging to any dwelling-house, park, pleasure ground, garden, orchard, avenue, or "any ground adjoining or belonging to any dwelling-house."* This is the description of certain places particularly protected as respects *any tree, sapling, shrub, or underwood* there growing, the stealing or damaging which, with intent to *steal* the same, (*b*) or the *maliciously injuring* the same, (*c*) is punishable as a *felony*, and simple larceny, in case the value of the article or articles stolen, or the amount of the injury shall exceed 1*l.*; (*d*) whereas, the stealing such articles *elsewhere* would not be punishable as a felony, unless the trees were worth, or the damage done exceed, 5*l.*, and if under that amount, the offence is only punishable summarily with payment of the damage, and not exceeding 5*l.* penalty. (*e*) The words "*adjoining to any dwelling-house*" in these acts, import actual contact, and therefore ground separated from a house by a narrow walk and paling, with a gate in it, is not within their meaning; (*f*) and whether ground be pro-

(*b*) 7 & 8 Geo. 4, c. 29, s. 38.

(*c*) Id. c. 30, s. 19.

(*d*) Id. c. 29, s. 38.

(*e*) Id. s. 39.

(*f*) 1 Mood. & M. 341, on sect. 38.

perly described as a "garden" within the same section, is a question for a jury, and it has been held that the word "plant" and "vegetable production" in section 42, do not apply to young fruit trees intended for *sale*, and the place where the latter are growing ought to be described as a nursery, and not as a garden.

So the wilfully taking or destroying any fish in *any water* that shall run through or be in *any land adjoining or belonging* to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, is a *misdemeanor*; whereas the taking fish in *other* water is only an offence punishable summarily with a pecuniary penalty of 5*l.* (*g*). It is to be regretted that in declaring such acts to be felonies or misdemeanors, a more defined description of place or distance from the dwelling-house than land or ground adjoining or *belonging* to a dwelling-house, has not been adopted. (*h*) It was held, that a stream of water (in which the plaintiff had the several fishery) running by the side of a piece of ground which it inclosed on every side, except that on which it was bounded by the water, was not a stream in *inclosed ground*, within 5 Geo. 3, c. 14, s. 3, so as to subject a person fishing therein to the penalty inflicted by that act. (*i*)

16. *Land* is the most comprehensive term in law in de- 16. Land. scribing real property *corporeal*, and by it every thing terrestrial and fixed will pass. (*k*) By that term, without other words, in a conveyance, not only land itself of every description, whether yards, orchard, garden, arable, meadow, pasture, woodland, land covered with water, and waste land, will pass, but also all houses and buildings thereon, and every thing thereon growing or thereto annexed; and therefore though in conveyances and wills, and declarations in ejectment, it has been usual to describe the particular kind of land, as so many acres of arable land,—acres of meadow land,—acres of pasture land, &c. &c. (and it is said that otherwise it will be taken to

(*g*) 7 & 8 Geo. 4, c. 29, s. 34.

(*h*) *Quare*.

(*i*) 1 Marsh. 127; 5 Taunt. 440.

(*k*) Co. Lit. 4, 5, 6; 2 Bla. C. 17, 18; 1 Burr. 133, 144. It was formerly considered necessary in ejectment to describe the property more particularly than at

present, so that the sheriff, by reading the writ of *habere fucias possessionem*, might know what to give the lessor of the plaintiff possession of; but now, as the plaintiff is to take possession at his peril, such particularity is no longer required.

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mean *arable* land, (l)) and also to enumerate houses and all kinds of outbuildings, that is not strictly necessary; (m) and if a person eject another from land and afterwards build thereon, it suffices for the owner to bring his ejectment for the land without specifying the building. (n) But an advowson in *gross* being an incorporeal hereditament, though belonging to the same owner, will not pass under a devise of *lands*, though it would if the words "tenements and hereditaments" be added. (o)

Cujus est solum ejus est usque ad cælum is a well known maxim in law, so that by the conveyance or devise of "*land*," every thing, as well above as below, such as mines, unless expressly excepted, will pass; (p) and if a person erect or fix any thing hanging *over* the land of another, and not merely temporarily passing over it; or if he from an adjoining highway fire off a gun, so that the shot pass over the land of another; (p) or if he undermine his land, or penetrate his mine, (q) these are direct and immediate injuries to the land, for which trespass is sustainable.

17. — Acres,
more or less. (r)

17. — Acres *more or less*. When the quantity of land to be sold or demised is stated, it is usual to describe the quantity as "containing by estimation — acres *more or less*," and which imports that the precise quantity is not warranted; but a large deficiency, such as 100 acres short, in land described as "349 acres more or less," would not be tolerated. (s) In cases of this description, where there has been an actual conveyance, relief would not be so readily obtained in equity, because the party had been guilty of laches in proceeding so far. (t) But it seems, notwithstanding the opinion of the then Master of the Rolls to the contrary, (u) that when the deficiency is considerable, the purchaser will be entitled to a compensation or deduction

(l) It has been considered that *land* in a fine or recovery, unless otherwise described, as meadow, pasture, wood, &c. means *arable* land; Salk. 256; Cowp. 346. The word *terra*, land, was anciently spelt *tera*, so called a *terendo*, *quia vomere teritur*, and in that sense it included only what was *ploughed*, but legally it has the more enlarged meaning, see Co. Lit. 4 a. When the pleadings were in Latin, the *terra*, without other words, would therefore import *ploughed* land, and this accounts for the decision, that *terra* alone denoted only *ploughed* land, and see 1 Thomas's Co. Lit. 333.

(m) As to utility of general words, see 1 Prest. Ab. 93.

(n) 1 Burr. 133, 144; but it is there

said, that if the building be a *messuage*, it ought then to be stated, *sed quare* the distinction.

(o) Id. *ibid.*; 4 Bing. 293, *ante*.

(p) 2 B. & Adolp. 443; Shep. T. 90; 2 Bla. C. 18; and as to the remedies for firing off a gun over land, &c. 11 Mod. 74, 130, 184; 2 Burr. 1114; 1 Stark. R. 56; see *post*, 184, Mines.

(q) 1 Bla. R. 482; 3 Burr. 1556.

(r) See in general, Sug. V. & P. 8th ed. 294 to 303; 1 Thomas's Co. Lit. 217, 219; 6 Geo. 4, c. 12, s. 25; 10 Bar. & C. 446; and see *Cross v. Elgin*, 2 B. & Adolp. 106.

(s) 2 Russ. R. 570; 2 B. & Adolp. 106.

(t) See 2 Freem. 106.

(u) 1 Ves. & B. 375.

in respect of the deficiency, but not if the quantity be only a little less than that described.(x) In general the term *acres* means according to *statute* measure, and which is now prescribed by 5 Geo. 4, c. 74, s. 1 & 2, and a contract to sell by other measure would be illegal.(y) There are, however, two descriptions of admeasurement; the one, the landlord's or selling measure, including the hedges, fences and ditches, and growing bushes and underwood in the divisions between closes; and the other the tenant's, or "*agricultural* measure," including only the ploughing or mowing acres, a distinction sometimes essential to be remembered. In case of the sale of *copyhold*, as 219 acres more or less, it suffices for the vendor to show that the tenants have long been in the actual possession of land about that quantity, although from the description on the Court Rolls that quantity is not distinctly made out, it being notorious that it is most difficult to make ancient descriptions accord with the modern.(z)

As respects *criminal* injuries to mere land, they are *forcible* entries and *forcible detainers*,(a) or wilful and malicious petty injuries, punishable summarily before one justice, under the 7 & 8 Geo. 4, c. 30, s. 24; but the latter act only extends to cases of *actual injury*, and not merely to persons trespassing by walking over grass, and not occasioning any actual damage;(b) and by express proviso the enactment is not to extend to trespasses under a fair and reasonable supposition that a party had a right to do the act, or to a trespass not wilful and malicious, in hunting, fishing, or in pursuit of game.(c) But the recent Game Act subjects trespassers in pursuit of game, and who are not entitled to the same, to a summary conviction and penalty of 2*l.*(d) and authorizes the owner of the land to take away from the party trespassing, all the game in his possession, and inflicts a penalty for refusing to give it up.(d)

Criminal injuries to land.

18. *Prima Tonsura* is a grant of a right to have the *first* crop of grass; and *aftermath* is a right to the *last* crop or pasturage; so there may be a right to the *herbage* or to the *pasture* for one hundred sheep; and all these are considered exclusive and *corporeal* rights, and are recoverable in eject-

18. Herbage, *Prima Tonsura*, &c. aftermath, beast gates and cattle gates.

(x) See 17 Ves. 394; 6 Ves. 328; 1 Esp. Ca. 229; Sug. Vend. 372, 375, 5th ed., and 8th ed. p. 294 to 303, where see the cases collected.

(y) Cro. Eliz. 267; 4 T. R. 314; 10 Bar. & C. 446; and see Sugd. V. & P. 302, 303; 1 Thomas's Co. Lit. 217, 219;

and see 6 Geo. 4, c. 12, s. 23.

(z) 4 Russ. R. 267.

(a) *Post.*

(b) 2 Car. & P. 585; 1 Mood. & Mal. 56; 1 D. & R. 223.

(c) 7 & 8 Geo. 4, c. 30.

(d) 1 & 2 W. 4, c. 32.

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ment, or damages to them in trespass; (e) but the ejectment should be brought specifically for the *first* grass, or for the *aftermath*, and not for the land generally; (f) one person may hold the *prima tonsura* of land as copyhold, and another may have the soil and every other beneficial enjoyment of it as freehold. (g) So in Suffolk, ejectment lies for a *beast gate*, and in Yorkshire for *cattle gates*, (h) for both these are considered corporeal interests, and quite distinguishable from mere rights of common of pasture, the owners of them being tenants in common, and having a joint possession, but several inheritances, and are as much demisable as any other tenements, and cattle gates are conveyed by lease and release, and if devised, the will must be duly attested by three witnesses, according to the statute against frauds, (i) and the owner of them may acquire a settlement by the occupation of them. (i) All these are considered to be corporeal interests in the land, and subject the owner of them to the poor rate in respect thereof. (k)

Fold courses, sheepwalks, wayleaves, and exclusive rights of pastures or commons. (l)

“*Fold courses, sheepwalks, wayleaves, and other exclusive rights of pasture*,” are rights nearly of the same description as the last. These sometimes exist quite distinct from mere rights of common or rights of way, and so much so as to constitute *corporeal* real property, being exclusive rights, and for an injury to which trespass is sustainable, and which property is rateable to the poor; whereas a mere right of common or of way, being incorporeal property, cannot be the subject of an action of trespass, nor is the same rateable. (m) A *waggon way*, when with exclusive occupation of the ground, is of this description, and entitles the owner to an action of trespass, and he is liable to be rated to the poor. (n)

But a mere *right of common of pasture*, or a mere right of way, is only incorporeal, and is not subject to the poor rates, and the owner's remedy for an injury is only by action on the case; (o) and so is right to *panage*, which is only of the mast which falls from the trees, and not part of the soil itself. (p)

19. Woods and underwoods.

19. *Woods and underwoods*. The precise nature of these is frequently essential to be known. Under the statute 43 Eliz.

(e) 13 East, 155; Cro. Car. 362; Hardw. 330; 2 Dal. 95.

(f) 2 T. R. 451; Hardw. 330.

(g) 7 East, 200; 3 Smith, 261, S. C.

(h) 2 Stra. 1063, 1084; 3 T. R. 452; R. T. Hard. 167.

(i) 1 T. R. 137.

(k) Burn's J., Poor Law.

(l) See as to a fold course, sheepwalk, &c. 1 Thomas's Co. Lit. 218, and note.

(m) 9 Bar. & Cres. 827; 5 East, 480; 4 Bar. & Cres. 750.

(n) 7 T. R. 598; Burn's J. Poor, 88.

(o) Post; 9 B. & Cres. 827; 2 T. R. 90.

(p) 1 Lev. 212; 1 Sid. 116.

c. 2, only "*saleable underwoods*" are rateable to the poor; (q) and under the tithe law numerous questions arise. A sale of trees or underwood, to be cut down, would now be held to be a sale of goods and chattels, and not of an interest in land. (r) By the grant of all woods, will pass all the highwood and underwood, and not only the wood growing upon the land or soil, but the land or soil itself whereon it grows; but if a man grant to another all his saleable underwoods within his manor, which have been usually sold, with free entry, egress and regress for selling, making, and carrying away the same, then the soil does not pass, but the wood only: (s) though it is said, that without the words, "with free entry, &c." the soil would have passed. (t) Woods and underwoods will pass in a fine or recovery, by the description of so many acres of wood, and so many acres of underwood, &c. And an exception of all timber trees and wood (not in the plural) does not except the soil on which the trees and wood grow. (u)

20. *Trees and underwoods* we have seen, although growing, are, after they have been agreed to be sold, and *sold*, considered as *quasi* personal property; (x) but generally speaking, when growing, they are part of the realty, though necessarily less durable than the land itself. If trees be excepted in a lease, the land on which they grow, or at least that immediately adjoining the stem and roots, is impliedly also excepted, and consequently, if the tenant cut down the trees, the landlord may maintain trespass for breaking his *close*, as well as for cutting down his trees. (y) But where by a lease of a tenement described as containing nineteen acres, save and except all timber trees, wood, (*not* woods in the *plural*), underwood, &c., it was held that six acres of *the soil*, which at the time of the lease were covered with growing wood were not excepted, but passed to the lessee. (u) When trees are *excepted*, it frequently becomes a question, what trees were intended; (s) an exception of trees in a lease does not include *apple* trees. (a)

Trees become the frequent source of dispute between *neighbours*, upon questions to whom they or their produce belong, and when they may be cut if overhanging the land of another,

(q) 10 East, 219; 1 B. & Cres. 375; Barn's J. tit. Poor, 80 to 83; 1 B. & Cres. 375; 10 East, 219.

(r) 9 B. & C. 56; *ante*, 93.

(s) Shep. T. 94.

(t) *Id.* 95, *sed quere*.

(u) 1 Bar. & Adol. 622.

(x) *Ante*, 86, 93; Off. Exec. 49, 60;

Toller, 6 ed. 194, 195.

(y) *Rolls v. Roch*, 2 Selwyn's N. P. 1287; but see 1 Bar. & Adol. 625; and see farther as to trees, Saund. Rep. Index, tit. Trees.

(s) 16 East, 316.

(a) 4 Taunt. 316; and see 5 Bar. & Cres. 842; 8 D. & R. 637; and see *Id.* 651.

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which points will be considered in the seventh chapter, relating to the abatement of nuisances. (b)

As regards *criminal injuries* in the nature of *larceny* or *malicious injuries* to trees and every description of *growing wood*, they are provided for by the two consolidating statutes against offences of that nature. (c) The offences in the nature of larceny are *stealing trees* and vegetable productions from gardens, orchards, &c. if of 1*l.* value; or elsewhere, if of 5*l.* value, punishable by indictment as simple larceny. And stealing trees, &c. growing any where, if of one shilling value, is punishable summarily before justices, with 5*l.* penalty; and a second offence with imprisonment for a year, and whipping; and a third offence as simple larceny; but if the tree be not of one shilling value, the stealing it is not at all punishable criminally. (d)

As regards *malicious injuries*, if the trees or shrubs destroyed were in a *garden or orchard*, &c., and of the value of 1*l.*, the offence is a felony, punishable with transportation for seven years, or two years' imprisonment; (e) and if the trees or shrubs were elsewhere, and of the value of 5*l.*, the injury is punishable in like manner; but if the trees, wherever growing, were of the value of one shilling, then the malicious injury is punishable as in the case of larceny of trees of such small value.

22. Mines. (f) 22. *Mines* are recognized at common law and under various statutes. These, unless expressly excepted, would be included in the conveyance of *land*, without being expressly named; and, therefore, though where mines have been previously used or opened, it is usual to describe them in a deed as a mine, yet, (excepting in a lease *merely* of the MINE, and not of the surface) no such description seems essential; (g) and so *vice versâ* by the grant of a mine the land itself, the surface above the mine, if livery be made, will pass. (h) All mines (except of gold and silver, which belong to the crown by royal prerogative) (i) are the property of the owner in fee of the surface; (k) and if, therefore, a tenant for life open a new mine, he will be guilty of waste; but he may dig and take the profits of mines that are

(b) *Post*; and see 1 Mood. & M. 112.

(c) 7 & 8 Geo. 4, c. 29, s. 38, 39, and c. 30, s. 19, 20.

(d) 7 & 8 Geo. 4, c. 29, s. 38, 39.

(e) 7 & 8 Geo. 4, c. 30, s. 19; see observations on this act, *Mills v. Collett*, 6 Bing. 85; perhaps, if trees be excepted in a lease, even the tenant might be guilty of an offence against the act. See observations of Tindal, C. J., and Gaslee, J., *id.*

(f) See as to mines in general, 1 Thomas's Co. Lit. 218; 3 Id. 237; *Lear's v. Branthwaite*, 2 B. & Adolp. 437.

(g) Co. Lit. 4; 2 Bla. C. 18; 7 East, 368; 2 Bar. & Ald. 570; 2 B. & Adolp. 437.

(h) Co. Lit. 6; Shep. T. 26; 1 Thomas's Co. Lit. 218.

(i) Plowd. 336.

(k) Co. Lit. 4, a.

open. (l) And he may open new pits or shafts for working the old vein, for otherwise the working of the same mine might be impracticable. (m) It is said that a recovery cannot be suffered of a mine alone, without the surface, because it is not in demesne, but in profit only. (n) Mines are not titheable of common right, though by custom they may be, because they are a part of the substance of the earth, and an annual produce. (o)

Ejectment lies for a *coal mine*, or for any other mine; (p) and inpleading it may be stated, "that the defendant entered a certain coal mine, or vein of coal, and dug, &c." or it may be alleged that the defendant broke the plaintiff's close, and there dug, made, and sunk divers, to wit, — pits, — shafts, and — holes, and there raised, dug, and got divers, &c. Trespass, and not case, will lie for encroaching on a *lead mine*, though the plaintiff has no property in the soil above the mine, but an exclusive right of digging. (q) But if it should turn out that the grant or lease of mines was so worded, as not to operate as an actual demise, but only as a *license to dig*, then the grantee or lessee could not, before he had actually opened the mines, nor could he after he had abandoned the same, recover in ejectment or trespass, though it is said that he might whilst he was in actual possession of working mines already opened. (r) There are in Derbyshire, Cornwall, and Mendip in Somersetshire, peculiar customs, authorizing any person to enter the land of another to search for and take away minerals, (the sites of houses, &c. gardens, orchards, and highways, excepted; (s) and a close planted with shrubs was holden a garden, within the exception.) (t) Where the ownership of a mine is distinct from that of the surface the exercise of the former is usually regulated by express deed, or by act of parliament, or by usage, so as to prevent the working the former becoming injurious to the latter. (u) If there be no such provision, then the mine must be so worked as not to injure the surface or the adjoining property, and if it be, trespass or case lies for any consequent injury, according to the place and mode of committing it. (u) As the statute 43 Eliz. c. 2, only mentions a particular description of mines, viz. "*coal mines*," no other mine, however annually productive, is rate-

(l) 5 Coke's R. 12.
(m) 2 P. W. 388; 3 Thomas's Co. Lit. 237.
(n) Shep. T. 41.
(o) 2 Inst. 651; see note (u), *infra*.
(p) Cro. Jac. 150; Noy, 121; 4 Mod. 143; Salk. 255; Adams's Eject. 3rd ed. 30.

(q) 1 Bla. R. 482; 3 Burr. 1556; 2 B. & Adolp. 437.
(r) 2 Bar. & Ald. 724, 652.
(s) 3 Burr. 1341; 1 Bla. R. 389; 10, East, 273.
(t) 4 Dowl. & R. 222.
(u) 7 East, 368; 2 B. & Ald. 570.

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and rabbits in warrens and grounds used for breeding the same; and the 9th Geo. 4, c. 69, renders certain night poaching peculiarly punishable. (*s*)

25. Game.

25. *Game*. The recent act 1 & 2 W. 4, c. 32, repealing all the prior acts, (except that against night-poaching, (*t*) and the certificate act, (*u*)) has, upon correct principles, placed game as property incident to the ownership of the soil or ground upon which the same is found, although it excludes a mere occupier, being a tenant for a short term, without having paid a fine upon granting the lease, from the right to kill the same, unless with the leave of the landlord, or by express reserved power in his lease; but with such leave or power the occupier, or indeed any person, having obtained a certificate, may now, without other qualification, sport and kill game upon the grounds of the landlord, whether in his own possession or in that of such tenant. The other provisions are highly conducive to the protection of game. The lord of a manor or lordship, not having a legal chace or free-warren, has no right in person or by his gamekeeper to sport over the lands of freeholders or copyholders within his manor, without the express permission of the party entitled to the game thereon. Under the repealed act 58 Geo. 3, c. 75, it was held that the sale of live pheasants was so illegal that no action could be supported for the price. (*v*)

26. Decoys.

26. A *Decoy*, established for twenty years, without such interruption as prevents its growing into a perfect right, is a place set apart for the resort and taking of wild fowl; and after such twenty years is so far a privileged place that a party may be sued for knowingly firing a gun, or making a noise even upon his own land or in a public navigable river, or open creek, so near it as to frighten away the fowl, although none of the fowl were killed, because it is maintained at considerable expense and trouble, and is a means of carrying on a trade. (*w*) The remedy is *case* where the injury has been committed *near* to the decoy, but *trespass* when it has been committed *in* the same. The acts against larceny and malicious injuries do not contain any particular provisions for the protection of *decoys* or wild fowl; (*x*) and though the Game Act requires a person to have

(*s*) See 10 Bar. & Cres. 89, *post*.

(*t*) 9 Geo. 4, c. 69, *post*

(*u*) 52 Geo. 3, c. 93, s. 5.

(*v*) 8 B. & Cres. 553.

(*w*) Holt, 14; 11 Mod. 74, 130; 11

East, 374; Id. 571; 2 Campb. 258; 2 B. & Cres. 934; 4 D. & R. 518; *ante*, 89.

(*x*) 7 & 8 Geo. 4, c. 29, 30.

a certificate to kill *snipes* or *quail*, (y) and subjects persons who trespass in pursuit of them to the same penalties as if in the pursuit of game, (z) and makes it penal to take out of the nest or destroy the eggs of any swan, *wild duck*, *teal*, or *widgeon*, or have the same in his possession or controul; (a) yet it contains no protection in favour of decoys, or of wild fowl themselves.

27. *Rookery*. However long established this may have been, neither the common nor the statute law contains any particular regulation relating to the same, other than the general law against trespass; and no action is sustainable for shooting on a party's own land so near to a rookery as to prevent rooks from continuing to build and breed in an adjoining rookery. (b) It is scarcely necessary to observe, as a precautionary measure, that all new rookeries should be created in a central situation, away from the land of others.

28. *Land covered with water* (including ponds, watercourses, rivers, and water generally,) and *fish* and *fisheries* therein. The legal view of water and fish therein, and of interests relating to the same, are various. If the interest is in the *soil or land*, as well as in the water upon the same, then it is *corporeal* property with all its incidents. But if the interest be merely in the *water*, it is then considered to be *incorporeal* property, and merely as a right or liberty to the *use* of the water in the place, or to the fish which may happen to be therein. The distinction will be found exceedingly important. (d) The interest or property in *land*, and the water over the same, is not technically to be described as water, or as a river, or rivulet, or watercourse, but as "so many acres of land covered with water;" (e) though ejectment or trespass lies for "a pool," or "pond," or "pit of water," or "a gulf," (f) or for "a several fishery," because those terms import an ownership as well of the water or fish as of the land. (g) By a grant in a deed merely "of water in such a place," nothing passes but a right of *fishing*. (h) But by the grant of a *several*

28. Ponds, watercourses, rivers, water, fish, and fisheries in general. (c)

(y) 1 & 2 W. 4, c. 32, s. 5.

(z) Id. s. 30, 31.

(a) Id. s. 24. But perhaps 7 & 8 Geo. 4, c. 30, s. 24, would extend to any wilful injury to a decoy.

(b) 2 Bar. & Cres. 934; 4 Dow. & Ry. 518; and see 2 Campb. 258; 11 East, 514; ante, 89.

(c) See post, "Watercourses."

(d) If a wharf be demised with the use of the water of a river adjoining the same, and not of the soil of the river, no distress for the rent of the wharf can be made upon a barge of the tenant on the adjoin-

ing water, *Buxard v. Capel*, 8 Bar. & Cres. 141.

(e) Yelv. 143; Co. Lit. 4, a; 1 Thomas's Co. Lit. 213; 2 Bla. C. 18, 19.

(f) A precipe lies of these, and the taking of the esplees may be of fishes, 1 Thomas's Co. Lit. 213.

(g) Co. Lit. 4, b. 5, b. 122, a; 1 Thomas's Co. Lit. 213; Yelv. 143; 2 Salk. 637; Cro. Car. 554; 2 Hen. Bla. 182; 5 Bar. & Cres. 897.

(h) Co. Lit. 4; 2 Bla. C. 19; Shep. T. 97.

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fishery, which may be accompanied with livery of seizin, something territorial passes, though precisely what is not well defined. (i) And by a grant of "our fishery of the halves and halven doles, with the fishings called Unlawater, with the appurtenances to the halves due and accustomed," something territorial passes; and the halves and halven doles are in the nature of land, or some local limit within which the fishery connected with the soil is to be exercised; and it therefore follows, that such an estate or interest is rateable to the poor. (k) Mere water is considered to be of a moveable nature, continually changing, at least by absorption and renovation, especially in a river, and therefore water itself by that name has no permanency or durability, the essential properties of corporeal real property. (l) If, therefore, a person have merely an interest in water or a watercourse, which is rather the use of the water which may happen to be in a particular place, and not in the land under it, he should describe it accordingly, and his remedy for any injury or deprivation cannot be trespass or ejectment, but must be an action on the case for the *consequenc* of the injurious act; (m) he could not complain of taking from or adding too much to a watercourse, as of itself a direct and immediate injury, as in the case of trespass to land, but must allege and prove that he thereby sustained some consequent damage; as the reduction of the power in working his mill, or the loss of the use of the water for his cattle, or that his land or banks became injured; (n) though, perhaps, the subtraction or any alteration of water in a *fishery* would actually produce, or be inferred to produce, some injury sufficient to sustain an action. (o)

The distinction between an interest in land and a mere interest in the water over it is material. Thus, if a wharf be demised with the use of the water in an adjacent river, unless the soil of the river also be demised, a barge of the lessee upon the water, though attached to the wharf with ropes, could not be distrained for rent in arrear, because neither the water nor the bed of the river are parts of the thing demised. (p) So the owners merely of a *navigation*, although they have a dam placed thereon, are not rateable to the poor, because they have no interest in the soil, and therefore are not the occupiers of "lands

(i) 1 Co. Lit. by Thomas, 199.

(k) 1 Maule & Sel. 652; Chit. Game L. 306.

(l) Yelv. 143; Co. Lit. 4, a; 2 Bla. C. 18, 19.

(m) Yelv. 143; 2 Bar. & C. 910; 6 Price's R. 1; 7 Moore, 354; 6 East, 208;

1 B. & Ald. 258.

(n) *Williams v. Morland*, 4 Dow. & Ry. 463, *post*, 192, notes (y), (z).

(o) 6 East, 208; 7 East, 193; 1 Wils. 175; on principle, a very small damage would suffice, 2 East, 154.

(p) 8 B. & Cres. 141.

or houses" within the 43 Eliz. c. 2, s. 1. (q) And this is one reason why canal shares, being mere interests in a navigation, and not in the soil, do not in general entitle a person to vote for members of parliament; (r) and Commissioners of Sewers, having no interest in the soil, cannot maintain trespass even for injuries to their works. (s)

The respective interests in a *several* fishery, *free* fishery, and *common* of fishery, the two last of which are only *incorporeal* rights, will be more properly considered amongst other incorporeal hereditaments. It is proper, however, here to observe, that when a river or watercourse *not navigable* divides the property of distinct owners, the inference is, in the absence of proof to the contrary, that the ownership of the soil of such watercourse, and of the fishery thereon, belongs separately to the owners of the land upon each side, to the centre of the watercourse, *usque ad medium filum aquæ*. But not so in the case of a navigable river. (t)

Every owner of land on the banks of a *river* or smaller watercourse has, *primâ facie*, an equal right to the use of the water, and one cannot acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant from all the other proprietors, or twenty years' enjoyment, which is evidence of a grant, (u) and such twenty years uninterrupted enjoyment is now secured by the provisions of the 2 & 3 Wm. 4, c. 71. It has been supposed that any one might divert a part of the water of a river or watercourse to his own use, so that he did not injure any *present* works of another on the same stream. (x) But that doctrine must be received with

(q) *Rex v. Aire and Calder Navigation*, 3 Bar. & Adolph. 139; 9 B. & Cres. 114, 820.

(r) *Ante*, 95. With regard to shares in a navigable river or canal, the legislature has, in many cases, declared them to be real property; in others, where no such express declaration has been made, but where the shareholders, in respect of their shares, are actual proprietors of the soil, or where they have such rights arising in and out of the soil as amount to an incorporeal hereditament, the law considers them real property, so as to give a right of voting. 2 Ves. jun. 652; 1 B. & C. 546; *id.* 551; 9 B. & C. 128; Rog. Elections, 116.

But if such shareholders are, by act of parliament, declared to be a corporate body, they cannot vote, Heywood's Law of Elections, 71; 4 Peck, 113; *id.* Gloucester, 136. So also held the revising barrister at Reading, 1832. The decision of the re-

vising barristers in the case of the Kennet and Avon Navigation shareholders. When the shares are declared to be *personal* estate, they are to be considered as *bona notabilia* in the diocese in which the canal lies, and probate may be properly obtained from the bishop of that diocese, 7 B. & Cres. 632.

(s) 2 J. B. Moore, 666, *post*.

(t) *Rex v. Smith*, 2 Dougl. 411; and see *post*, 192, note (z); see *post* as to the ownership of soil adjoining a high road.

(u) *Wright v. Howard*, 1 Sim. & Stu. 190, cited and confirmed in *Mason v. Hill*, 3 Bar. & Adolph. 304; *post*, 192, note (z); and see 2 Bar. & C. 910; 4 D. & R. 583; 1 Camp. 463; 6 East, 208; 1 Wils. 174; 1 Bar. & Ald. 258; 5 Taunt. 454; 4 East, 107; 7 Bing. 692.

(x) *Bealey v. Shaw*, 6 East, 207; and per Tindal, C. J. in *Liggins v. Juge*, 7 Bing. 694, 695; but see 1 B. & Adolph. 874; 3 Id. 304; *post*, 192, note (z).

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qualification, for although no particular individual can sue for an alteration in a watercourse, unless he can show that it has occasioned some actual injury to himself; (y) yet, if afterwards, and within twenty years, although *subsequent* to such alteration, any person entitled to the use of the watercourse in its natural state should think fit to erect works, or otherwise to begin to use the watercourse as he was *originally* entitled to do, and find that the antecedent alteration then prevents him from so doing, or from enjoying his privilege as fully entitled, he may then sustain an action for the interruption of his right, then, for the first time, beginning to produce an actual injury. (z)

As respects the *criminal* law, special provisions have recently been enacted, varying the punishment for criminal injuries of different descriptions to *water and watercourses* and *fisheries*, whether in the nature of larceny or of malicious injuries, and which we will now notice. (a)

Fisheries and *fish*. As respects injuries in the nature of larceny, it is provided that if in any *water* which shall run through or be in any *land adjoining or belonging to the dwelling-house* of any person being the owner of such water, or having a right of fishing therein, any person unlawfully and wilfully take or destroy any fish, he is guilty of an *indictable misdemeanor*.

(y) *Williams v. Morland*, 2 Bar. & Cres. 910; but note that in *Mason v. Hill*, 3 Bar. & Adolph. 312, Ld. Tenterden seems to have suggested whether that principle should have been admitted. It will be observed, however, that the principle is correct. A commoner cannot sue for a trespass on a common without averring and proving some consequent damage, however small, 2 East's R. 154.

(z) *Mason v. Hill*, 3 Bar. & Adolph. 304. The court in that case held that the proprietor of lands contiguous to a stream may, as soon as he is injured by an antecedent diversion of the water from its *natural course*, made within twenty years, maintain an action against the party so diverting it: and that it is no answer to the action that the defendant *first appropriated* the water to his own use, unless he had twenty years undisturbed enjoyment of it in the altered course. The Court quoted the judgment of the Master of the Rolls in *Wright v. Howard*, 1 Sim. & Stu. 190, as expressed in language most perspicuous and comprehensive. "The right to the use of water rests on clear and settled principles. *Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the

water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years: which term of twenty years is now adopted, upon a principle of general convenience, as affording conclusive presumption of a grant." The learned judge then adds, that an action will lie "at any time within twenty years, when injury happens to arise in consequence of a new purpose of the party to avail himself of his common right." See also 1 B. & Adolph. 874.

(a) 7 & 8 Geo. 4, c. 29, s. 34, 35, 36; Id. c. 30, s. 12, 15, 24.

The term "*belonging to a dwelling-house*" seems very loose and uncertain. (b)

The illegally taking or attempting to take or destroy any fish "in *any water*, not being such as aforesaid, but which shall be *private* property, or in which there shall be any *private right of fishery*," is an offence punishable summarily before a justice with 5*l.* penalty. (c)

But if any person shall, by *angling in the day time*, take or attempt to take or destroy any fish in such first mentioned water, he shall, on conviction before a justice, forfeit 5*l.*, and if in the last mentioned water, then 2*l.*; and a power is given to seize the rods, lines, hooks, nets, and other implements, for the use of the owner; but which seizure exempts the offender from the payment of any damages or penalty for such angling. (d)

28. The *maliciously* breaking down or destroying the dam of any *fish-pond*, or of *any water* which shall be *private property*, or in which there shall be any *right of private fishery*, with intent thereby to take or destroy any of the fish in such pond or water, so as thereby to cause the loss or destruction of any of the fish; or the maliciously putting any lime or other *noxious material* in any such pond or water, with intent thereby to destroy any of the fish therein; or maliciously breaking down or otherwise destroying the dam of any mill-pond, is an *indictable misdemeanor*, punishable with transportation for seven years, or imprisonment for two years, and whipping, if a male offender. (e)

28. Fish-ponds and dams.

29. *Oyster Bed, Laying or Fishery*. The stealing any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, is *larceny*; and the using any dredge, or any net, instrument, or engine whatsoever within the limits of any such oyster fishery, for the purpose of taking oysters or oyster brood, although none shall be actually taken, is an indictable misdemeanor, punishable with fine of 20*l.*, or three calendar months' imprisonment, or both, as the court shall award. (f)

29. Oyster beds.

30. *Hedges, Fences and Ditches*. When these are external, and separate the properties of distinct owners, the rule appears to be, that if there be two adjacent fields separated by a hedge

30. Hedges, fences and ditches.

(b) 7 & 8 Geo. 4, c. 29, s. 34; and see the decision on the word "*adjoining*," ante, 178, 179.

(c) Id. *ibid.*

(d) Id. s. 35.

(e) 7 & 8 Geo. 4, c. 30, s. 15.

(f) Id. c. 29, s. 26.

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and ditch, the hedge and bank *primâ facie* belong to the owner of the field *immediately* adjoining the same; and if there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership. (g) In other words, in the first instance, and in the absence of express evidence of the original formation of the hedge or ditch, or of acts of ownership, the inference is, that the party originally resolving to fence his land, dug his ditch at the extreme boundary of such land, so as to exclude very little, if any, part thereof; and that he threw the excavated earth *inwards*, towards and upon his own land, and then planted or erected a thorn quick or paling upon the ground thus elevated. (h) It has been held, that if a person have a field fenced with a bank and ditch, it is not a necessary consequence that his rightful ditch properly extended to the width of *eight feet* from the interior line of the foot of the bank, i. e. four feet for the base of the bank, and four feet for the ditch; (i) but proof of the ancient width of the ditch is evidence that the owner's land did not extend beyond the *outer* edge of it, and that he has no right to cut away his neighbour's land for the purpose of widening the ditch, (j) nor would it be lawful to dig a deeper ditch, if the consequence would be the giving way and sinking of part of the neighbour's ground. (k)

Twenty years' possession and reparation of a boundary or division hedge or ditch, by an owner in fee, affords presumptive evidence of a continuing *legal obligation* to repair, and he or his tenant (on whom, as occupier for the time being, the obligation to repair devolves,) would afterwards be compellable to repair, and if he should omit to do so, he would be liable for any consequential damage in several respects; as *first*, to an action of trespass, if his cattle, through any defect in his fence, escape

(g) *Per* Bayley, J. *Guy v. West*, 2 Selw. N. P. 1287.

(h) *Semble*, 3 Taunt. 137; and see observations of Holroyd, J. in *Doc v. Pearsley*, 7 Bar. & Cres. 307, 308.

(i) 8 Taunt. 137.

(j) *Id.* *ibid.*

(k) *Semble* with respect to *park paling*, and other upright wooden fences, the usual course is to place the same on the extreme outside or boundary line of the owner's property, when adjoining that of another; and, as it is termed, to drive the nails homeward, that is, to place the pales on the flat surface of the rails, and to drive the nails towards the owner's land, so as to present the flat and even surface towards the neighbour's land, and thereby

prevent persons getting over, which they otherwise might do, by stepping on the rails; and this practice, in otherwise doubtful cases, will assist in deciding upon the ownership of the fence, and of the land on which it stands, but not universally so, for at the time the fence was erected, the neighbour might have refused permission to enter his land, and thereby have compelled the party making the fence to work only upon his own land, and thereby necessarily reverse the above order of proceeding; and, in that case, the inference would be that the boundary line of the land, and of trees growing in the fence, was the external side of the posts to which the rails were fixed. As to a wall, see 8 Bar. & Cres. 257.

from his own land into that of his neighbour; and also his cattle, whilst so illegally therein, might be taken as a distress; *secondly*, to a special action on the case for any trouble, damage or loss, that a neighbour might sustain by his cattle escaping out of his own lands into those of the owner of the defective fence, and there receiving injury; and *thirdly*, he could not complain of any trespass or damage done upon his own land by cattle escaping from that of his neighbour, nor could he legally take them as damage feasant. (l) Again: as between owners *in fee* of fences, there is an ancient specific remedy, which, though now out of use, would be highly useful to revive in practice, viz. a writ "*curia claudenda*," compelling the owner *in fee* to repair his defective fence. (m)

31. The general presumption of law is, that waste land, which adjoins to a public turnpike or other road, and lies between such road and the fence of inclosures near to the same, belongs to the owner of the adjoining inclosed land; whether he be a freeholder, leaseholder, or *copyholder*, and not to the lord of the manor; (n) but this presumption may be, and frequently is, rebutted by proof of acts of ownership by the lord of the manor or other owner of the adjacent property, such as cutting and taking valuable timber trees to his own use, or cutting large quantities of bushes, or other acts, when the latter cannot be ascribed to the exercise of a mere right of common. (o) So where highways or lanes, or narrow strips of land, divide the private inclosed lands of different owners on each side, the legal inference, in the absence of proof of acts of ownership to the contrary, is, that the ground on each side, to the centre of such highway, lane or land, *ad medium filum riae*, belongs to the owners of the land, whether freehold or copyhold, *ex utraque parte*. (p) But this presumption does not affect the soil of a highway set out over a common under an inclosure act, where, previous to the inclosure, only the lord of the manor was owner of the whole soil; (q) nor does it affect land immediately on the outside of a fence adjoining a large waste or common, in which case such land is presumed to belong to the

31. Boundary line, where land adjoins an highway, lane or common.

(l) 1 Salk. 335; 1 Ld. Raym. 273; 2 Y. & J. 391; 1 B. & Ald. 59.

(m) Fitz. N. B. 128; 1 Salk. 128; Vin. Ab. Fences, *Curia Claudenda*; and see chap. ix. post, *Specific Relief*.

(n) *Doe v. Pearley*, 7 Bar. & C. 304;

2 Stark. Rep. 463.

(o) Per Littleton, J., *id. ibid.*

(p) Com. Dig. Chemin; 7 Tannt. 39; 2 Stark. 463; Loft, 358; Stark. Ev. 2 Mood. & M. 32; 7 B. & Cres. 304.

(q) 2 Mood. & M. N. P. C. 24, 32.

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PROPERTY.

Boundaries of
estates, expedi-
ency of ascer-
taining them in
certain cases. (t)

owner of such waste; (r) and in Kent there is a right called land peerage to the same effect. (s)

Where a tenant or other person in the occupation of an entire estate, or of two estates belonging to different owners in fee, has *confounded* or *confused* the external boundaries, or where freehold and copyhold lands lie intermixed, and the exact division of the two has become doubtful, and more particularly with reference to the distinct titles to two estates, one of which the owner wishes to sell, it may become essential to ascertain the precise boundary, which must be done by obtaining in equity a commission to settle the same, or by an issue at law, but the necessity for such a proceeding should be carefully avoided, by the owner from time to time ascertaining and marking, in the presence of young witnesses, ancient marks, and taking care to keep up such ancient marks and divisions between copyhold and freehold, and his own and neighbour's property. (u)

Criminal inju-
ries to hedges
and fences, and
walls, &c.

Criminal injuries to hedges and fences are punishable by several recent acts, but less severely than formerly. The cutting, breaking or throwing down, with intent to *steal*, any part of any live or dead fence, or any wooden post, pale or rail, set up or used as a fence, or any stile or gate, or any part thereof, is punishable summarily before a magistrate, with the forfeiture, for the *first* offence, of the value of the article stolen, and not exceeding 5*l.*; and for a *second* offence, a year's imprisonment; and for any *subsequent* offence, the additional punishment of whipping may be inflicted. (x) And if upon *searching*, any such article of the value of 2*s.* shall be found in possession of a person, and he do not show that he came lawfully by the same, he is to pay the value of the article, and not exceeding 2*l.* (y) *Malicious* injuries of a like nature, but without proof of an intent to *steal*, to any such article, or to a *wall*, subjects the offender to pay the amount of the injury done and 5*l.* penalty; and for a second offence, imprisonment for a year; and for any *subsequent* offence, the additional punishment of whipping. (x) For *small* wilful or malicious injuries to fences, not exceeding 5*l.* damages, the summary remedy before a justice is provided by the same act, but which does not apply to a case of merely

(r) 7 Taunt. 39.

(s) Rob. Gavelkind.

(t) As to inclosures of parts of a waste and to whom they belong, see *post*, under *Tenure*.

(u) See *post*, chap. viii., and 1 Mad.

Ch. Pr. 29, 30; 5 Taunt. 167; 1 B. & Ald. 428; 3 Thomas's Co. Lit. Index, tit. *Boundaries*.

(x) 7 & 8 Geo. 4, c. 29. s. 40.

(y) Id. s. 41.

(s) Id. c. 30, s. 23.

carrying away part of a fence, but only to the party damaging the same. (a)

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32. Navigable Rivers, Creeks and Canals, Quays, Docks and Wharfs. It is important to have an accurate knowledge of the nature of these, and the rights therein, as well regarding the liability to the poor rates and the criminal law, as also respecting other incidents. As respects the poor rate, if the interest be merely in the *navigation* of the river, creek or canal, without any exclusive interest in the soil, then no poor rate can be imposed upon the proprietor of the navigation, however profitable; but if he also have a substantial interest in the soil or land, over which the water passes, so that he might maintain *trespass*, it is otherwise; the former is a mere easement and incorporeal right, the latter an interest in the land, and as such rateable; (c) and when rateable, is to be at a sum which, if let, a tenant would give per annum as rent. (d) In the case of *docks* and *wharfs*, the owner and occupier necessarily are in possession of land, and consequently they are rateable at their annual value, thus improved and increased by the mode of occupation. (e) So also any lands or buildings occupied by a canal company are rateable. (f) It is not a legal presumption, that the owners on each side of a *navigable* river are entitled to the soil of the bed of the river to the centre, (g) though it may be so in a river not navigable. (h) The rights to dock dues, tolls, &c. are frequently regulated by particular statutes, and in that case there is no common law right to be implied to receive other remuneration than that prescribed, however reasonable. (i) So most canals are under modern acts placed under the management of companies of adventurers, and who frequently have power to widen and deepen the same, even after it has been completed. (j) The liability to repair the banks of a river is affected by the same rules as relate to sea walls and banks. (k) In general, commissioners of

32. Navigable rivers, creeks, canals, quays, docks and wharfs. (b)

(a) *Res v. Harper*, 1 Dowl. & R. 223.

(b) As to canals in general, see Dean Tucker on Trade, 116, 117; 2 Chit. Com. L. 134; Eq. Dig. tit. Canals, and ante, 95; post, as to voting. Sometimes the shares in a canal are expressly declared to be personal property, but still the property may be considered as locally arising in the county or diocese in which the canal lies, and therefore if a shareholder die, a probate granted by the bishop of that diocese will be proper, *Ex parte Horne*, 7 Bar. & C. 652.

(c) 9 Bar. & C. 95, 114, 820; 3 B. & Adol. 139.

(d) 1 B. & Adol. 932, 933.

(e) 1 T. R. 219; 5 M. & S. 394; Burn's J., Poor, 95 to 104.

(f) 1 B. & Ald. 263, 289; 5 Bar. & C. 473.

(g) *Ante*, 191; 4 Burr. 2163; *Res v. Smith*, 2 Dougl. 411; because a right to corporeal property cannot be prescribed for, or be appendant or appurtenant, *ante*, 154.

(h) 4 Burr. 2163, *ante*, 191.

(i) 8 Bar. & C. 42.

(j) 7 Bar. & C. 722.

(k) *Post*, 199; Co. Lit. 53, 1; 3 Thomas's Co. Lit. 236, note F.

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PROPERTY.

Criminal inju-
ries.

sewers and owners of canals merely have jurisdiction over them, and not possession, and therefore commissioners of sewers cannot sustain an action of trespass for any supposed injury to a sewer or watercourse. (*l*)

With respect to *offences* of a *public* nature to navigable rivers, it has been held, that though an erection for pleasure, whim or caprice, which interferes in the least degree with a public right of passage, is an indictable nuisance; yet if it be erected and continually applied for the purposes of *trade and commerce* to an extent beneficial to the interest of the country generally, it is a justifiable erection, and not a nuisance. (*m*) But to divert a part of a navigable river, whereby the current is so weakened as not conveniently to carry along the same vessels of the same burthen as before, is indictable. (*n*) And the right of fishing therein is subservient to the right of navigation. (*o*) However, the owner of a vessel sunk by accident in such river is not indictable for not removing it; (*p*) though he is bound to place a buoy there to prevent mischief. (*q*)

The stealing "any goods or merchandize in any vessel, barge or boat, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to or communicating therewith, or from any dock, wharf or quay adjacent to such port, river, canal or creek," is particularly punishable, and consequently the particular description of those places may frequently become material. (*r*) The repealed act 22 Geo. 2, c. 45, was confined to the stealing such goods as were *usually* lodged in ships or on wharfs and quays, (*s*) and it has been suggested that the same decision would affect the present act, (*t*) and it was considered that stealing goods from a vessel *aground* in a dock, in a creek or river, would not be within the former act. (*u*)

33. Bridges. (*v*) 33. *Bridges*. These may be public or private property, and though a bridge built by a private individual may have been dedicated to the public, yet, subject to the use of it by the public, the right to the soil on which it stands, and the mate-

(*l*) 2 J. B. Moore, 666; 8 Bar. & C. 42, *ante*.

(*m*) 6 Bar. & C. 566; Lord Tenterden, *diss.*; see Wellbeloved, in his *Treatise on Highways*, p. 449, and 2 Stark. R. 511; but see 1 B. & Adolp. 441, 874.

(*n*) Hawk. c. 75, s. 11; but see 1 B. & Adolp. 874.

(*o*) 1 Campb. 517.

(*p*) 2 Esp. R. 675.

(*q*) 1 Campb. 515.

(*r*) 7 & 8 Geo. 4, c. 29, s. 17.

(*s*) Fost. 79; 1 Leach, 52; 2 East's P. C. 647.

(*t*) 3 Burn's J., *Larceny*, 577, and *quære* Leach, 341, and Collyer's *Statutes*, 338; Fost. 77.

(*u*) Leach, 357; but the present act contains the words "in any creek, &c."

(*v*) See in general, Burn's J., *Bridges*; Chitty's Coll. Stat. *Bridges*.

rials of which it has been constructed, may still be in a private individual, so that he might sustain ejectment for the soil, or trespass for other injury.(x) The maliciously pulling down or destroying, or injuring with intent to render dangerous or impassable, any public bridge, is felony, transportable for life or seven years, or imprisonment not exceeding four years, and whipping;(y) and other inferior wilful or malicious injuries are punishable summarily before one justice, and 5/. penalty;(z) and different injuries to the materials of a bridge, in the nature of larceny, would be punishable under the Larceny Act, 7 & 8 Geo. 4, c. 29.

34. Sea Banks and Walls. The shore between high and low water mark usually belongs to the lord of the adjacent manor, as owner of the waste and other property not appropriated to individuals, and he may maintain trespass for digging or taking gravel or stones or other materials from that part of the shore,(b) and the owner may support trespass against persons passing with machines over the beach to bathe, without his leave.(b) The owner of land adjoining the sea-shore may legally erect a groin to protect the same from the inroad of the sea, though he may thereby render it necessary for his neighbour to do the like;(c) though he could not legally do so there or in a river, so as to change the usual course of the water and throw it in a new direction upon his neighbour's land, and thereby occasion deluvium.(c) If an individual suffer particular loss by an individual or corporation omitting to repair sea walls, in pursuance of a grant from the crown, or in respect of any other liability, he may sustain an action,(d) and the insufficiency of the corporate funds would not afford any defence,(e) and although if the damage were wholly attributable to a peculiarly high tide, or the act of God, that would be a defence, it would be otherwise if the sea wall or bank were at the time in decay, and probably the damage was partly attributable to that cause.(e)

34. Sea banks and walls.(a)

It has been finally settled in the House of Lords, that land *not suddenly derelict*, but formed by *alluvion* of the sea, imper-

(x) 6 East, 154; 2 Inst. 705; see further, Burn's J., Bridges.

(y) 7 & 8 Geo. 4, c. 30, s. 13; and see other particular provisions, 2 Russ. 17, 19, n.

(z) Id. s. 24.

(a) See in general, 1 Thomas's Co. Lit. 48, in notes; Id. Index, tit. "*Juris Maris*," and tit. "*Sea*."

(b) 5 B. & Ald. 268; 2 B. & Adolp. 236;

so held in that case, though the report only relates to the admissibility of witnesses.

(c) 8 Bar. & C. 355; 3 Wils. & Sh. 235; 1 Dow's Rep. 178; 1 Sim. & Stu. 190; 2 Bar. & C. 910, post. See 1 B. & Adolp. 874, 888.

(d) 5 Bing. 911 to 913; Co. Lit. 53, 54; 3 Thomas's Co. Lit. 236; id. note F.

(e) Id. ibid.; 1 Bar. & C. 477.

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ceptible in progress, belongs to the owner of the adjoining demesne lands, and not to the crown. (f) But if there be a sudden derelict* of land, the latter belongs to the king. (f) Fishing in the open sea, or in any arm thereof, is of common right, and therefore it would be idle and improper to claim the right by prescription or custom. (g) But the *exclusive* right to fish may be prescribed for. (h)

35. Ports and
harbours. (i)

35. *Ports and Harbours* are in general more matter of public than of private concern. It has been held that if a party bound to repair the same omit doing so, a third person, injured by the neglect, must request him to repair, before he can legally do so himself. (k) Frequently, by modern acts, ports and harbours are vested by act of parliament in certain persons incorporated and invested with certain privileges; and in that case the statute usually prescribes and limits the rights and duties relating to the management of such port or harbour. (l)

36. Light-
houses, bea-
cons, and sea-
marks. (m)

36. *Light-houses, Beacons, and Sea-marks.* The power of erecting these was originally vested in the king; (n) but at present the erection of light-houses, and other establishments of the same nature, usually take place under the authority of acts of parliament. The principal act is the 8 Eliz. c. 13, which delegates general and extensive powers to the Trinity House. (o) The exhibiting any false light or signal, with intent to bring a ship into danger, is punishable capitally. (p) The other regulations in that act, and in 7 & 8 Geo. 4, c. 29, against larceny, would extend to these as to other "*buildings*" not particularly named.

37. Highways
and turnpike
roads. (q)

37. *Highways and Turnpike Roads* are principally of public, but very frequently also of private concern, excepting that in general, subject to the right of way, the *presumption* is, that the soil, mines, and trees, belong to the owner of the adjacent land, whether freehold or copyhold, *ex utraque parte, usque ad*

(f) 3 Bar. & C. 91; 5 Bing. 163; and see Scultès on Aquatic Rights; 1 Thomas's Co. Lit. 47, in note.

(g) Willes, 268; 2 Bos. & Pul. 472.

(h) 4 T. R. 439.

(i) See in general Hale De Port Mar.; 1 Hargreave, 46, 73; 2 Chit. Com. L. 2 to 32; 1 Thomas, Co. Lit. 47, 48, in notes.

(k) 2 Bar. & Cres. 302; 2 Dow. & Ry. 550.

(l) 8 Bar. & Cres. 42.

(m) See in general 2 Chit. Com. L. 33 to 46; Burn's J., Ships; 1 B. & Adolp. 509.

(n) 4 Inst. 148; 12 Co. 13; 4 M. & S. 291.

(o) See 2 Chit. Com. L. 34, 35.

(p) 7 & 8 Geo. 4; c. 30, s. 11.

(q) See in general Burn's J., Highway; Chit. Col. Stat. Highway, with notes; 2 Crim. L. 127, &c.

filum viæ, (r) unless where a road has been set out over a waste under an inclosure act; (s) and when the owner of the adjacent land is entitled to the soil of the road, he may support trespass or ejectment for any injury to the soil, or for an ouster. (t) If the highway be not thirty feet wide, two or more justices may order it to be widened, and to take for that purpose adjacent land, but not so as to pull down any house or building, or to take away the ground of any garden, park, paddock, court or yard; and for which compensation is to be agreed or assessed by a jury, and paid, before the land can be taken. (u) All injuries to any highway are public nuisances at *common law*, and in general indictable as such; (x) such as the common practice of ploughing up a public footpath across an arable field, (y) suffering adjacent ditches to be foul, or trees to grow over; (z) and it seems clear that any person might justify lopping such trees so far as to avoid the nuisance. (a) But these and other nuisances are by the Highway and Turnpike Acts removeable or punishable by summary proceedings: and in general notice is required to the occupier himself to remove the nuisance, before another person can interfere. (b) Mere temporary obstructions are not indictable when absolutely necessary; but if otherwise, they are so. (c) Thus the erecting a scaffold to repair a house to a reasonable extent, or the unloading a cart or waggon, and the delivery of any large articles, as casks of liquor, if done with as little delay as possible, are lawful; though if an unreasonable time were employed in the operation, they would become nuisances. (c) And on repairing or rebuilding a house, care must be taken that the incroachment on the highway be not unreasonable. (d) And a timber merchant, although only occasionally cutting logs of wood in the street, and which he could not otherwise convey into his premises, would not be excused by the necessity which, in choosing the situation, he himself created; (e) but the removing them promptly, and not suffering them to remain on the highway an unreasonable time, would excuse him. (f) So if stagecoaches, carts, or other carriages,

(r) *Ante*, 195, 6; 7 B. & Cres. 304; 2 Stra. 1044; 1 Burr. 143; 9 B. & C. 95, 114; 3 Bla. C. 413; 4 Bing. 448; 2 Hen. B. 527; 11 East, 51; 2 Stark. R. 46; 7 Taunt. 39; 11 Price, 736; but that presumption must not always be relied upon, and other evidence should, if possible, be adduced, Holt, C. N. P. 463.

(s) *Ante*, 195, n. (g); but see 11 Price, 736.

(t) *Supra*, note (r).

(u) 13 Geo. 3, c. 78, s. 16.

(z) Hawk. c. 76, s. 48.

(y) 3 Campb. 226.

(s) Hawk. c. 76, s. 50; Burn's J., Highways, XIII. 9.

(a) *Id.*

(b) See Highway Act, 13 Geo. 3, c. 78, s. 6 to 11, 13, 14, 63; and see Turnpike Act, 3 Geo. 4, c. 126, s. 113, 114, 116, 117.

(c) 3 Campb. 231.

(d) 1 Bos. & P. 407.

(e) 3 Campb. 230; 2 Roll. Abr. 137.

(f) *Id. ib.*; Bac. Ab. Highway, E.

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ply or be kept an unreasonable time in a public street, the owner may be indicted. (g) And public exhibitions in a street, occasioning a large concourse of people there, would be indictable. (h) But a mere transitory obstruction, as distributing hand-bills in a public highway, is not illegal. (i) Nor is it indictable to build a house higher than before, whereby the street becomes *darker*. (j) But these and other matters of the like nature are now usually regulated by particular local acts, as in those relating to the metropolis. Offences of a *criminal* nature to highways and turnpike roads, are in general punishable under the particular provisions of the general Highway or Turnpike Acts or local acts. A *small* nuisance occasioned by an act producing *great* public benefit may be excused. (k)

38. Toll-houses,
turnpike gates,
and weighing
engines.

38. *Toll-houses, Turnpike Gates, and Weighing Engines.* These are a description of corporeal property fixed to the realty, as the places and means of securing the receipt of the principal property, which is *incorporeal*, viz. tolls and penalties for their nonpayment. These are usually regulated and protected by the general highway (l) or turnpike acts (m) or by local acts. The occupation of them does not create a settlement. (m) The interest in these is usually vested in the trustees of the turnpike roads, or the mortgagee of the toll and toll-houses; and if the trustees should have no power under their local act to mortgage the toll-houses, they being trustees for the public, will not be estopped from disputing their power to mortgage, and may therefore support ejectment against their own mortgagee. (n)

Criminal injuries to these are punishable under the 7 & 8 Geo. 4, c. 30, s. 14, which enacts that if any person shall maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike gate, or any wall, chains, rail, post, bar, or other fence belonging to any turnpike gate legally erected, or any house, building, or weighing engine, legally erected, he shall be guilty of a *misdemeanor*, and punished accordingly.

39. Rail roads,
waggon roads,
trucks, &c. (o)

39. *Rail Roads, &c.* are highways to be used in the particular manner in which railways are to be used, and subject to the statutes under which they may have been constructed. (p)

(g) 6 East, 427; 3 Campb. 224.
(h) 1 Vent. 169; 1 Mod. 76; Bac.
Ab. Nuisance.
(i) 1 Burr. 516.
(j) 1 Ld. Raym. 737.
(k) *Ante*, 198, note (n); but see 1 B.
& Adolp. 441.
(l) 13 Geo. 3, c. 78.

(m) 3 Geo. 4, c. 126.
(n) 2 Term Rep. 171.
(o) See in general Tucker on Trade,
116, 117; 2 Chit. Com. L. 135, 136;
2 B. & Ald. 646; 10 Ves. 92.
(p) 2 B. & Ald. 646. See 1 B. &
Adolp. 441.

Waggon ways and trucks are particularly named in the Malicious Injury Act, 7 & 8 Geo. 4, c. 30; (q) and the 24th section of the same act would extend to any wilful or malicious injury to a *rail road*; and injuries in the nature of larceny to the iron, or other materials of a rail way, would constitute offences against the 7 & 8 Geo. 4, c. 29, sect. 44.

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II. INCORPOREAL REAL PROPERTY is so termed, because it has no "*corpus*," and is not tangible or visible, nor is the object of the senses, but itself exists only in legal contemplation; though it may *produce* something substantial and beneficial to the owner, as in the instance of the right to tithes, and in that respect it is principally distinguished from corporeal real property, such as land and houses. The corporeal property is the land itself; the incorporeal is merely the right to have some *part* only of the produce or benefit of such corporeal property, or to exercise a right, or have an *easement* or privilege or advantage over or out of it. The possession of corporeal property, as houses and lands, is capable of actual and visible delivery and transfer, and is, therefore, said to lie in *livery* (meaning delivery of seisin) or possession. Whereas incorporeal property is incapable of actual possession, and passes by the mere deed of grant, and is, therefore, said to lie in *grant*.(s). Such as advowsons, tithes, commons, ways, rents, &c. which, together with all other *freehold easements*, must be granted by *deed*, and pass by the execution of such deed, without any actual or supposed delivery of any thing tangible.(t) The instance of an advowson well illustrates the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages, but is merely the right to give some *other* man a title to such bodily possession. It is not a *jus habendi* but a *jus disponendi*. The right of advowson is not the object of the sight or touch, and

II. INCORPOREAL REAL PROPERTY.(r)
1. Defined, and in what respects it differs from corporeal real property, and also from personality.

(q) Sect. 6.

(r) See division of subject, ante, 145 to 150.

(s) Co. Lit. 9, 172; Com. Dig. Grant. But incorporeal hereditaments will pass by other kinds of conveyances than mere grants, as by bargain and sale, Cro. El. 166; covenant to stand seised, 4 Com. Dig. 135; or lease and release, Id. ib. 145.

(t) Id. ibid.; 2 Bla. C. 314, 316. A

lease for any number of years of *land* may even, since the statute against frauds, be created by writing signed by the lessor; but a lease for years of an *incorporeal* thing (as a *several fishery* in the arm of the sea or navigable river) can only be made by lease under seal, 5 Bar. & Cres. 875. So a lease of *tithes* must be by deed, or the lessor is still rateable, 4 Man. & Ry. 434; 9 B. & Cres. 479.

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yet it perpetually exists in the mind's eye and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporeal possession be had of it by the owner, for the latter exclusively belongs not to the patron but to the person whom he has a right to present. The patronage can, therefore, be only transferred by operation of law and grant under seal.^(u) The right of advowson, entitling the owner to present to the church, when vacant, an ecclesiastical relative or friend, and reward merit, is of high estimation, and saleable for large sums of money, but the possession of such right can never legally produce pecuniary advantage to its owner, as he cannot sell the next presentation without being guilty of simony when the church is either vacant, or the incumbent *in extremis*; ^(x) though a sale of the next presentation, the church being then full, is valid. ^(y)

There are several circumstances in which at common law, and also by statute, *incorporeal hereditaments* differ materially from corporeal real property and also from personalty, and *first* as respects their *creation* and the *modes* of transfer, and the evidence of title. Corporeal real property, before the statute against frauds, passed by verbal feoffment and livery of seisin or possession; whereas a *deed* of grant was always at common law and still is essential to the creation or transfer of a *freehold interest* in any *incorporeal* hereditament or easements, and consequently in general a mere verbal or written authority, not under seal, to present to a living, or to use a right of common or way, or other easement, passes no substantial *permanent* right or interest, but is at most a mere license or excuse, in general revocable at will.^(z) Again: a right to or interest in real property *corporeal* cannot be claimed by grant or by prescription, which supposes it, but must be claimed by sixty years' exclusive *seisin*, or by feoffment, or by lease and release, or covenant to stand seised, &c.; whereas as regards *incorporeal* real property, it *must always* have been claimed by custom, or by express or supposed grant, or by

(u) 2 Bla. C. 21, 22; note, it is there stated that an advowson may pass by verbal grant, but that position is clearly erroneous, Co. Lit. 9; 1 Saund. 228.

(x) Cro. Eliz. 685; 19 Vin. Ab. 458; 2 Bla. R. 1052.

(y) 3 Cru. Dig. 33.

(z) 5 Bar. & Cres. 221 to 275; 8 Bar. & Cres. 293; 4 East, 107; 9 Bar. & Cres. 479. It has been well observed, that it is singular how in the teeth of the statute against frauds, 29 Car. 2, c. 3,

s. 1 & 4, it has been held that a *parol license* or agreement may still create a *perfect right* to enjoy an easement. See Sugden, Vend. & P. 8th ed. 75, referring to Sayer's Rep. 3; 8 East, 308, &c. It is equally singular that it should have been settled, that a mere deposit of deeds, without even a written memorandum, shall create an *equitable mortgage*, and consequently in effect a substantial interest in land without writing.

prescription, which supposes such a grant; or now, under the important recent act, by alleging the continued enjoyment of the right of common, way, watercourse, use of the water, ancient lights, or other easements, (except tithes, rents, and services) for one of the periods mentioned in the act, viz. sixty, forty, thirty, or twenty years, according to the subject-matter claimed and other circumstances. (a)

Incorporeal hereditaments differ also from corporeal in respect of many of their incidents, privileges, and liabilities. In general, no incorporeal hereditament or mere easement, however valuable, (excepting rents-charge, (b) tithes, and tolls of fairs and markets,) (c) give no right to vote in an election of a representative in parliament.

Nor are the same rateable to the relief of the poor; and it is only under the express terms of 43 Eliz. c. 2, s. 1, that they can be so rated, as in the instance of tithes *impropriate*: and *proportion* of tithes and mere rights of common or way are not rateable. (d)

Some incorporeal hereditaments are capable of being *extended* under an *elegit* the same as corporeal property, as for instance a rent-charge. (e) But not a rent-seck, (f) nor an advowson in gross. (g)

In general, also, incorporeal property having no *corpus*, and not being the object of touch or force, the *remedies* are peculiar; and ejectment, trespass, and trover are inapplicable, unless expressly given by particular statute, as in the case of ejectment for tithes. (h)

With respect to *tenure*, and the modes of acquiring *incorporeal* hereditaments, many of them may, like corporeal real property, be of copyhold tenure. Thus, a fair or a market appendant to a manor may be granted by copy of court roll. (i) So tithes, &c., when the custom will warrant; (k) and many incorporeal things may pass by themselves without land, and without any relation to land, by copy of the court roll. (l)

The rights to most incorporeal real hereditaments *descend* from ancestor to heir the same as corporeal real property, in which respect they differ from personalty, which upon the death

(a) 2 & 3 W. 4, c. 71; see more fully post, tit. *Prescription and Custom*.

(b) If duly registered under 3 Geo. 3, c. 24.

(c) See Wordsworth, *Elections*, 29.

(d) 9 Bar. & Cres. 827; Burn's J., Poor, 68, 83; see exceptions, ante, 181, 2.

(e) Gilb. Ex. 39; Moor, 32.

(f) Cro. Eliz. 656.

(g) Gilb. Ex. 39.

(h) 2 Stra. 834; Ld. Raym. 191; 52 H. 8, c. 7; Adams' Eject. 18.

(i) Willes, 324.

(k) Id. ibid.

(l) Id. ibid.

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of the owner pass to the executor or administrator for the benefit of creditors or legatees, or next of kin. There is one exception to this rule as regards an advowson, when the executor may be entitled to present, and not his heir, as in the case of an advowson appendant to a manor where the lord dies leaving the church vacant. (m) So with respect to tithes, there cannot be an *ancient* descent, because *laymen* were formerly incapable of holding them before the dissolution of the monasteries. (n) So a devise of incorporeal real tenements or hereditaments must be attested by three witnesses, whereas in the case of personalty and copyhold no attestation is required. (o) In observing upon the words "appendant and appurtenant," we have seen when the different kinds of incorporeal rights to real property may with propriety be claimed as appendant or appurtenant to particular and what descriptions of corporeal real property. (p)

Secondly. Several kinds of incorporeal real property.

Incorporeal hereditaments are of two descriptions, the *first* usually annexed to, or used and enjoyed with, some particular corporeal real property, and either essential to or useful in the enjoyment thereof, such as ancient windows, pews, (q) commons, private ways or private watercourses. The *second* may be enumerated rights wholly unconnected with and independent of the possession or enjoyment of any real corporeal property, such as advowsons, tithes, offices, dignities, franchises, corrodiages, pensions, *annuities*, (r) rents and services, rent-charge, rent-seck, quit rents, fee farm rents, rack rent, and corn and other rents.

1. Ancient lights. (s)

1. An *ancient window* may be classed under *incorporeal* hereditaments, for the right to the enjoyment of it may be

(m) 8 Bing. 490, 498, 501; 7 B. & Cres. 113; Toller's Exec.; see *post*, p. 217.

(n) See 2 New R. 491, where a rectory in Kent, formerly belonging to one of the dissolved monasteries, having been granted by Hen. 8, to a layman, to be holden in fee by *knight service in capite*, it was held that the lands and buildings thereon were descendible according to the custom of gavelkind, but that the tithes descended according to the common law. See also H. Chitty on Descents, 200.

(o) 29 Car. 2, c. 3, s. 5; but note, that act only names lands and tenements, omitting "*hereditaments*."

(p) *Ante*, 153 to 158.

(q) See 2 Bla. C. 21. It will be ob-

served that Blackstone singularly mentions pews as partaking of personal property, descending by custom.

(r) "*Annuities*" is a term now technically applicable only to such annual payments as are *not* charged upon or issuing out of land, and cannot therefore be styled incorporeal hereditaments, though so stated by Blackstone.

(s) See in general the cases collected, 2 Chit. Pl. 5th ed. 768, 769, in notes, and see 2 Bla. C. 403, and notes. Blackstone singularly treats the right to an ancient window amongst rights to *personal* property by occupancy. See further, *post*, chap. viii., as to injunctions to prevent the obstruction of an ancient light, and tit. *Prescription*.

defined to be a right to free access of light and air *over land of another person*, adjoining to the building in which the window is placed, so as to prevent the owner of such adjacent land from building or using his land so freely as he otherwise might have done, and precluding him from so enjoying it as to obstruct in any sensible degree the light or air from entering through such window or other apperture. The uninterrupted permission by an owner *in fee* to his neighbour thus freely to use such window for twenty years, at common law, afforded presumption of a *grant* by deed, founded upon adequate consideration, of the free use of the light and air over the land of the adjacent owner through such window, (t) and now by express enactment such long enjoyment creates an absolute and indefeasible right, so that after the lapse of that time no building could legally be erected on the adjacent ground, occasioning any sensible diminution of the light and air, unless it can be shown that the enjoyment originated by a qualified consent or agreement, expressly made or given by deed or in *writing*, so as to exclude the presumption of an absolute grant; and consequently, every owner of property adjoining a window that has not been erected nearly twenty years, should take care within that time either to obstruct it, or have some writing signed by the owner of the window, qualifying his otherwise perfect right. (u) On the other hand, if an ancient window has been shut up for more than twenty years, it loses its privilege, as that nonuser affords a presumption of a release of the prior right. (x) But the circumstance of an ancient window having been built contrary to the Building Act, affords no defence to an action against a private individual for obstructing it. (y) Where the owner of an entire plot of ground builds two or more houses upon it, and afterwards separates the ownership or occupation, each party taking a part impliedly engages not to alter or affect the existing state of the buildings, and in that case even six years, or less, will give as perfect a right to the free use of a modern window, as in other cases twenty years adverse enjoyment would create. (z) The remedies for injuries to ancient windows are abatement of the nuisance or by an

(t) But such a presumption is excluded by the custom of London, 3 Swan. 335. See 1 Mood. & M. 350, as to this custom; but see 2 & 3 W. 4, c. 71, affecting *all* such customs.

(u) 2 & 3 W. 4, c. 71, s. 3, &c.; 3 Campb. 82. See the statute stated fully, post, "*Prescription*," and in chap. ix. as to *Limitations*. If the use of the window commenced during a tenancy for life, 11

East, 512, or life of an *ecclesiastical* person, 4 B. & Ald. 579, or a *lease* for years to a tenant, id. *ibid.*, the owner in fee will not be affected. The statute also provides for such exceptions.

(x) 3 Campb. 514.

(y) 1 Marsh. 140.

(z) 1 Price, 27; 1 Lev. 122; R. & M. 24; 1 M. & M. 396, 400; 2 Saund. 114, n. 4.

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action on the case, if the obstruction or other nuisance was committed off the land of the owner of the window, or by an action of trespass, if the injury were by fastening a wooden or other obstruction into the owner's wall or window, and the action might be repeated even by a reversioner^(a) for every continuance of the nuisance. But when the right to an ancient light is about to be obstructed, the best course is immediately to file a bill, and move a Court of Equity for an injunction to *prevent* the erection of the injurious building.^(b) Where an old house is pulled down wherein were ancient lights, and a new one built, the lights in the new house must, it has been said, be in the same place, and of the same dimensions, and not more in number than the lights in the old house,^(c) though it should seem on general principles, that a new building on the same scite would in general be entitled to the same rights as the former.^(d) It has been held, that if a building, after having been used twenty years as a malthouse, is converted into a dwelling-house, it is in its new state entitled only to the same degree of light as was necessary to it in its former state, and that the owner of the adjoining ground might therefore lawfully erect a wall which prevented the admission of sufficient light for domestic purposes, if what was still admitted would have been enough for the making of malt.^(e)

2. Pews.

2. *Pews.* The right to sit in a pew is treated by Blackstone as of a personal nature, that may descend by custom immemorial, without any ecclesiastical concurrence, from ancestor to heir; but it seems clearly to be at least an *incorporeal* interest in real property.^(f) It is not an exclusive title to the pew itself, as a corporeal real estate, but is a right merely to sit or be there at particular times, for the specific purpose of attending divine service; for which reason trespass is not sustainable against a stranger for sitting therein, but case is the proper remedy;^(g) though for actually breaking and injuring the wood-work of a pew, it has been said that trespass might be sustained by the owner against a mere wrong-doer.^(h) And

(a) *Shadwell v. Hutchinson*, 2 B. & Adolp. 97; 9 Bar. & C. 591; 1 Mood. & M. 350.

(b) 2 Russ. R. 121, and *post*, chap. viii.

(c) 2 Vern. 646, *sed quære*.

(d) *Ante*, 151; 1 Campb. 322; 3 Campb. 81; 2 B. & Adolp. 164.

(e) 1 Campb. 322, 323.

(f) 3 Inst. 202; 12 Coke, 105; H.

Chit. Desc. 259. It appears to descend or pass by alienation of the house, not by any *custom*, but of common right; and see 2 B. & Adolp. 164, as to the subdivision of this right between several occupiers.

(g) 1 T. R. 430; 5 B. & Ald. 361, *per* Holroyd, J.; 8 B. & C. 294.

(h) 3 Bing. 137, 138; 2 Roll. R. 140; Palm. 46.

an action of trespass for breaking and entering a chapel and destroying the pews will lie at the suit of a perpetual curate of an augmented parochial chapelry, even against the chapel warden. (i) The right to sit in a particular pew in a church arises either from *prescription*, as appurtenant to a messuage, and which presumes a faculty, or from an actual faculty or grant from the ordinary, who has the disposition of all pews *de novo*, and which are not claimed by prescription. (k) In an action upon the case at law for a disturbance of the enjoyment of a pew in the body of the church, if the plaintiff claim it by prescription, he must state it in the declaration as *appurtenant* to a messuage in the parish. (l) But it is said that a pew in the aisle or chancel of the church may be prescribed for in respect of a *house out* of the parish. (m) This prescription may be supported by an enjoyment for thirty-six years, and perhaps any time above twenty years. (n) But where a pew was claimed as appurtenant to an ancient messuage, and it was proved that it had been so annexed for thirty years, but that it had no existence before that time, it was held that this modern commencement defeated the prescriptive claim. (o) In an action against the ordinary the plaintiff must allege and prove repairs of the pew. (p) But a possessory right to a pew is sufficient to sustain a *suit* in the Ecclesiastical Court against a mere disturber. (q) The faculty and a prescription, which supposes it, cannot be granted of a pew in the body of the church to a man and his heirs, but it must be in respect of a messuage within the parish. (r) The right to sit in a pew may be apportioned; and therefore where by a faculty reciting that A. had applied to have a pew appropriated to him in the parish church in respect of his dwelling-house, a pew was granted to him and his family for ever, and the *owners and occupiers* of the said dwelling-house; and the dwelling-house was afterwards divided into two; it was held

(i) 2 Young & J. 265.

(k) Gibbs' Cod. 221; see generally, as to the right to pews, 1 Phill. E. C. 316; see a declaration stating a faculty, 2 B. & Adolp. 164.

(l) 5 B. & Ald. 356; 8 B. & Cres. 294.

(m) Forrest. R. 14, 15; 5 B. & A. 361, S. P.

(n) 1 T. R. 428; 2 & 3 W. 4, c. 71.

(o) 5 T. R. 296; but now see 2 & 3 W. 4, c. 71.

(p) 1 Wils. 326; 8 B. & C. 280; 2 Man. & R. 318, S. C.; Loft's R. 423; Tidd, 9 ed. 444.

(q) 1 Phil. E. C. 316; see further, the cases and precedents, Forrest. R. 14; 1

Young & J. 583; 2 Chit. on Pleading, 817, note (a); Com. Dig. Action on Case for Disturbance, A. S.; 2 Saund. 175, c. d. Evidence; see 3 Campb. 288; 2 B. & Adolp. 164. The right is described "for plaintiff and his family, inhabiting a named messuage with the appurtenances, to have the use and benefit of a certain pew in the parish church of, &c. to hear and attend divine service celebrated therein, as to the said messuage and tenements belonging and appertaining;" or it may be claimed as "the right and privilege and liberty of sitting," &c.

(r) 1 T. R. 428; Forrest. R. 14; 5 B. & C. 1, *ante*, 155, note (k), *supra*, (k)(l).

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that the occupier of one of the two, though constituting a *very small part* of the original messuage, had *some* right to the pew, and in virtue thereof might maintain an action against a wrongdoer. (s) If a faculty for annexing a pew to a messuage has been obtained by surprise or undue contrivance, it may be revoked. (t) But a sentence in the Ecclesiastical Court or Court of Arches, relative to the right to a pew, is not conclusive evidence of the plaintiff's right in an action for disturbance, even between the same parties. (u)

3. Commons. (x) 3. *Commons*. The rights to use these are *incorporeal* hereditaments, being merely rights to take part of the produce or profits of another's land or water therein, such as to feed cattle, to dig turf, to cut wood, to catch fish, or the like, and are therefore principally of four sorts, viz. common of pasture, turbarry, estovers, or piscary, being no right to the land itself, but merely to a part of the produce, to be taken in a certain manner. (y) These we have seen are distinguishable from beast-gates, cattle-gates, fold-courses, &c. which are exclusive corporeal rights to the pasture upon certain lands. (z) Being incorporeal interests not expressly named in the statute 43 Eliz. c. 2, these mere rights of common are not in general directly and *eo nomine* or separately rateable to the poor, though in effect they are so rated when attached to land, because the land to which they are appendant or appurtenant may be rated higher in respect of the annual value being increased by the circumstance of

(s) 2 B. & Adolp. 164.

(t) *Bull v. Jones*, 2 Hagg. Ecc. R. 417.

(u) 3 T. R. 639.

(x) As to appendants and appurtenances, *ante*, 153; as to rights of common in general, see Com. Dig. tit. Common; Bac. Ab. Common; Selwyn, N. P. tit. Com.; Saund. Rep. Index, tit. Com. The better cultivation, improvement, and regulation of common fields, wastes, and commons of pasture, is effected by 29 Geo. 2, c. 36, s. 1, 31 Geo. 2, c. 41, 13 Geo. 3, c. 81; and the 38 Geo. 3, c. 65, contains regulations for preventing the depasturing of forests, commons, and open fields, with sheep or lambs affected with the scab or mange. The general inclosure act, 41 Geo. 3, c. 109, (amended by 1 & 2 Geo. 4, c. 23,) extends to all commons, which, however, is not to operate against the express provisions of any local act. See sect. 44; 1 B. & Ald. 630; 3 M. & S. 127.

In general, to sustain a common of pasture, a party should have *land*, and not merely a house without a curtilage, 5 T. R.;

46; but see 5 Taunt. 244. A copyholder must prescribe in the name of the lord of his manor for common on another manor, 5 Taunt. 365; Saund. Rep. Index, Common. Twenty years' adverse exclusion bars the right, 2 Taunt. 160; and on the other hand, twenty years' uninterrupted user in general gives the right, 2 & 3 W. 4, c. 71. As to the right to approve, 2 T. R. 391; 3 T. R. 445; 1 Stark. 102; Rast. Emr. 626, 627; Thomps. Ent. 453. Under the inclosure act, within what time to appeal against allotment decision, 3 M. & S. 127, What title to an allotment before award, 18 Ves. J. 207; 2 Bar. & Ald. 171.

(y) All sorts of common bear a resemblance to common of pasture; but in one respect they go further, common of pasture being a right only of feeding on the herbage of the soil; but common of turbarry and others are a right of taking away the very soil itself, 2 Bla. C. 34, 35.

(z) *Ante*, 181, 182; Roll. Ab. 402; Cro. Car. 432; 7 T. R. 671; 1 T. R. 137; 2 T. R. 462; 2 Stra. 1004.

having the right of common attached to it. (a) But when the right of common is of an exclusive nature, as in the case of cattle-gates and beast-gates, so as to give the sole or exclusive right of pasture, it is otherwise: (b) and as there may exist such an exclusive right, it has been held that after verdict a declaration in ejectment for land, and also for "common of pasture" generally, without alleging that it was appendant to the land, is sufficient; (c) though in general ejectment for mere right of common of pasture separately is not sustainable: (d) and in general for disturbance of this right, case is the proper remedy, and not trespass, unless where cattle have been driven or chased off the common. (e) In taking a conveyance or lease of land, to which a right of common is supposed to be attached, care should be observed to ascertain whether the right is legally appendant or appurtenant, or whether the prescriptive right may not have been extinguished by unity of seisin; and if there should be any doubt, then words of express grant should be introduced into the conveyance or lease, or words sufficient to pass a right to all commons *used* with the premises conveyed. (f) In pleading, and in evidence in general, twenty years' uninterrupted exercise of the right is at least *prima facie* sufficient, and sixty years' user is now conclusive. (g)

We have seen in a former page that common of pasture cannot be claimed in respect of a house alone without land; (h) but it may be in respect of land to which there is no house attached; and therefore where in an action for disturbance of plaintiff's right of common the declaration stated that he was possessed of a house and so many acres of land, with the appurtenances, and by reason thereof ought to have common of pasture, &c., it was held that this allegation was divisible, and that proof that the plaintiff was possessed of land only, and entitled to the right of common in respect of it, was sufficient to entitle him to damages *pro tanto*. (i)

Common of *pasture* is *appendant*, *appurtenant*, or *in gross*. The fourth, *pur cause de vicinage*, is not a right of common, but merely an excuse for a trespass when two commons be near

(a) 9 B. & Cres. 827; Burn's J. Poor, 83, &c.

(b) 5 East, 480; 1 B. & Cres. 389; 2 D. & Ry. 651; 4 B. & C. 750; 6 D. & R. 635; Burn's J. Poor, 83 to 88.

(c) Cas. T. Hard. 127; 1 Stra. 54; Adams's Eject. 3 ed. 19.

(d) Id. ib.

(e) 2 East, 154; 3 Wils. 279.

(f) 1 Taunt. 205; *Cowlam v. Slark*, 15 East, 108; Wils. 310, 319; *ante*, 156, 157.

(g) 2 & 3 W. 4, c. 71; see further as to rights of common, Com. Dig. tit. Common; Bac. Ab. Common; 2 Bla. C. by Chitty, 32 to 35, in notes.

(h) *Ante*, 155; but see 5 Taunt. 244.

(i) 2 B. & Ald. 360.

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to each other, and the cattle of the commoners have been accustomed to wander on each, in consequence of there being no division fence between. It would not justify one commoner turning or driving his cattle on to the common upon which he has no strict right of pasture, and the owner of the soil might legally fence one common from the other, and thereby put an end to this mere excuse for the trespass. (k)

Common *appendant*, properly, is a right attached to *arable* land, and is an *incident* of tenure, and supposed to have originated in the lord or owner of a manor or waste originally, in consideration of certain rents or services, or other value, granting out to a freeholder or to copyholders plough land or land to plough, and at the same time granting either expressly, but generally *impliedly* and as of *common right* and necessity, common appendant over his remaining wastes and commons, *so that such grantee might, whilst his corn was growing, have a place to turn out and feed his horses and beasts kept to plough such land, and sheep and other cattle kept to manure the same.* (l)

Levancy and couchancy are as incident to common appendant as well as to common appurtenant; that is to say, the occupier of the arable land can turn on no more cattle than would be proper to till and manure his quantity of arable land, nor more than the produce of the land would support in the winter, and consequently the *number* as well as *kind* of cattle must be limited, with relation to the quantity and nature of his land; (m) and it cannot be for cattle *borrowed*, unless they be used all the year to plough or manure his land, (n) and for that reason this right of common is *apportionable* or *severable*, and if the land be divided ever so often, every little parcel of land is entitled to common appendant, and it may be claimed even for a yard of land, because the aggregate number of cattle that may be legally turned on would not, by such subdivision, be increased. (o)

Common *appurtenant* differs from appendant in respect of its origin, not being necessarily connected with tenure, nor confined to arable land, nor to beast of the plough, or for manuring land, but may extend to animals not generally commonable, as hogs, goats, or the like. These originated in a grant by deed,

(k) *Musgrave v. Cave*, Willes, 319, 322; Co. Lit. 122; 13 East, 348; 2 Wils. 269; 2 Woodes. 78; 4 Co. 38; 2 Mod. 105.

(l) Co. Lit. 122, a, *per* Willes, C. J. in *Bennett v. Reeve*, Willes, 222, 322; 2 Bla. C. 32. The reason is not that the tenants by their tenure were obliged to plough the lord's lands, *per* Willes, C. J. Willes, 230.

(m) 4 Vin. Ab. 583, pl. 6; and *per* Willes, C. J. Willes, 222, 322; 2 Bla.; as to the necessity for land or a curtilage, 5 T. R. 46; but see 5 Taunt. 244.

(n) *Id.* *ibid.*; Wood's Institutes, 208, 209.

(o) 4 Coke, 37; 8 Coke, 79, a; Willes, 222, 522; *per* Taunton, J. in 2 B. & Adolph. 168.

which might be made by any person who had waste or other land to another person, owner of other land, to have his cattle, or a particular description of cattle, levant and couchant upon his land, upon such waste or other land, at certain seasons of the year, or at all times of the year; and uninterrupted usage for upwards of twenty years, during a tenancy in fee of the owner of the waste, will afford sufficient evidence of a corresponding right. Such an express grant may be made at this day. (p) The intendment is, that no person would make such a grant without limit as to the number of cattle, and that he would grant it only for such number as would be essential or useful for the fair occupation of the grantee's land, and consequently only for so many of his *own* cattle as the produce of that land in the summer and autumn can keep and maintain in the winter, which is the meaning of the term *levant and couchant*. Until the quantity of cattle has been fixed by a jury, the precise number is uncertain, as more produce may be raised in one year than in another, and which is the reason this is sometimes, though inaccurately, termed common *sans nombre*, but still it is certain in its nature, and to be readily ascertained, with reference to the quantity and quality of the land, and the usual produce and number of cattle ordinarily kept upon the same during the last twenty years. (q) In a plea, therefore, prescribing for common of pasture appurtenant to land, it is essential to aver that the cattle were the party's own cattle levant and couchant on his land; (r) and if the claim be for an unlimited number, without these qualifying words, it cannot be supported; (s) and the notion that common *without stint* can exist is exploded. (t) Common appurtenant may be apportioned the same as common appendant. (u)

Common in *gross* is a right to turn on for pasture a certain limited number of cattle, and which may have been made, and still may be, by grant under seal, without regard to tenure or to any land of the grantee, and is merely to the grantee and his heirs at large, without qualification, and belongs to his person, and is therefore termed in gross. It may be claimed by prescriptive right, which supposes an original grant by deed, as by a parson of a church, or a sole corporation. It is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor, (x)

(p) 15 East, 116.

(q) 2 Brownl. 101; 1 Vent. 54; 5 T. R. 48; 1 B. & Ald. 706; *Rogers v. Benstead*, Selwy. N. P. tit. Common.

(r) 1 Saund. 28, 343; 2 Saund. 346, n. 1; 8 T. R. 396.

(s) Willes, 232; 8 T. R. 596.

(t) Id. *ibid.* overruling what is said in 2 Bla. C. 34.(u) *Ante*, 212, note (o); 2 B. & Adolp. 168.

(x) 2 Bla. C. 34.

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and it is never parcel of a manor. (y) It follows that levancy and couchancy is not essential in the exercise of this right. (z) Under the old settlement acts, 13 & 14 Car. 2, a right of common in gross, as the going of two head of cattle on a common, was holden to give a settlement. (a) A fold-course for not exceeding 300 sheep may be granted even by the owner to another. (b)

Common appendant and appurtenant are frequently confounded in the books, (c) nor is it necessary in *pleading* to allege in express terms whether the common of pasture be appendant, appurtenant, or in gross, for the court will judge of it from the nature of the right as otherwise claimed, though the word *pertinent* is always used in claiming common in respect of the occupation of any land. (d)

We may here observe, as a general rule, that twenty years' uninterrupted use of a common for a certain description of cattle, or in any particular way, will establish a right, if by law a grant could have legally been made to the extent of the usage.

4. Ways. (e)

4. *Private ways.* With respect to these they must have originally been created by grant under seal; but in the absence of an express grant they may be established by prescription after twenty years' uninterrupted enjoyment. Such long enjoyment of a way is now of itself, in general, a sufficient *prima facie* title, and *forty* years is conclusive, unless it be shown that it was enjoyed by some consent or agreement expressly made for that purpose by deed or writing, and the right may be claimed merely by averring and proving such long possession in the cases mentioned in the recent act. (f) Here also a purchaser or lessee should ascertain the title to the way, and if it be doubtful whether the prescriptive right may not have been destroyed by unity of seisin or other means, he should require a fresh express grant, or at least words sufficient to pass all ways theretofore *used* by the prior occupiers. (g) The word "*belonging to*" is only synonymous to "appurtenant," and not equivalent to the word "*used*," and will not pass a way extinguished by unity of seisin, unless it be a way of *necessity*. (h) Injuries to a right of way may in general be remedied by abatement or removal of the obstruction, (i) or by action on the case, but not by action

(y) Willes, 323; 4 Co. 38, a.

(z) 5 Taunt. 244; 1 Rol. Ab. 401, pl. 3; Cro. Jac. 27; 1 Ld. Raym. 726.

(a) 7 T. R. 671.

(b) 1 Rol. Ab. 402; Cro. Car. 432; Sir W. Jones, 375.

(c) Per Willes, C. J. in Willes' Rep. 222 and 319.

(d) Per Willes, C. J., Willes' R. 319.

(e) See in general the full notes of modern decisions, 2 Bla. Com. 35, 36.

(f) 2 & 3 W. 4, c. 71.

(g) 3 Taunt. 24; 5 B. & Ald. 830; 2 B. & Cres. 100; 2 Dowl. & Ry. 287, S. C.; 15 East, 108; ante, 156, 157.

(h) Decided in K.B. Hil. T. 1833.

(i) 2 Smith, 9.

of ejectment or by trespass, unless in case of assault upon the person attempting to use his right of way.

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5. *Watercourse*. The right to the use of water, without any property in the subjacent land, is, we have seen, a mere incorporeal hereditament, which must be created by express grant under seal, or be founded on prescription, which supposes an ancient grant, or now, by the recent important act, the right may be directly claimed and proved by mere uninterrupted user for twenty or forty years. (k) There is also a peculiarity relating to a claim of this nature, viz. that it never was destroyed by unity of seisin of the land and water, and of the place in respect of which the use to the water was claimed, the law admitting an exception to the general rule on account of the uncontrollable nature of water, which will run in its old course, in spite of legal fictions or rules, and that the claim to water is not strictly by grant or prescription, but *ex jure naturæ*; (l) so that in the case of a watercourse a purchaser or lessee need not, as he should in the case of commons or of ways, be solicitous with respect to the title to a natural watercourse, which will come to and run from his purchased or leased land precisely the same, without regard to the terms of his conveyance. To this rule, however, there may be many exceptions, especially where there be many persons claiming or likely to claim water from, or the use of water in the same watercourse, in which stipulations securing the right of the purchaser or lessee should be cautiously introduced. In general, the remedies for obstructions or injuries to a watercourse are abatement of the nuisance, (m) or an action on the case. (n)

5. Water-
courses. (i)

6. *Advowson* or *patronage* is the right of presentation to a church or ecclesiastical benefice. Advowsons are either *appendant* or in *gross*, and are either presentative, collative, or donative. (p) If *appendant* to a manor it will pass or be conveyed together with the manor, as an incident and appendant, by a conveyance of the manor only, without adding any other words. (q) But where the property of the advowson has been once separated from the property of the manor by a legal con-

6. Advow-
sons. (o)

(j) See in general, *ante*, 189 to 193; and 2 Chit. Pl. 5 ed. 788 to 799; and 2 Bla. Com. 14, 90, 403, n. (7); 3 Id. 218.

(k) 2 & 3 W. 4, c. 71, s. 2, &c.

(l) 1 Bos. & Pul. 374; see Vin. Ab. Extinguishment, C.; Poph. 166; Latch, 153; 3 Bulstr. 340.

(m) 2 Smith's R. 9.

(n) See several precedents and notes, 2 Chit. Pl. 5 ed. 788 to 799.

(o) *Ante*, 150, 163, 164.

(p) 2 Bla. C. 22.

(q) Co. Lit. 307.

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veyance, it is called an advowson in *gross* or at large, and never can be appendant again, but is for the future annexed to the *person* of its owner, and not to his manor or lands; (*r*) and an advowson in gross cannot be extended under an *elegit*. (*s*) The right of presentation is the right to offer a clerk to the bishop to be instituted to a church. (*t*) All persons seised in fee, in tail, or for life, or possessed for a term of years of a manor to which an advowson is appendant, or of an advowson in gross, may present to a church when vacant. Although this is a right considered of great value as a provision for relations, a pledge of friendship, or, what is its true use and object, the reward of learning and virtue, yet the continued possession of it, and the actual presentment of the clerk never yield any *lucrative* benefit to the owner, as the law has provided that the exercise of this right must be perfectly gratuitous. The advowson itself is valuable and saleable, but not the presentation when the living is void; (*u*) therefore the mortgagor shall nominate when the church is vacant, though the advowson has been mortgaged in fee, and though the legal right to present is transferred to the mortgagee, yet as he can derive no advantage from the presentation (which must be gratuitous) in reduction of his debt, (*x*) for which he could account, a court of equity will compel the mortgagee to present the nominee of the mortgagor. (*y*) So though the assignees of a bankrupt may sell the advowson, yet if the church be void at the time of the sale, the *bankrupt* himself must present the clerk; (*z*) and if an advowson is sold when the church is void, the grantee cannot have the benefit of the next presentation, and it has been doubted whether the whole grant is not void, (*a*) though probably there would be no objection to the grant of an advowson though the church is vacant, if the next presentation be expressly reserved by the *grantor*; especially as it has been decided that a conveyance of an advowson, though void for the next presentation, yet may be good for the remaining interest when it can be fairly separated from the objectionable part. (*b*) And it has been recently held in the House of Lords that the sale of a next presentation, the incumbent being *in extremis*, within the know-

(*r*) Gilb. Exec. 120.

(*s*) Gilb. Exec. 39; it then passes in a will under the word "tenements," 4 Bing. 293; but not under the word "lands," *ante*, 151, 153.

(*t*) *Ante*, 150; Co. Lit. 120, a; 3 Cruise, 3.

(*u*) 1 Leon, 205; *ante*, 150.

(*x*) 3 Atk. 599; Mirehouse, Adv. 100.

(*y*) 2 Vern. 401; Com. R. 343; 3 Atk. 559; Owen, 49.

(*z*) Mirehouse, 156.

(*a*) Cro. Eliz. 811; 3 Burr. 1510; Bla. Rep. 492, 1054; 2 Wils. 174; Amb. 268.

(*b*) 5 Taunt. 727; 1 Marsh. 292.

ledge of both contracting parties, but without the privity or with a view to the nomination of the particular clerk, is not void on the ground of simony. (c) An advowson in fee in gross is assets in the hands of the heir, for he might sell such advowson. (d) But it is not extendable under an *elegit*, because a moiety cannot be set out, nor can it be valued at any certain rent towards payment of the debt. (e) He who has an advowson or right of patronage in fee may by *deed transfer* every species of interest out of it, (*viz.*) in fee, in tail, for life, for years, or may grant one or more presentations. The right of presentation *descends* by course of inheritance from heir to heir as lands and tenements, unless the church become vacant in the *lifetime* of the person seised of the advowson in fee, in which case the void term being then a chattel goes to the executor, unless it be a donative benefice, and in that case the right of donation descends to the heir. (f) If, however, the patron present and die before his clerk is admitted and his executor presents another, both these presentments are good and the bishop may receive which of the clerks he pleases. (g) Where the same person is patron and incumbent, and dies, his heir is to present; (h) but such patron and incumbent may *devise* the presentation. (i) But as we have seen, an advowson in gross will not pass by the word "*lands*" in a will, though it will be comprehended under the terms *tenements* and *hereditaments*. (k) But where a testator gave to his son, who was then the incumbent, the perpetual advowson of H. and all his lands, it was held that the son took only a life estate. (l)

The *remedy* for the infraction of the incorporeal right of presentation is an action *quare impedit*, in which, although no profit can be taken for presenting the clerk, yet the patron, whose right of patronage is injuriously disturbed, recovers two years' value of the church, if the turn of presentation be lost. (m)

(c) *Fox v. Bishop of Chester*, 6 Bing. 1.

(d) 3 Bro. P. C. 556; 1 Bro. P. C. 144.

(e) Gilb. Exec. 39; 2 Saund. 63, f.

(f) 2 Wils. 150; 8 Bing. 490.

(g) Co. Lit. 388, a; Burn's Ec. L. tit. Advowson; Mirehouse on Advowsons, 139, where see in general the right of presentation; see further as to presentation by joint tenants and tenants in common, 2 Saund. 116, b.; in case of parceners the eldest sister is to present first, Willes, 659; 2 Bla. C. 190, n. 16.

(h) 3 Lev. 47; 3 Buls. 47; 8 Bing. 490; an advowson belongs to a prebendary in right of his prebend. The church becomes

vacant, and prebendary dies without having presented, the prebendary belongs to his *personal representative*, according to the opinion of six judges out of eight, delivered in the House of Lords, 8 Bing. 490, where see the nature of an advowson fully discussed; and see 7 B. & Cres. 113, S. C. (i) 1 Lev. 205; 2 Roll's R. 214, 216; Cruise's Dig. 21; Mire. 73.

(k) *Ante*, 151, 153; 4 Bing. 293.

(l) (Park, J. dissent.) 3 Brod. & B. 27; *ante*, 159.

(m) 3 Cruise, 17, 18. *Quare impedit* lies also jointly for a church and hospital, Willes, 608.

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Whereas if a parson be evicted from or disturbed in his rectory, which is corporeal property, his remedy is by action of ejectment or trespass.⁽ⁿ⁾ Where the bishop refuses without good cause or unduly delays to admit and institute a clerk, he may have his remedy against the bishop in the *Ecclesiastical Court*.^(o)

6. Tithes.

6. *Tithes* are incorporeal hereditaments, because the owner has no distinct tangible right to any part even of the produce of the real and corporeal property whilst growing, or even after severed, until the tithe has been set out, but merely a right to have the tithe duly set out from the residue of the produce. At common law, therefore, any injury to the right to tithe could not be remedied by any action appropriated only for injuries to corporeal real property. But the remedy by ejectment for tithes, and real actions, and for other ecclesiastical or spiritual profit, was given by 32 H. 8, c. 7, s. 7, without claiming the same as a rectory or chapel, and the tithes thereunto appertaining, but generally for certain tithes of corn, grain, wood, grass, wool, lambs, and calves, arising, growing, renewing, increasing, and happening within the parish of, &c., and within the bounds, limits, and titheable places thereof; ^(p) though it is said, that the particular species of tithe, though not the precise quantity of each, must be stated. ^(q) The remedy by ejectment is, however proper, against a third person only, who illegally claims a right to the tithe, and not against the occupier, against whom, if he illegally neglect to set out either great or small predial tithe in kind, (excepting agistment tithe, which cannot be set out,) the proper remedy is an action of debt for the treble value, founded upon 2 & 3 Ed. 6, c. 13, ^(r) or by suit in equity, or in the Ecclesiastical Court, for subtraction of tithe, which, when the contest is with many parishioners, may be preferable to a common law suit, ^(s) especially as costs are recoverable in such a suit, unless there has been a previous adequate tender, whereas no costs are recoverable in an action for not setting out tithe in kind, when the single value exceeded 6*l.* 13*s.* 4*d.* ^(t) The Ecclesiastical Courts have no jurisdiction to

⁽ⁿ⁾ *Ante*, 163, 164.

^(o) 3 Cruise, 17. As to any remedy for the clerk at law, see 13 East, 419; 15 East, 117.

^(p) Cro. Car. 301.

^(q) 11 Co. 25. b; 1 Rol. R. 65, 58; Dyer, 84, 116, b.

^(r) 1 Brownl. 65; Moore, 915; 3 Anstr. 763.

^(s) 3 Bla. C. 87, 88; Com. Dig. Prohibition, G. 5; Bac. Ab. Courts Ecclesiastical, D. and title Tithe, E. e; Mirehouse on Tithes, 203 to 208; Burn's J. tit. Tithes, where see the law and proceedings in an Ecclesiastical Court.

^(t) 2 Mad. Ch. Pr. 556, 557; 1 Hen. Bl. 107, 108; *ante*, 27, note ^(f).

try the *right* of tithes, unless between spiritual persons, but only between spiritual men and laymen, to compel the latter to pay them when the right is not disputed, (u) and if in a suit in the Ecclesiastical Court for subtraction of tithe the defendant plead any custom, modus, composition, or other matter, whereby the right of tithing, or the obligation to set out the tithe, is called in question, that must be tried by a jury, and the Spiritual Court has no jurisdiction to proceed, and may be restrained by prohibition. (x)

If the tithes withheld are not predial, or could not be set out in kind, then there is no remedy at law, but the proceeding must be by bill in Chancery, or perhaps more properly in the Court of Exchequer, (y) or libel in the Ecclesiastical Court, and which being proceedings relating to a permanent right, are sustainable, however small the present value of the tithes withheld may have been. (z) When the title to the tithes claimed is clearly made out, the Court of Chancery or Exchequer will decree an account; but if the title of the claimant to tithe at all is disputed, the suit then becomes in effect an ejectment bill, and the title must be tried at law: and where a modus or real composition is pleaded, and supported by affidavits of reasonable evidence, to show that the question is fairly disputable, then the practice is to direct an issue at law before the court proceeds to decree against the common law right of the parson. (a)

The recent act, 2 & 3 W. 4, c. 100, renders evidence, that land has been exempt from tithe for *thirty years*, or that a *modus decimandi* has been paid during that time, presumptive evidence of right; and *sixty years'* exemption from payment are in general conclusive, where there has been an agreed composition between the owner of the tithe and the occupier of the land to pay a fixed sum, in lieu of rendering tithe in kind. The agreement is, in most respects, analagous to a tenancy from year to year of land, and the composition is to be determined by a similar notice to quit, unless it were for a time certain, as for one year. (b) Where an occupier, who had been under composition for tithes, refused for two years to set out the tithe in kind, alleging that he was exempted by a modus, it was held, in an action on the 2 & 3 Edw. 6, for the treble value

(u) 2 Rol. Ab. 309; 2 Inst. 364, 489;
3 Bla. C. 88, 89.

(x) 2 Rol. Ab. 309; 2 Inst. 364, 489;
3 Bla. C. 88, 89.

(y) Mad. Ch. Prac. 104 to 109.

(z) 4 Bro. P.C. 314; 1 Mad. Ch. P. 105.

(a) 1 Mad. Ch. Pr. 105 to 108.

(b) 1 Bos. & P. 458; 6 Taunt. 333;
2 Marsh. 38; 1 Brod. & B. 4; 3 J. B.
Moore, 216.

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of the tithes, that it was not necessary to prove any notice to determine the composition, the occupier's disclaimer of the rector's title to tithe in kind rendering notice unnecessary, as it would where there has been a tenancy of land. (b)

But these compositions are entirely personal between the rector and the occupier for the time being, who were parties to the bargain, and if the former die his successor is not bound, though if he be content to continue to receive the like composition, there will be a just apportionment between him and the executor of the deceased incumbent. (c) So if the tenant cease to occupy, the fresh occupier will immediately become liable to set out tithe in kind. (d)

The owner of tithe, before he enters into a composition, should be certain of the solvency of the occupier with whom he is to contract, for, by entering into such a composition, the common law right and remedy regarding the tithe itself, and also the remedy on the statute, is waived, and the tithe-owner could only have his personal action for the arrear of the composition; so that, if the occupier become insolvent, he may lose the benefit of his former right. (e)

When the owner of tithes lets them by *parol*, he continues liable to be rated to the poor in respect thereof, because, tithes being an incorporeal hereditament, they cannot be conveyed or passed without deed, (f) though it is otherwise when he has let them by *deed*, a circumstance which should be taken into consideration, as well by the owner as the lessee of tithe, before entering into the contract. (g) In general, a parson who lets to each parishioner the tithe growing on his own land is properly, in legal contemplation, still the occupier of the tithes, and ought to be rated accordingly, and not the occupier of the land. (h) The rector is, in some instances, exonerated from the burthen of poor-rate on his tithes by the arrangement for an extinguishment of tithe in an inclosure act; as where such an act provided that a certain corn rent, free from all taxes and deductions, (except land-tax,) should be issuing out of the lands to be inclosed, and to be paid to the rector in lieu of tithes, it was held that such corn-rent was not liable to be assessed to the relief of the poor; (i) but the mere extinguishment of the tithe and the sub-

(b) 1 Brod. & B. 4.

(c) 10 East, 269; 8 Ves. 308; 2 Ves. & B. 334.

(d) 2 Chitty R. 405.

(e) 4 Madd. R. 177.

(f) *Rex v. Lambeth*, 1 Stra. 525; 9 B. & Cres. 479, and 4 Man. & Ryl. 334, S. C.; 16 Vin. Ab. 427.

(g) *Rex v. Lambeth*, 1 Stra. 525; 1 Eagle on Tithes, 19; Burn's J., Poor, 68, 69.

(h) 16 Vin. Ab. 427; *Chanter v. Glubb*, 4 Man. & Ryl. 334; 9 Bar. & Cres. 479, S. C.; Burn's J., Poor, 68.

(i) 6 Bar. & Cres. 271; 3 Bar. & Cres. 863.

stitution of an annual rent or consideration will not discharge the rector's liability; (*k*) and if a person be entitled to the tithe of all fish caught in the parish, or to oblations and other offerings which constitute the rectorial or vicarial dues, he is rateable in respect thereof. (*l*) A summary mode of enforcing payment of tithes, oblations, and compositions, not exceeding 10*l.*, is given by statutes by complaint to two justices of the peace, (*m*) and against Quakers to the extent of 50*l.*

Tithes in the hands of lay impropriators may be held in fee-simple, fee-tail, for life, or years, and these are assets for the payment of debts, and are governed by the same rules of descent as temporal inheritances, and have all other similar incidents belonging to them; they are alienable in the same manner as other real estate, and are included in the statute of uses, under the word "hereditaments." (*n*)

8, and 9. With respect to *offices* and *dignities*, (two *other* incorporeal hereditaments,) as they are not of great general importance, nor are they daily subjects of legal discussion, we shall merely mention them, referring to the works in which they have been particularly discussed. (*o*) We must, however, observe, that the offices here referred to are those in which a person may have an estate to him and his heirs, or for life, and legal fees attached to them, and in respect of which, if a disturber receive such fees, and not merely gratuities, the owner might support an action to recover the fees as received to his use, without resorting to the ancient writ of assize of office. (*p*) Ministerial offices may be in reversion, but in general not when they are judicial.

8. Offices.
9. Dignities.

10. *Franchises* and *liberties* are very various, and almost infinite, but always denote a *royal* privilege subsisting in the hands of a subject, and which originated in an express grant from the crown, or may now be presumed after length of time, and therefore may be prescribed for. They are principally to hold courts, (*q*) to have a manor, to have waifs, wrecks, estrays, treasure trove, royal fish, forfeitures, and deodands; to have an

10. Franchises.

(*k*) 4 B. & Cres. 467; 6 Dowl. & R. 467, S. C.

(*l*) 3 T. R. 385.

(*m*) 7 & 8 W. 3, c. 6 and 34; and 53 Geo. 3, c. 127; 1 Geo. 4, st. 2, c. 6; 7 Geo. 4, c. 15; Burn's J., Tithes.

(*n*) H. Chit. Descent. 200; but see *ante*, 206, note (*n*).

(*o*) See 2 Bla. C. 36 to 44; Cruise's Digest, tit. Offices; 1 Tho. Co. Lit. 208,

236, &c.; Com. Dig. Offices. As to acquiring a settlement by an office, see Burn's J., Poor, Index, tit. Office; and see Harrison's Index, tit. Office; and Chit. Col. Statutes, tit. Office, as to the sale of an office; and see 1 B. & Adolp. 761.

(*p*) See in general 1 Tho. Co. Lit. 236, 237, and notes.

(*q*) 9 East's R. 335, 340.

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exclusive bailiwick ; or liberty to have a *fair*, (r) or market, or right of taking tolls ; or to have a forest, chase, park, free-warren, or fishery endowed with a privilege of royalty. (s) We will consider the latter as well respecting the civil rights as criminal injuries and remedies.

Forest, Chase,
 Purliou, and
 Deer. (t)
 Forests.

Franchises relating to *game* are forests, purlieus, chases, parks, and free-warren, the civil rights and criminal provisions respecting which we will here shortly notice. *Forestal* rights, properly so called, are not grantable to a subject. (u) It is said that there are only thirteen legal chases in England. (x) A *chase* is an open tract of country privileged for game, and usually less than a forest, and ought not to be inclosed. It does not necessarily give the owner any interest in the land, but merely in the beasts and game therein, and the exclusive right to pursue the same ; it may be, and usually is, claimed over other persons' grounds, though it may, like free-warrens, be over the owner's land, without merging in the higher territorial property. (y)

Chases.

Parks. (z)

A legal *park*, properly so called, is a large tract of inclosed ground privileged for wild beasts of chase, and must be founded on the king's express grant, or claimed by prescription, and it is not strictly legal to erect a park *de novo* without such grant. (a) It is said there are only 781 legal parks in England, (b) though no information or criminal proceeding could be instituted for so doing. (c) When legally made, it has some peculiar privileges and properties, namely, the owner or keeper of a *lawful* park may legally shoot a self-hunting dog in pursuit of the deer, which no owner of other land, or of an illegal park, could do, (d) and deer in a lawful park go to the heir, and not to the executor, (e) unless where the deceased owner was merely a lessee for years. (f)

Criminal of-
 fences relating
 thereto.

As respects *criminal* injuries, and the protection afforded to *these places*, it will be observed, that *parks* are not expressly mentioned, and the only distinction between the several

(r) Trespass lies against a person for disturbing plaintiff in the profits of a *fair*, by erecting a toll booth, without saying *quare clausum fregit*, *Smith v. Pearson*, Woodfall, L. & T. 542.

(s) 2 Bla. C. 37, 38 ; Cruise's Dig. Index, Franchise ; Com. Dig. Franchise.

(t) Manw. 143 ; and see in general Chitty, Game Law ; Burn's J., Game.

(u) 5 Price, 269 ; see Manw. on Forests in general.

(x) 1 Wood. Vin. Lee, 129.

(y) Manw. 49 to 147 ; see further as to

Chase, 3 Tho. Co. Lit. Index, Chase.

(z) There are very few (about 781) legal parks strictly entitled to privileges.

(a) 1 Wood. Vin. L. 129.

(b) Bro. Ab. tit. Action sur le Statute, pl. 48 ; Co. Lit. 223 ; 2 Inst. 199 ; 11 Coke's R. 86.

(c) 2 Ld. Raym. 1409 ; 1 Stra. 637.

(d) 1 Saund. 84, note (3) ; Cro. Jac. 45 ; 11 East, 568.

(e) 1 Inst. 8 ; Toller, 192, ante.

(f) Toller, 148.

places is, whether the same be or not *inclosed*. Thus the unlawfully and wilfully coursing, hunting, snaring, or carrying away, or killing or wounding, any deer kept or being in the *inclosed* part of a *forest*, *chase*, or *purlieu*, or in *any inclosed land*, wherein deer shall be kept, is felony, punishable as simple larceny; (*h*) and if in the *uninclosed* part of any forest, chase, or purlieu, the offence is punishable before a justice with 50*l.* penalty, and a second offence is felony; (*h*) and if venison, upon a search warrant, be found in possession of a person without his accounting for his lawful possession, he forfeits 20*l.*; (*i*) and the setting any snare, or breaking down a fence, is a 20*l.* penalty; (*k*) and persons unlawfully entering such places, with intent to take deer, may with their guns and dogs be seized by the keepers and their assistants for the use of the owner; (*l*) and the beating or wounding any deer-keeper is felony. (*l*)

Free-warren is a franchise, founded on express grant from the king, or a prescription which supposes it. It is an exclusive privilege to preserve and kill certain beasts and fowls of warren (such as hares, rabbits, roes, partridges, pheasants, rails, and quails, woodcocks, and mallards, and herons, but not grouse,) (*n*) in a certain tract originally of open country, even in exclusion of the owners of the soil, and being such an exclusive right, the owner of the free-warren may support trespass against any person, even the owner of the land, who pursues game of warren within the district, although no such game be killed, and may recover full costs, although the damages be under forty shillings, (*o*) because it is impossible that the title to the soil can ever come in question, for though both may unite in one person, yet the title to the free-warren is always collateral to that of the land, and a man may have and frequently does claim a free-warren in *alieno solo*, and unity of seisin of the land and free-warren does not extinguish the latter. (*p*) It is a right that may at this day be granted by the king to a person over his own land, though such a modern grant is not usual. (*q*) The owner of a free-warren may legally kill self-hunting dogs that

(*h*) 7 & 8 Geo. 4, c. 29, s. 26, &c.

(*i*) Id. s. 27.

(*k*) Id. s. 28.

(*l*) Id. s. 29.

(*m*) There are very few legal free-warrens in the kingdom, though very frequently conveyances profess to pass the right; see in general, 2 Bla. C. 38; Com. D. Chase, F.; Co. Lit. 233; 1 Chitty, Game L. 19 to 25.

(*n*) Grouse are not birds of warren, Manw. 44; Co. Lit. 233; 7 B. & Cres. 36.

(*o*) 2 Salk. 637; 2 Bla. R. 1150;

5 Taunt. 422; 2 M. & S. 499; 7 B. & C. 36.

(*p*) 3 Dyer, 326; Chitty, G. L. 23; in 1 Campb. 313, Heath, J., appears to have supposed that a right of free-warren is not apportionable, *sed quare*, for the owner of a free-warren may grant a part of his exclusive right to another, and which may be prescribed for. See *Davie's case*, 3 Mod. 246; and other cases, Chitty on Game Laws, 2d ed., 20, 21, note (*d*).

(*q*) Cruise's Dig. 34, s. 4.

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haunt the warren. (r) The game killed by any person in a free-warren instantly become the property of the owner. (s) The rabbits and game go to the heir, and not to the executor of the owner, unless he were a mere lessee. (t) Twenty years' undisturbed exercise of a free-warren may, as in case of other incorporeal right, afford presumptive evidence of a lawful and perfect right of free-warren. (u) But even when an express grant of free-warren can be proved, yet if the freeholders and others within the tract of country over which the free-warren is claimed have repeatedly, without interruption, or without being sued with effect by the owner of the free-warren for so doing, killed game, though on their own lands, a release or some extinguishment of the free-warren may be presumed. So that the owner of a strict legal free-warren must, in order to continue his right, watchfully prosecute every material invasion of it. And claims of free-warren, though frequently recited and conveyed in title deeds, can but rarely be supported in evidence.

Franchises of
free fishery, several
fishery, and common of
fishery.

The rights of free fishery, several fishery, and common of fishery, have also been considered as franchises. 1. *Free fishery* is an exclusive right of fishery in a *public navigable river*, or sometimes in an arm of the sea, originating in a grant from the king. (x) 2. *A several fishery* is an exclusive right to fish usually in a *private* river or water, not navigable, and may be confined to the right to fish there, or may also include the ownership of the soil, and ejectment may in some cases be supported for a several fishery, (y) whereas the owner of a free fishery never has any interest in the soil. (z) A several fishery in a navigable river is an incorporeal and not a territorial hereditament, and a term for years in it cannot be created without deed; (a) but such a several fishery in a navigable river or arm of the sea may pass as appurtenant to a manor, (b) and such a right of fishery may be *apportioned* and lost as to a part, but reserved as to the residue. (c) 3. *Common of fishery* does not import any exclusive right, nor any property in the fish before

(r) Cro. J. 45; 1 Saund. 84; 11 East, 568.

(s) 2 Bla. R. 1151.

(t) 1 Inst. 8.

(u) 6 East, 215; 7 East, 199; 11 East, 488; 2 Saund. 175, n. 2; 2 B. & Ald. 667; 4 B. & Cres. 639; 7 D. & R. 49, S. C.; 2 & 3 W. 4, c. 71.

(x) Com. Dig. Piscary; 2 Bla. C. 39, 40; Co. Lit. 127 & 122, in notes; see 2 Chit. Pl. 875, note (d); 4 T. R. 437; 2 Hen. B. 182; must have been by deed, 5 B. & Cres. 875; ante, 191, as to

fisheries.

(y) Id. ibid.; 5 Burr. 281; the owner of a several fishery in a river not navigable is *prima facie* owner of the soil, 2 Chit. R. 658; 5 B. & Cres. 875.

(z) 1 T. R. 361; 2 Salk. 630; Co. Lit. 4; 1 Chit. R. 201; 1 M. & S. 652, as to whether the grant of a fishery passes the soil; a right to *sea fish* does not entitle the party to shell fish, 2 M. & S. 568.

(a) 5 B. & Cres. 875.

(b) 1 Campb. 312.

(c) Per Heath, J. in 1 Campb. 113.

taken, but merely a right to take fish in the same water which others also have a right to fish in, and therefore, as the party has no exclusive right, he cannot support trespass against a stranger for fishing in the fishery any more than a party entitled to common of pasture could support trespass against a stranger for turning on cattle and diminishing his pasturage, and his proper remedy is an action on the case. (d) The right to fish in the sea or in an arm of the sea is of common right in all subjects, and therefore a plea claiming such a right of *common* of fishing by prescription would be bad, (e) and a right to fish in the sea or a navigable river is always subject to the right of navigation, and must be so conducted as not to impede it. (f)

11. 12. *Corodies*, and also annuities, are named as specimens of incorporeal hereditaments, (g) but as neither of them issue out of nor are connected with land, (h) though the former were charges in the ecclesiastical *person* of the owner in respect of his inheritance, and the latter being purely personal and wholly unconnected with real property, though the regular payment may be secured by a charge thereon, they might more properly be classed amongst personalties. When the latter are wholly personal, and not charged upon real property at all, or stock, or not charged upon land of equal or greater annual value than the annuity, and whereof the grantor is seised in fee simple or fee tail in possession, or has power to charge at that time, then the same are regulated by the statute 53 Geo. 3, c. 141. (i)

13. Rents (*redditus*) is an *annual* render either in money, provisions or labour, in general, in retribution for land or other real property that has been conveyed or demised. (l) It must be reserved out of *corporeal* real property, and not in respect of incorporeal, (m) nor upon a letting merely of the use of personal chattels, as a flock of sheep, for if it be, it will have none of the incidents of rent, nor will be recoverable by distress, unless under an express power, but will, in legal contemplation, be a

(d) Com. Dig. Piscary; 2 Bla. C. 39, 40; Co. Lit. 127, 122, in notes; see 2 Chit. Pl. 875, note, (d); 4 T. R. 437; 2 Hen. B. 182.

(e) 1 Campb. 312.

(f) Id. 577.

(g) 2 Bla. C. 40; 1 Tho. Co. Lit. 288, as to *Corodies*.

(h) Unless the deed contains an express charge and power of distress, in which case the annuity is a rent charge, presently

considered.

(i) See decisions thereon, Chit. Col. Stat. Annuities.

(k) See in general, 2 Bla. C. 40 to 43; 3 Bla. C. 6; 1 Thomas's Co. Lit. 439 to 487, and notes; 2 Roll. Ab. 44, b, pl. 7; 2 Saund. 202; 1 Thomas's Co. Lit. 441, 442; Cruise's Dig. Index, Rents.

(l) 2 Bla. C. 41, 42,

(m) 8 Bar. & C. 150.

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sum in gross to be paid by instalments; but if rent be reserved upon the demise of a ready furnished house, then it will be considered as reserved in respect of the realty, and may be recovered by distress; (n) but it may be, as in the case of a rent-charge, wholly independent of any conveyance or demise.

At common law there are three descriptions of *rents*, viz. *rent service*, *rent charge*, and *rent seck*; and these again may be *quit rents*, *rack rent* or *fee farm rent*. (o) All these must properly be *annual* payments or renders in respect of *lands* or *tenements corporeal*, and cannot properly be reserved out of an advowson, a common, an office, a franchise, or out of other rent, or the like; and if so reserved, they are considered merely as *annuities*, operating only as a personal contract, and are not in legal contemplation *rents*. (p)

Rent service. *Rent service* is so called because it hath some corporeal service incident to it, as at the least, fealty, or his feudal oath of fidelity. (q) And this is frequently payable by a freeholder to the lord paramount, usually the lord of the manor, within which the freehold land is situate.

Rent charge. (r) A *rent charge* is where the owner of the *rent* hath no future interest or reversion expectant in the land, but an *express clause or power of distress*; and this may originate in two ways, as first, by a party conveying his whole estate in fee simple in land, but *reserving* to himself a certain annual rent payable thereout and charged thereon, with a clause of distress, in case the same shall be in arrear, and for which reason it is termed a rent charge; or secondly, by the owner in fee simple granting to another an annual rent in fee simple, or for life of the grantee, with a similar clause of distress, and therefore also called a rent charge. (s) The latter was the usual mode, before the recent act, of creating a qualification for killing game. (t) They were probably first adopted for the purpose of providing for younger children. (u) Where a rent charge is created by *demising* an estate for a long term of years, it is necessary for the grantee to enter in order to perfect his interest, or at least such an entry must be stated in pleading a title against strangers, unless it be alleged and shown that the grantee elected that the

(n) 2 New Rep. 224.

(o) 2 Bla. C. 41.

(p) Gilb. Rents, 9; 1 Tho. Co. Lit. 439.

(q) Co. Lit. 142; 1 Tho. Co. Lit. 442.

(r) See in general, 1 Tho. Co. Lit. 449.

(s) 2 Bla. C. 42.

(t) See form of Grant, Chit. G. L. 726; Cald. 230; and as to the consequence of a *colourable* grant, 2 B. & Ald. 367; 2 Jac. & W. 565, 591.

(u) 1 Tho. Co. Lit. 448.

deed should enure by way of bargain and sale. (x) A rent charge *pur autre vie*, if grantee die, living *cestui que vie*, goes to the grantee's executor, though not named in the grant, in the nature of special occupant. (y)

On account of a rent charge issuing out of corporeal property, it is considered as so permanent and important a right, that if the owner thereof have a *freehold* interest in a rent charge, as for the term of his life, duly registered six calendar months before voting, he has a right to vote at an election; (z) and before the late act he was qualified to kill game. (a) When a deed reserves a clear rent charge, it is to be paid free from any deduction in respect of the land tax. (b) If land upon which a rent charge is charged be afterwards sold in parcels, and the grantee levy for the whole rent on one purchaser, the Court of Chancery will relieve him by a contribution from the rest of the purchasers, and restrain the grantee from levying in future upon him only. (c) A rent charge cannot be directly or indirectly, as by a warrant of attorney and judgment, charged on an ecclesiastical benefice. (d) In creating a rent charge, there should be an express power reserved to distrain upon growing crops, or upon common appurtenant, or in case of fraudulent removal; for otherwise, as the 11 Geo. 2, c. 19, does not extend to a rent charge, no such distress could be made. (e) If there be an express clause of distress, the grantee may distrain under it upon the grantor, or any person claiming under him since the grant was made, although a term may be vested in himself to secure the payment, (f) but he could not distrain for the rent charge upon a person in possession under a lease prior to the grant, but must, in that case, distrain only for the arrear of rent under the lease when the reversion has been assigned to him. (g)

Rent seck is a rent reserved by deed and payable in respect of corporeal property, but without any clause of distress, and therefore termed *siccus* or barren rent, and before the 4 Geo. 2, c. 28, s. 5, no distress could have been made for an arrear of that rent; but that statute, after reciting that the remedy for recovering rents seck, rents of assize, and chief rents, (now called *quit rents*,) are tedious and difficult, gives the power of

(x) 8 Bing. 99.
(y) 7 Bing. 178.
(z) 1 Bla. C. 173; 20 Geo. 3, c. 17; and see Reform Act.
(a) Cald. 230.
(b) *Bradbury v. Wright*, Dougl. 625.
(c) Cary, 2, 92.
(d) 1 Bar. & Adolp. 673.

(e) *Miller v. Green*, 8 Bing. 92.
(f) 2 Bla. R. 1326.
(g) 1 Roll. Ab. 669, 45; and see 1 Tho. Co. Lit. 478, n. 62.
(h) See the two legal meanings of the term *Seck*, 1 Thom. Co. Lit. 482, note (71).

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Quit rents.

distress to the owner of such rents, provided they have been paid for three years, within twenty years before the first day of the session of parliament in which the act was passed, or which should be thereafter created.⁽ⁱ⁾ These were formerly termed rents of assize or chief rents, but now *quit* rents, and are sometimes payable as well by freeholders as copyholders, and are so called because by paying such rent the owner of the land goes *quit* of all other services.^(k) Mere length of time, short of the statute of limitations, and unaccompanied by any circumstances, is not of itself a sufficient ground to presume a release or extinguishment of a quit rent, the punctual payment of which small render is rarely exacted with vigilance.^(l)

Fee farm rents.

A *fee farm* rent has been defined to be a rent charge issuing out of an estate in fee, and perpetually payable in fee, and of at least *one-fourth* of the value of the lands at the time of its reservation;^(m) for a grant of lands reserving so considerable a rent is, indeed, only letting lands to farm in *fee simple* instead of the usual methods for life or years.⁽ⁿ⁾ But Mr Hargrave and others have expressed an opinion that this quantum of the rent is not essential to create a fee farm rent;^(o) and others have considered that a fee farm rent is not necessarily a rent charge, but may also be a rent seck;^(p) and if the latter, and if granted before the 4 Geo. 2, c. 28, in order to support a distress for the recovery of it, it would be necessary to prove that the rent had been paid for three years, within twenty years before the passing of that act.^(q) It should seem that since the statute *quia emptores*, 18 Edw. 1, a *fee farm rent* could not be created, though sometimes attempted, and when accompanied with an express power of distress it would at least operate as a *rent charge*.^(r)

Rack rents.

The term *rack* rent merely refers to *amount* and not to any particular description of rent, and imports a rent of the full annual value of the tenement or near it.^(s) The 11 Geo. 2, c. 19, s. 16, and 57 Geo. 3, c. 52, use the term, and enact, that if any tenant, holding any lands, tenements or hereditaments at a *rack rent*, or where the rent reserved shall be three-fourths of the yearly value of the demised premises, at the least, shall be in arrear half a year's rent, and shall desert the premises or

(i) See construction *Bradbury v. Wright*, Dougl. 627.

(k) 2 Bla. C. 42; Cowp. 214.

(l) *Elridge v. Knott*, Cowp. 114.

(m) 2 Bla. C. 43; Co. Lit. 143.

(n) 2 Bla. C. 43.

(o) Co. Lit. 144, note 5; and see 1 Id.

by Tho. 446, note.

(p) Dougl. 627, note 1.

(q) Id. *ibid*.

(r) Co. Lit. 143, b., Mr. Hargrave's note 5; and see 1 Id. by Tho. 446, n. 5, 477.

(s) 2 Bla. C. 43.

leave the same uncultivated or unoccupied, so as no sufficient distress can be had, then justices may give him possession by summary proceedings. The term rack rent, as thus used in these acts, does not mean the rent *reserved*, but such a rent as the landlord and tenant might fairly agree upon, supposing the premises were vacant and unlet. (t)

By various inclosure and other acts, rents, usually termed *corn rents*, are made payable in lieu of tithes to the parson, subject sometimes to the poor rate, and sometimes not, according to the terms of the particular statute and are recoverable as directed by the same. (u)

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Corn and other
rents.

By the statute 12 Car. 2, c. 14, many of the *ancient military* and other tenures were abolished, (y) and only *free socage*, (now termed freehold,) *copyhold*, and *privileged villenage*, (such as ancient demesne and customary freeholds,) and *spiritual tenures* (such as frankalmoigne) were reserved. The *first* includes the ordinary tenures prevailing at this day, as principally and most generally *freehold*, (z) including also tenures in free burgage, (a) as borough English, (b) and certain customary burgage tenures and gavelkind; (c) the *second*, (*copyhold tenure*), varying by custom, in some respects, in each particular manor; (d) the third tenure, in *privileged villenage*, including *ancient demesne*, (e) and *customary freeholds*, (f) which are not

II. The different
TENURES by
which Corporeal
and Incorporeal
Real Property
may be holden.
(x)

(t) 2 B. & Ald. 652.

(u) 6 B. & Cres. 274; 3 B. & Cres. 863; 4 B. & Cres. 467; 6 Dowl. & R. 467.

(x) See in general Gilbert on Tenures, and 3 Tho. Co. Lit. Index, Tenure.

(y) The tenure in petit serjeantry is not wholly abolished. The tenure by which the lands and property granted to the Duke of Marlborough and the Duke of Wellington for their great military services are holden at this day, is of this kind of tenure, each rendering a small flag or ensign annually, which is deposited in Windsor Castle. This is, however, but socage tenure, in effect, because it is a yearly render of a thing certain, in the same manner as a rent; nor is the tenant bound to perform any other service. See Litt. s. 160; see Co. L. 108, b. note 1. The Reform Act, 2 & 3 W. 4, c. 45, expressly provides for rights to vote in elections to persons holding freehold, copyhold, ancient demesne, or by any other tenure whatever.

(z) See tenure in freehold in corporeal

and in incorporeal property, and in a rectory, rent, &c. pleaded, 2 Chit. Pl. 560 to 564, and notes.

(a) See tenure by *free burgage* pleaded 2 Saund. 234; 2 Chit. Pl. 560; and see points relating to burgage tenure, 1 Tho. Co. Lit. 392, 393; 3 Tho. Co. Lit. Index "Burgage;" and see 1 Bla. Com. 175, note 43; 1 Tho. Co. Lit. 59, in notes.

(b) See tenure in *borough English* pleaded 8 Went. 201; borough English lands shall be brought into hotch-potch under statute of distributions, 2 Stra. 935.

(c) See in general 2 Bla. C. 78 to 90, in notes; and see this tenure pleaded, 1 Burr. 326.

(d) See in general 2 Bla. C. 90 to 99; as to the mode of describing *copyhold* tenure, &c. 1 Saund. 348; Heath, Maxims, 145; Com. Dig. Pleader, E.; 2 Chit. Pl. 565, b.

(e) 2 Bla. C. 99.

(f) Scriven on Copyholds, 656; see *customary freehold* tenure pleaded, 2 Chit. Pl. 5 ed. 567; 9 Went. 124; and as to the statement of this estate, and the

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unusual in the northern counties of England. Corporeal real property, as well as most descriptions of *incorporeal* property, are in general capable of being holden by either of these descriptions of tenure. (g)

As respects tenure, the now repealed laws relating to the qualification to kill game, (h) and the recent reform act, (i) make no distinction whether the *tenure* be freehold, copyhold, ancient demesne, or any other tenure, and the owner and occupier of each, when of a certain yearly value, are entitled to vote, (k) though formerly copyholders could not vote at an election. (l) We have seen, that there may be different tenures as to different parts of the same land, or rather as to the different interests, that might, before the time of legal memory, have originally been carved out as to the same land. Thus one may hold to him and his heirs the *prima tonsura* of land as a copyholder, and another may hold to him and his heirs the soil, and every other beneficial enjoyment of it, as a freeholder. (m)

Freehold.

Although freehold is the most independent description of tenure, yet in law and substantially the land is considered to be holden of a superior lord, to whom sometimes *rent*, or suit and service at his court, is due, and who may require the owner to take the oath of fealty, and who, upon the death of the owner intestate without heir, is entitled to the estate by escheat. (n) This rent, sometimes payable by freeholders, is called chief rent, *redditus capitales*, or quit rent *quietus redditus*, because thereby the tenant goes quit and free of all other services. (o) In all other respects the land and every thing upon it belongs absolutely to the owner, who may, as well at law as in equity, except in the case of a trustee, (p) alter the same, and cut and sell timber, and commit what would in others, holding by inferior tenure or title, be waste, with impunity, and even burn his own house, unless it be insured or likely to occasion damage to another person; (q) and as his tenure is superior in its advantages to any other, the owner should take

nature thereof, 3 Bos. & Pul. 378; 5 East, 51; 7 East, 305, where see the difference between freeholders and customary tenants explained. A customary freeholder may plead his title in a *que* estate, 2 Ld. Raym. 1188.

(g) Things *merely incorporeal* may be granted by copy of court rolls, *per* Willes, C. J., Willes's Rep. 324.

(h) 22 & 23 Car. 2, c. 25; Cald. 230.

(i) 2 & 3 W. 4, c. 45, s. 18, 19, 20, 25.

(k) See *post*.

(l) 1 Bla. C. 173, 174.

(m) 7 East, 200; 3 Smith, 261, S.C.

(n) 2 Bla. C. 86, 87, 97. A legal manor ceases to exist as such for most purposes, if there be not two freeholders continuing bound to attend as suitors at the Court Baron, Bro. Ab. Cause a Remover, pl. 35; 2 T. R. 447; 10 East, 259; 2 Bla. C. 90, *ante*, 166, note (q).

(o) 2 Bla. C. 42, 43.

(p) 1 Mad. Ch. R. 120; For. 6; 2 Ch. Cases, 32; 3 Woode's Lect. 399, *post*.

(q) 7 & 8 Geo. 4, c. 30, s. 2; Rex v. March, R. & M. C. C. 182.

care that the boundaries of the estate, when adjoining copyhold, be not confused, so as to subject the owner thereof to any claim of the lord of the manor, or the restrictions imposed upon copyholders. (r) The incidents of this tenure most materially distinguish it from copyhold. The owner of freehold tenure could always vote for a representative in parliament, but before the recent reform act a copyholder could not. (s) The owner is expressly enabled by the statute *qui emptores* to sell or transfer his freehold land, subject to the purchasers still holding by the *same* freehold tenure, and performing the like services to the lord as the vendor. (t)

But a copyholder cannot transfer his interest to a purchaser except by custom, and then only by intermediate surrender to the lord, and his grant to the purchaser. Upon descent of *freehold*, the heir is immediately entitled to the whole profits, without any admittance by the lord of the fee, (subject only to the widow's claim of dower, if not barred by jointure). It is transferable by the owner by feoffment, or by lease or release, fine or recovery. It may be absolutely demised for any term of years without the consent or controul of the superior lord. A moiety of the owner's interest may be seized under an elegit, and if he become bankrupt, or be discharged under the insolvent act, his entire interest may be sold and conveyed to a purchaser for the benefit of the creditors; (u) and if a trader die, his freehold estates are liable in equity to the payment of his debts, and fraudulent devises are invalid, (x) whereas copyhold could not be taken at the suit of a single creditor, or on an extent by the king. Freehold may be devised without any previous act, (y) but the will must be attested by three witnesses, (z) and after-purchased or acquired lands do not pass, a devise of freehold not being ambulatory or prospective. (a) The conviction and attainder of the owner forfeits only his life interest. (b) So also freehold property is by the common law subject to claims of curtesy and dower; but in copyholds, these can only arise from the custom of the manor, the latter being called freebench, which is sometimes of the whole property, and not like freehold, of only one-third.

(r) See *post*, as to bills to establish boundaries, *ante*, 196.

(s) 1 Bla. C. 173, 174; but now see 2 & 3 W. 4, c. 45, s. 19.

(t) 18 Edw. 1, c. 1; 2 Bla. C. 91, note 15.

(u) 6 Geo. 4, c. 16; 7 Geo. 4, c. 57.

(x) 11 Geo. 4, and 1 W. 4, c. 47.

(y) 32 Hen. 8, c. 1; 34 Hen. 8, c. 5; 2 Bla. C. 374, 375.

(z) 29 Car. 2, c. 3; Cowp. 90; 7 T. R. 399.

(a) 2 Ves. jun. 417, 419, 429.

(b) 54 Geo. 3, c. 145.

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The term "*freehold*" is sometimes used with reference to the *estate* or interest of the party in the lands, without reference to the *tenure* by which he holds them. Thus Lord Coke writes :—
" A freehold is taken in a double sense ; either it is named a freehold in respect of the state of the *law*, and so copyholders may be freeholders ; for any that hath an estate for his life, or any greater estate in any land whatsoever, may, in this sense, be termed a freeholder, in respect to the *land*, and so it is opposed to copyholders, that what land soever is not copyhold is freehold." (c) But this application of the term is extremely incorrect, for no person can be strictly considered as a freeholder, or entitled to the privileges of a freehold, unless the land to which his interest relates be of freehold tenure ; and although his interest in the land be of a duration equal to a fee-simple, yet, as the tenure by which he holds is base in its nature, he cannot be entitled to the privileges which attach to freeholds, and his interest alone is of a freehold nature, but his estate cannot be called properly freehold, unless he hold it by free tenure. (d)

Copyhold.

Copyhold tenure varies by custom in different manors. It may be not only of house, land, and other *corporeal* things, but also of most *incorporeal* things which may have been granted, though held by copy of court roll. Thus, a fair, or market, or tithes, may be granted by copy, and incorporeal things may pass by themselves without any land, and not as an incident, by copy. (e)

Originally a copyhold was a mere tenancy at will, but is now only nominally so, for the interest of a copyholder of inheritance is as certain and permanent, though subject to forfeiture, as that of a freeholder, and copyholds are to be governed by the rules of the common law, unless a particular custom intervene. (f) The owner is generally subject, like freeholders, to fealty, suit and service, payment of quit rent to the lord of the manor, and to escheat. (g) In this tenure the freehold is supposed to be in the lord of the manor, and not in the copyholder, though of inheritance, for which reason trustees are not essential, as in deeds relating to freehold tenure, to support contingent remainders of copyhold, the lord's estate sufficing. (h) In general, it is a tenure that must have been immemorial, and it cannot be

(c) Co. Cop. s. 15.

(d) Bla. Comp. Cop. ; see 1 Cru. Dig. 62.

(e) Willes, 324.

(f) 12 Mod. 301 ; 2 B. & Adolph.

440.

(g) 2 Bla. C. 97 ; as to the effect of enfranchisement, see 1 Marsh. R. 50 ; 11 East, 280.

(h) 10 Ves. 282 ; 16 East, 406.

created at this day, at least without a *special custom* in the manor, authorizing grants of land as copyhold *de novo*; (i) and a custom for the lord to grant leases of the waste without restriction is bad. (k) But the lord may re-grant, as copyhold, after forfeiture, lands which have been immemorially demised by copy, even though he keep them in his hands for many years, because they were always demisable. (l) And where the lord re-granted such a copyhold, with the appurtenances, to which a right of common was, previous to the forfeiture, annexed, it was held that after such re-grant it was still a customary tenement, and the tenant entitled to right of common. (m) Like freehold, copyhold may be subject to special occupancy, (n) and we have seen that there may be different tenures with respect to the same land, and that therefore one may hold the *prima iusura* of land as a copyholder, and another may have the soil, and every other beneficial enjoyment of it, as a freeholder. (o) Copyhold tenure, although the owner have an estate of inheritance therein, is still considered, in the eye of the law, for some purposes, as only a tenancy *at will*, and consequently, as a much less estate even than that of a term for years, (p) the copyholder being said to hold "at the *will* of the lord, according to the custom of the manor;" but though he holds at will, yet such must be in accordance with the custom, and not absolute. But the consequence of this tenure being only a tenancy at will is this, that if the copyholder take a conveyance of any interest carved out of the freehold tenure, however small, even an estate for years, it will operate as an extinguishment, not as a merger, of his copyhold interest. (q)

Copyhold tenure differs from freehold in the following respects: the 30 Geo. 3, c. 35, expressly prohibited any copyholder from voting at an election, (r) but the owner of copyhold of the yearly value of 10*l.* is now expressly entitled to a vote. (s) He may, on his becoming entitled by descent, or devise, or by purchase, be admitted and pay a fine to the lord, which is not to exceed two years' value, (t) after deducting the quit rents, but not the land tax; and unless there be evidence of a special custom the lord is not entitled to the payment of a full fine by

(i) 2 Wils. 125; 2 T. R. 415; 2 Maule & S. 504; 2 Bar. & Ald. 189; 3 Bar. & Ald. 153; 2 Campb. 264.

(k) 3 B. & Ald. 153.

(l) Id. *ibid.*; Co. Lit. 58, b; 4 Rep. 30, a; Cro. El. 699.

(m) 3 B. & Ald. 153.

(n) 2 Bla. R. 1148; 7 East, 186.

(o) 7 East, 200; 3 Smith, 261, S. C.

(p) Willea, 325.

(q) See 3 Prest. Est. 539, 560.

(r) 1 Keny. Rep. 110; 1 Bla. C. 172, 174.

(s) 2 W. 4, c. 45, s. 19, 25, 26, *post.*

(t) *Leake v. Pigot*, Selw. N. P. 87; Dougl. 724; 2 T. R. 484; 3 Bos. & P. 346; 6 East, 57.

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the remainder-man upon his admission. (u) The steward may by custom be entitled to full fees on the admission to each of several copyholds, though where there is no such custom, he is only entitled to reasonable fees for his entire trouble. (x) The *property* in the soil, from the centre of the earth upwards, is always considered to be in the lord, but the *possession* in the copyholder, subject to certain peculiar local customs; (y) so that the copyholder has only the possession and use of the property as permanently affixed, and has no right without custom to dig mines or cut trees, excepting the latter for repairs; and on the other hand the lord cannot, as we shall presently see, without special custom, dig mines or cut trees, and if he do, the copyholder may sue him or a stranger in trespass for the injury, viz. the breaking the surface or sub-soil, or trespassing on his estate, or for the loss of the shade, and lop and crop and use of the trees for reparation and horse-bote and plough-bote. (z) If the owner (unless authorized by special custom, (a) cut timber trees otherwise than for reparation, or commit other waste, he forfeits his interest; (b) but the Court of Chancery will not grant an injunction to restrain a copyholder from cutting down timber. (c) A copyholder for life or lives cannot, even where there is a custom for copyholders to cut timber trees, do so at pleasure; (d) a custom for a copyholder for life to cut timber being unreasonable and void. (e) Waste, whether wilful or permissive, as letting his houses and buildings become decayed, is cause of forfeiture; (f) he cannot let to a tenant for a term of years, but only for *one year* or less, or strictly at will, without license from the lord, unless by special custom. (g) The demising absolutely for *one year* is not a forfeiture, such lease being, as Lord Coke observes, warranted by the *general* custom of the realm. (h)

(u) 8 Bing. 439.

(x) 2 Marsh. 84; 6 Taunt. 425.

(y) See *Lewis v. Brentwate*, 2 B. & Adolph. 437.

(z) Id. *ibid.* See Gilb. Ten. 327.

(a) 10 East, 267.

(b) 11 East, 56; 2 Maule & S. 68; 2 T. R. 746; 2 Taunt. 52; 1 Thom. Co. Lit. 673, A. 1; cutting trees for repairs, and afterwards exchanging the same for preferable timber is waste, 7 Bing. 640.

(c) 6 Ves. 700.

(d) 2 T. R. 746.

(e) Cro. Car. 220.

(f) Salk. 186; 1 Tho. Co. Lit. 673, note 32; and when a Court of Equity will relieve against forfeiture for waste,

Id. 674, in notes.

(g) 4 East, 221; 1 New R. 168; see cases in Chancery, 1 Tho. Co. Lit. 664, note 24; Id. 673, n. 32.

(h) 4 Co. 26; 9 Co. 75, b.; W. Jones, 249; 1 Tho. Co. Lit. 664, note 24; Id. 673, note 32. A lease for more than one year is a forfeiture, so is a demise for one year and so on from year to year; but it is otherwise if the demise be for one year with a mere covenant or agreement, that the lessee shall enjoy for another year; or if the demise be for one year, and from thence from year to year, for thirteen years, if the lord would license, and so as they should not be liable to forfeiture, for then the obtaining the license is a con-

The interest of the copyholder is forfeited to the lord for his life only (*h*) upon his conviction of *felony* after attainder, but not before, unless there be a special custom in the manor to the contrary. (*i*) But the interest of a copyholder cannot be affected by a writ of *elegit* or extent, or other process at the suit of a *single* creditor, (*j*) or even of the king, (*k*) though in case of *general insolvency*, and bankruptcy, (*l*) or discharge under the insolvent act, (*m*) his entire interest may be sold for the benefit of the creditors at large. But the recent act against fraudulent devises and subjecting the freehold estates of traders to the payment of their debts, does not extend to copyholds; (*n*) nor is the heir or devisee of a copyholder liable to be sued upon the bond or other specialty of his ancestor, as in the case of freeholds. (*o*) A *transfer* of copyhold cannot in general be effected by feoffment, lease, or release, or fine or recovery; (*p*) but usually must be by surrender to the lord to the use of the vendee, and presentment thereof by the homage, and by the lord or his steward's admittance of such *vendee* to hold by the rod at the will of the lord, and according to the custom of the manor, and upon which a fine must be paid by the purchaser, as before observed, to the lord, (*q*) and such surrender, re-grant and admittance, must be entered on the court rolls. (*r*) However, an equitable mortgage may be, and frequently is, effected upon a loan of money or security for a debt by a mere deposit of the prior copies of admissions, and other parts of the court roll relating to the estate, with a deed of covenant to surrender and do all other reasonable acts upon request. (*s*) But an equitable interest in copyhold lands

dition precedent, and these are the proper words in an agreement for a lease by a copyholder; 4 East, 221; 11 Ves. 170; 1 New R. 163; 2 Taunt. 52; 2 Maule & S. 255; and see 1 Tho. Co. Lit. 665; note 24; Id. 673, note 32.

(*h*) 54 Geo. 3, c. 145.

(*i*) 3 B. & Ald. 510; 2 Wils. 13; 5 B. & Cres. 584; 2 Vent. 38.

(*j*) 1 Rol. Ab. 888; 2 B. & Cres. 242; 3 Dowl. & Ry. 603, S. C.; 3 Bla. C. 419.

(*k*) Parker, 195; Tidd, 9 ed. 1050, a recent attempt was made, in vain, to pass an act to subject copyhold to the satisfaction of debts to the king in consequence of the defalcation of a barrack-master-general. But as the recent Bankrupt Act, and the Insolvent Debtors' Act, in case of *general insolvency*, extend to copyholds, there seems no reason why

such copyholds should not be liable to be seized for debts to the king, and other debts, taking care of the interest of the lord.

(*l*) 6 Geo. 4, c. 16, s. 68.

(*m*) 7 Geo. 4, c. 57, s. 20.

(*n*) 11 Geo. 4 & 1 Wm. 4, c. 47, s. 2, 9.

(*o*) Id. *ibid.*; Bac. Ab. tit. Heir and Ancestor, F.

(*p*) 2 Bla. C. 367; 368, and notes.

(*q*) 2 Bla. C. 368 to 372.

(*r*) Id. *ibid.*

(*s*) It should seem that such an equitable mortgage is not of itself a perfect security, but at least the *covenant* should be presented by the homage, which would not entitle the lord to a fine as upon a complete surrender; 2 T. R. 484; 1 East, R. 632; but would operate as a security against a subsequent fraudulent perfect

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is not properly the subject of a surrender, but should be transferred by assignment. (t) In general an estate of inheritance in copyhold is as *devisable* by the common law (u) as freehold is by the statute, but there is this material distinction, namely, that a will of copyhold need not be attested by three witnesses, (x) and it will pass lands purchased or acquired after the date of the will, if the testator's intent to that effect be clearly declared; (y) for such a will is ambulatory till the death of the testator, and is considered as rather in the nature of an appointment or declaration of a use, than as a devise in the case of freehold. (y) There is, in strictness, another peculiarity, that there should be a surrender of the estate to the lord, to the uses of the will, either before or after the making of the will, though the omission is now supplied in certain cases by express enactment. (z) If there be no devise and no special custom to the contrary, the estate of inheritance of the deceased owner devolves in the same course of descent as in the case of freehold tenure. (a) And by custom, in many manors, whether the lands descend or are devised, the lord is entitled to a render of an *heriot*, as the best beast, or other goods (as the special custom may be) of the deceased owner. (b) And if the heir or other person, who may have claim, do not appear after three proclamations, at three successive general courts, the lord may by precept seize into his hands the land *quosque*, &c. that is, until the heir appear, but not as an absolute forfeiture, unless there be an express custom to warrant it. (c)

Rights of lord.

The lord of a manor cannot, without a special custom, enter the land of a copyholder to cut timber trees though going to decay, (d) or to dig for mines of coal or work the same, (e) and if he do he may be restrained by injunction, (f) or sued by the copyholder or his tenant as a trespasser; (g) and an incumbrance created by the lord on his manor and other rights, cannot pre-

surrender to another person, who by the court rolls would have implied notice of the equitable charge. But *quære* as to such implied notice, Sugd. V. & P. 759, 8 ed.

(t) 2 T. R. 484; Scriv. Cop. 267.

(u) 3 Bro. & C. 286; 15 Ves. 396; and a custom to the contrary is void, Id. *ibid.*; but see Evan's Stat. tit. Wills.

(x) 7 East, 299 to 322, unless the terms of surrender require three witnesses; Id. *ibid.*; 2 P. Wm. 258.

(y) Cowp. 130.

(z) 55 Geo. 3, c. 192; 7 Bingham, 275, when a Court of Equity, before this act, supplied the want of surrender in favour of a wife, or younger children, or creditors,

and when this act will still not aid the want of a surrender, see note 2 Bla. Com. by Chitty, 367, 368; 5 B. & Ald. 492; 1 Dowl. & Ry. 81, S. C.

(a) H. Chitty on Descents, 162.

(b) 2 Bla. C. 97.

(c) 3 T. R. 162; Watkins on Copyholds, 239; H. Chitty on Descents, 165; 1 Scriven, 341, 342.

(d) 4 Maule & S. 340; 2 B. & Adolp. 487; *ante*, 234.

(e) 10 East, 189; W. Jones, 343; 15 Ves. 236; 17 Ves. 281; 2 B. & Adolp. 437.

(f) Id. *ibid.*

(g) 10 East, 189; 2 B. & Adolp. 437.

judice a copyholder; (*h*) and the lord of a manor might be indicted for a forcible entry in the house or land of his copyholder. (*i*)

In some respects, therefore, although there is not in copyhold that *independence* of tenure as in freehold, nor is the same, when acquired, of equal value, because the party is subject to the small incumbrance of quit rent, and cannot cut timber for sale, or absolutely demise for a term of years without license, nor open new mines, unless by special custom; yet in some other respects the title evidenced by the court rolls is more secure, and the expense of transfer is less than in freehold conveyance, and the heir and devisee may take it free from liability for debts of the last owner. It may be worthy of notice that copyholds are excepted out of the registry act. (*k*)

We may here observe, that it has been held, that as the generality and vagueness of descriptions of copyhold property on the court rolls are so well known, a vendor of lands of copyhold tenure is not bound to show how the description on the court rolls is to be applied to the present state of the property, and that it suffices if he prove that the property as described has actually been enjoyed and passed under that description for upwards of sixty years. (*l*)

In case of copyhold as well as in freehold tenure, strips of land outside of old inclosures, and between them and an highway, are to be presumed to belong to the copyholder, although where such land forms part of a large open waste or common it might be otherwise. (*m*) It is treated as an unsettled point, whether an incroachment upon a waste, adjoining to the demised premises, by a lessee, without permission of the lord of the manor, or of the landlord, and uninterrupted possession thereof by such lessee for twenty years, shall give the lessee a possessory right thereto, or whether he shall be deemed to have inclosed the waste in right of the demised premises for the benefit of his landlord after the expiration of the term. (*n*)

Wastes adjoining inclosures.

(*h*) 8 Co. 63; 1 Tho. Co. Lit. 657.

(*i*) Gilb. Ten. 328, 329; 1 Tho. Co. Lit. 657, note D.

(*k*) For Middlesex, 7 Ann, c. 20, s. 17.

(*l*) 4 Russ. R. 267; and see *Doe v. Pearsey*, 7 B. & Cres. 304, which appears to establish that in copyhold tenure, land outside the external fence, and between the same and an high road, may be presumed to belong to the copyholder, and not to the lord.

(*m*) 7 B. & Cres. 304; *ante*, 195.

(*n*) Adams on Ejectm. 3d ed. 51, 52; 1 Esp. R. 460, 461; 2 Taunt. 160;

1 Taunt. 208; *semble*, that if such land belonged to the *landlord*, according to the presumption in 7 B. & Cres. 304, and the lessee threw down the old external inclosure and made the new fence serve as the external fence, the inclosure must be considered as made for the benefit of the landlord. But if the land inclosed belonged to the lord of the manor, then he alone could recover it. What is evidence of holding by permission of lord of manor, so as to prevent the statute of limitation being a bar to an action of ejectment, see 8 Bar. & Cres. 717.

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natures of INTE-
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1 General out-
line of these.

III. *The Extent of Interest in these several things.* We now arrive at the consideration of what are termed in law the *estates*, or quantities of *interests* which a person may have in the several kinds of real things before enumerated, of whatever tenure the same may be. The term "*estate*," we have seen, (o) is used in two senses, the one of *locality*, and merely referring to the thing, the other, (the sense now used,) importing the *degree* or *extent* of the *interests* which a person hath in lands, or in any other subject of property, and to this term (at least in conveyances by *deed*) some adjunct or expression should be added, in order to show the *degree* or *extent* of such estate or interest, or in other words, the *time* for which the grantee's estate is to continue, "to him and his heirs and assigns for ever," or, "to him and the heirs of his body;" or more specially when an estate tail special, "to him and the heirs of his body, by E. his wife, for ever;" or "to him and his assigns for the term of his natural life;" or "to him and his executors, administrators, and assigns for the term of 21 years," &c. by which words respectively an *estate* in *fee simple*, or in *fee tail*, or an *estate tail special*, or *for life*, or *for years*, may be created, and the grantee is said to have an *estate* in fee, or in tail, or for life, or for years, or on condition, &c., according to the adjunct words. (p) Frequently, though untechnically, the word "*estate*" is used merely as a local description, as "all my *estate* at *Ashton*," and in a *will* this would convey the fee to the devisee, unless expressly restrained by other words, (q) though it would be otherwise in a *conveyance* by deed. (r) With reference to the *extent* of *interest*, the term "*real estate*" imports that a party's interest is not less than for the term of his life; for a term of years, even for 1000 years, perpetually renewable, is a mere *personal estate*; (s) and so is any interest carved out of or created by the owner of such term, though it import to be an estate of freehold in point of duration. (t) A *license*, in strictness, creates no *estate* or interest whatever in real property, and therefore is not within the statute against frauds, (u) for which reason also a party having it can maintain no action of trespass. (x)

The consideration of estates, in the legal sense, meaning the *interest*, as we now intend to use it, is divisible under several heads, as 1st. Whether the owner has an estate or interest of *inheritance* to him and his heirs generally for ever, or to him and particular

(o) *Ante*, 158.

(p) See 1 Preston on Estates, 20.

(q) *Ante* 159.

(r) *Ante* 159; 7 East, 259; 4 M. & S. 369; 4 Taunt. 176; 6 Taunt. 410; 2 Marsh. 113; and see Prest. on Estates, 20.

(s) *Ante*, 84, note (a); 148, note (r);

2 Bla. R. 386.

(t) *Post*.

(u) Sugd. V. & P. 8 ed. 73; Sayer, 8; see further *post*, License.

(x) 2 East, 190; 11 East, 345.

heirs, as to him and the heirs of *his body*, either generally, not specifying any wife, or by a particular wife, termed in *tail*: or 2dly. A freehold interest, but only *for life*, or whether for his own life, or that of another, or as tenant in dower, or by the curtesy; or 3dly. A still less interest and estate, *less than freehold*, as only for a *term of years*, or the most inferior, as at will or by sufferance, which, however, are not *real* estates, but chattel *interests* in realty, though for a term of 2000 years. (y) It is essential, concisely to consider each of these; for though the full study of them constitute more peculiarly the learning and science of conveyancing, yet a practical knowledge of the leading rules is absolutely essential to all concerned in the administration of the poor laws, and many branches of the criminal law, and to every branch of the legal profession. We must also keep in view the highly important distinctions between *legal* and *equitable* interests, which will presently be more particularly examined.

It is essential first to distinguish between what is an *actual interest* in real property, and what is a *mere power* or *authority* to exercise a *jurisdiction*, or do some act upon, over, or to the same. This is a distinction in various respects of most extensive importance, for although persons may have full power and jurisdiction over land, yet if they have no legal *interest* therein, they cannot be considered as the occupiers thereof, and they are not rateable to the poor, nor would be entitled to vote in respect thereof; nor could support any action of trespass for any injury; nor would there be any implied right to compensation for the use of the land. (z) Thus where a statute authorized certain persons to make the river Avon navigable, and to maintain such navigation, and for those purposes to clear, scour and cleanse the same, and to dig and cut banks, and to build bridges, sluices, locks, &c. and to do all other necessary things, it was held that they could not be deemed the occupiers of the land covered with water, nor rateable to the poor in respect thereof, but had a mere easement in the watercourse, though they were liable to be rated in respect of a certain cut and lock, which they had made for the purposes of the navigation upon lands purchased by them. (a) So although commissioners of sewers have a very extensive *jurisdiction* over sewers and the banks of the adjacent lands and works relating to the same, yet it does not follow that they in legal contemplation have any

2. Important distinction between an *interest* and a *mere authority* over real property.

(y) *Ants*, 84, note (a).

(z) See in general *Rex v. Thomas*, 9 B. & Cres. 114; and the several cases there quoted, and *Newcastle, Duke of, v. Clark*,

2 J. B. Moore, 616; *Rex v. Aire Navigation*, 3 B. & Adolp. 139; 8 B. & Cres. 42.

(a) *Rex v. Thomas*, 9 B. & Cres. 114.

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interest in, or even actual or constructive possession of, the property over which they have jurisdiction; therefore commissioners of sewers cannot maintain an action of trespass against the commissioners of a harbour for breaking down a wall or drain erected by the former, as such commissioners, across a navigable river; because the authority to be exercised by such commissioners of sewers on behalf of the public does not vest in them *such* a property, or even possessory *interest*, as will enable them to maintain such action even against a wrongdoer: (b) and the same principle has been applied to persons authorized by statute to make and maintain a navigable river, and it was held that the proprietors of such navigation did not necessarily acquire such an *interest* in the soil in a bank excavated from a new channel made by them, for the first time, under the act, as would enable them to maintain trespass. (c) For the same reason, although the owners of a mere navigation have jurisdiction, to a limited extent, in the bed of the canal, and its banks, and locks, and drains, it was recently held that they have no *interest* in the soil, or any thing corporeal, therefore are not rateable to the relief of the poor, as occupiers of land; (d) and where an act, incorporating the Hull Dock Company, authorized them to make a dock, quays, wharfs, &c., and which were to be vested in them for certain public purposes, and giving them right to certain wharfage for goods *landed* or *discharged* upon such quays or wharfs, it was held, that as the premises were only vested in the company for the purposes of the act, they had no common law right to a compensation for the use of them, and that as the statute gave them no right to claim wharfage for goods *shipped off* from other quays, they could not maintain any action upon a supposed contract to pay wharfage for such use of the wharfs, though, if they had had a common law interest in the wharfs, such a contract would have been implied. (e) So, where it appeared that the plaintiff in an action was a person who had assigned over all his effects under an insolvent act, and that his wife continued to reside in his house, retaining some of the furniture, and that the wife having been absent for two days, and no one being in the house, the defendant committed a trespass in an attempt to distrain for rent; it was held that the wife had not a sufficient possession to enable her husband to sue in trespass, he neither having any legal interest, nor any actual or constructive possession; (f) and where the plaintiff, having built a chapel, conveyed the same to the

(b) *Newcastle, Duke of, v. Clark*, 2 J. B. Moore, 666.

(c) *Hollis v. Goldfinch*, 1 B. & Cres. 205; 2 Dowl. & R. 316, S. C.

(d) *Rex v. Aire Navigation*, 3 B. & Adolph. 139.

(e) 8 B. & Cres. 42.

(f) 6 Bing. 515.

defendant by a deed, the validity of which was questionable, and the defendant took possession, and gave the key to a gardener, who, with his permission, lent it to the plaintiff, merely to enable him to enter and preach in the chapel upon a Sunday, and the plaintiff thereupon locked up the chapel, and refused to re-deliver the key, it was held that he had not sufficient possession to maintain an action of trespass against the defendant for breaking open the chapel. (g)

3. A person who has merely a *license* to use land has not such an interest therein as to enable him to maintain an action of trespass; (h) though, if he were, in fact, in exclusive possession, without any right or title whatever, or under a void title, he might sustain that action against a stranger. (i) But here we must distinguish between a mere license to use land in common with others, and a license or agreement to have the whole use of the same; for if the latter be valid at all, it would be equivalent to a demise, and operate as a lease. (k) We shall hereafter consider the validity and effect of a license, when we consider the different modes of acquiring a right to real property. (l) It may be here observed, that a beneficial license to be exercised upon land, but not conferring any interest in the land, may be granted without deed or writing. (m)

3. Distinction between a mere license and possession, or an interest.

4. With regard to strangers, who cannot themselves establish any *title* to the property, which is the subject in contest, it is seldom necessary to prove the nature or extent of the interest of the claimant, or to produce any title-deeds whatever; and the mere proof of twenty years' undisturbed *possession* of real property corporeal, or of the enjoyment of real property incorporeal, (the effect of which we shall have occasion to consider more fully among the modes of acquiring property,) is sufficient, and affords a presumption in favour of the highest or largest estate that a person could possibly have in the subject-matter. (n) Such presumption may, however, be rebutted; and under these and other circumstances, recourse must occasionally be had to the proof of the precise nature of the estate, or degree of interest of the owner, and how he acquired the same, and which, therefore, we will now examine practically.

4. Twenty years' possession *prima facie* a sufficient title.

5. The different *estates* or *degrees* of *interests* are divided into such as are *freehold*, and such as are *less than freehold*.

5. Extents or quantities of interest enumerated, and in what property they may be created.

(g) 5 Bing. 7; 2 Moore & P. 12, S. C.

(h) 2 East, 190; 11 East, 345.

(i) 1 East, 41.

(k) 1 Vin. Ab., License, 92.

(l) And see, as to license, Sugden's V. & P., 8 ed. 73, 75; and Sayer's Rep. 3.

(m) 8 East, 308; 7 Taunt. 374.

(n) See *post*; and see 3 Car. & P. 610.

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Those of *freehold* are either of *inheritance*, descending from ancestor to heir, whether in fee simple or limited, as in fee tail; or are *freehold not of inheritance*, as for the life of the owner, or for the life of another person or persons, and ceasing upon death; or are by the curtesy and in dower. Estates *less than freehold* are for years, from year to year, at will, or at sufferance, and to these are added estates *upon conditions* of various descriptions, as to cease upon a certain specified event; and the estates of mortgagees, and tenants under statutes staple or statute merchant, or by *elegit*, are classed as of this nature, their interests determining when the debt has been satisfied. (o) It will be observed that Blackstone, in enumerating these several estates, considers them only as applicable to *freehold* tenure, and notices estates in copyhold merely as a subdivision of estates *at will*. But it must be kept in view that, though it cannot be properly said that a person has a *freehold*, (p) either of inheritance or for life, in a copyhold, yet he may have an *estate* of inheritance, or an *estate* for life, or dower, (and then called freebench,) or for years in a *copyhold*, and descending and continuing, or ceasing, precisely the same as in freehold tenure, and in general copyhold tenure (subject to the custom of each manor) is as capable of subdivision in degrees of estate or interest, &c. as lands of freehold tenure, and, in many respects, the rules applying to freehold estates will equally apply to copyhold, as regards the *estate* or *degree* of interest therein, though subject to certain peculiar incidents affecting all or most copyholds which do not extend to freehold, on account of the peculiarity of the tenure.

Power of alienation how far incident to every degree of estate.

There is one incident to every description of tenure and estate, (excepting leases by copyholders,) namely, that unless expressly taken away by the terms of the conveyance, the owner has a right to alienate either the whole or a part of his estate, whether he is entitled to an estate of inheritance in fee-simple, or for a year, or a time certain, less even than a year, in lands of freehold tenure, (q) (or his interest as a leaseholder in lands of copyhold tenure, who holds an estate by the rules of the common law, and not a customary estate, (r) and he may either convey or assign his *entire interest*, or may carve out *less interests* therein, unless such power be expressly prohibited, as it may be, and as occurs in estates upon condition, and more frequently in leases for years, where a landlord having the *jus disponendi*

(o) See 2 Bla. C., chap. 7 to 10, and pages 103 to 162.
(p) *Ante*, 232.

(q) 1 Tho. Co. Lit. 636, note (k); Doct. & Stu. 27; 15 Ves. 264.
(r) Com. Dig. Cop. K. 3.

may annex any lawful terms to his grant or demise ;(s) and a parol interest, as tenant from year to year, may even be seized and sold under a *fiери facias*. (t) But it may be here noticed that no restraint of the power of alienation (except to a particular person) can be imposed upon the grantee of an estate in fee, such a condition being void, as repugnant to the nature of the estate given. (u) Even a tenancy from *year to year*, unless the landlord determine it, might endure for ever, and on this account such a tenant may grant a lease for twenty-one years, and he has, in contemplation of law, a reversion, so as to enable him to distrain. (x)

The utmost time allowed by law, in order to guard against perpetuities, during which freehold estates of inheritance and fee-tails therein, and also leaseholds and personal property, may be limited, so as to be rendered unalienable, is during the existence of a life, or of *any* number of lives in being at the time the limitation is created, and *twenty-one years* after, and *no longer*, or in case of a posthumous child, perhaps a further period of nine months, to allow for the birth, but that is the utmost extent of prohibition will be given effect to; (y) and, in case of an entailed estate, immediately the first tenant in tail comes into possession, he may bar it by a common recovery, the power of suffering which for such purpose cannot be restrained by any condition, limitation, or covenant; (z) therefore there is no danger of perpetuity, for any tenant in tail might, if he should so think fit, bar the entail. (a) Copyhold tenure is an exception to these rules, for the owner cannot, as we have seen, *demise* for more than a year, or *from year to year*, without an express license from the lord of the manor. (b)

It is another general rule, that if a person have an interest less than an absolute estate of inheritance, and he attempt to convey a larger estate than he himself has, he *forfeits* his own interest by such assumption of greater interest than he really has; as if a tenant for life or for years convey an estate in fee, the person in remainder may immediately take advantage of such forfeiture, and instantly take possession, as if the particular estate had determined by efflux of time. (c) But a conveyance

Forfeiture by alienation of a larger interest than party has.

(s) 2 T. R. 133.

(t) 1 Marsh. 10.

(u) Litt. s. 360, 361; 8 T. R. 61.

(x) 2 Chitty's R. 461.

(y) 1 Sim. R. 173; and see a useful note, 1 Tho. Co. Lit. 516, in note 7; 2 Id. 578, note A.; 3 Id. 296, note D.; and Chit. Eq. Dig., tit. Perpetuity.

(z) 1 Inst. 223, b; 1 Burr. 84; 1 Rep.

83; 6 Id. 40; 10 Id. 37.

(a) 1 Saund. 147; 2 Bro. C. C. 215; 4 T. R. 13.

(b) Ante, 234, 235.

(c) Co. Lit. 251; 2 Bla. C. 294, 295, and notes; 1 Co. 14, b; 1 Saund. 319, b; when not a forfeiture, Co. Lit. 251, b; 1 Prest. Conv. 202.

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by lease and release, bargain and sale, or covenant to stand seised by a tenant for life, will not create a forfeiture, (though a feoffment would,) (*d*) these being what are technically termed *innocent* conveyances, inasmuch as they can transfer no more than the party conveying has. Of this nature also is a *disclaimer*, by any person who has less than a freehold estate of inheritance, to hold of the lord or landlord, who may therefore treat such disclaimer as a forfeiture, and proceed to eject the occupier. (*e*)

Distinction between freehold and leasehold interests.

There are several other leading distinctions between freehold estates or interests, and those which are less than freehold. The former are termed *real* estates, the latter *personal* estates. (*f*) One is, that a freehold interest (that is, an interest to endure for life or longer,) must be created either by feoffment, which applies only to corporeal property, or by *deed under seal* operating under the statute of uses; and that no freehold interest, even in an incorporeal hereditament, as a right of common or way, can be created by parol or by unsealed written instrument; (*g*) whereas an estate or interest less than freehold, as a lease or demise even for 1000 years, may be created without deed, except in an incorporeal hereditament; (*h*) and before the statute against frauds, which requires a signed instrument when for a term exceeding three years, might have been even by mere words. It is for this reason, that if a rector grant or demise his tithe by a mere written instrument, not under seal, he is still, in point of law, the owner and occupier of the tithe, and to be rated in respect thereof, because the legal interest in tithe passes only by grant under seal; whereas if the same instrument had been under seal, the lessee, acquiring the legal interest in the tithe, would be the proper person to be rated. (*i*)

Another rule is, that an estate of *freehold* cannot be derived from an estate for years; and therefore, where a rent was granted for life out of a long term of years, though it was resolved to be a good charge as long as the term lasted, yet the court held it to be only a chattel, and not a freehold. (*k*)

Another great distinction is, that a *freehold* estate cannot commence *in futuro* by a *common law* conveyance, as by feoffment and livery, which must be at the time of the feoffment; (*l*)

(*d*) Willes, 268.

(*e*) 2 Bla. C. 276; Bul. N. P. 96; Peak. R. 196; 2 Sch. & Lef. 625. *post*.

(*f*) *Waldron v. Howell*, 3 Russ. R. 376, and where it was holden that a leasehold for years, though perpetually renewable, cannot be deemed *real* estate.

(*g*) 8 East's R. 167; 5 B. & Cres. 875.

(*h*) 5 B. & C. 875.

(*i*) 1 Eagle on Tithes, 19; 1 Stra. 525; 16 Vin. Ab. 427; 4 Man. & R. 334; 9 B. & Cres. 479; Burn's J., Poor, 68, 69.

(*k*) *Butt's* case, 7 Co. 23, a; 1 Tho. Co. Lit. 635, note H.

(*l*) 2 Bla. Com. 143, 144.

but by a conveyance under the statute of uses there may be a creation of a freehold to commence *in futuro* with only an estate for years intervening; (*m*) and a lease for lives to begin from the day of the date thereof with seisin delivered *afterwards* is good, and shall not be said to convey a freehold to commence *in futuro*. (*n*) So the lessee under a lease for lives *in futuro* and who has covenanted to pay rent will be estopped, whilst he continues in possession, from insisting that being a lease for lives it could not commence *in futuro*, or be granted without livery of seisin, or lease and release, or bargain and sale. (*o*) But with respect to chattels real, as a lease even for 1000 years, it may, unless expressly prohibited, (as in leases by tenants in tail, (*p*)) be created to commence *in futuro*. (*q*)

Another rule is, that no freehold interest in remainder can, *by any common law conveyance*, be supported by an intervening estate less than freehold. (*r*)

So a freehold interest cannot merge in a chattel interest, though the latter may merge in the former (if both be equitable or both legal estates, but not otherwise); consequently if an estate of freehold for the term of his life vest in a person who is owner for a term of 1000 years, the freehold interest, though substantially of shorter duration, will not merge, but the term will merge in the freehold, (*s*) unless in case of a mere *interesse termini*. (*t*)

In pleading also a freehold interest in possession, the owner is stated to be “*seised* in his demesne as of freehold for the term of his natural life,” (or if the interest be in incorporeal property, the words “in his demesne” are to be omitted); whereas the owner of a term of years is alleged to be “*possessed* of the tenements for the residue of a certain term of years, commencing from, &c. and then unexpired;” (*u*) or if the term is to commence *in futuro*, he is then “*possessed* of the interest in a certain term, to commence on, &c. of and in certain land, &c.” (*x*)

The same different estates or *degrees* or quantities of interest may in general exist equally in freehold or copyhold, or in any other tenure; and in each a person may have an estate of inheritance descending to him and his general heirs, according

Interests of
inheritance in
what things.

In fee.

(*m*) 1 Sanders' U. & T. 128; 2 Id. 7, 98; 2 Prest. Conv. 157; 2 Bla. Com. 165, note (2).

(*n*) 2 Wils. 165.

(*o*) 1 Bro. P. C. 67.

(*p*) 32 H. 8, c. 28.

(*q*) 5 Coke, 94; 1 Tho. Co. Lit. 636, note K; 2 Bla. C. 143, 144.

(*r*) 2 Bla. C. 170, 171.

(*s*) 11 Co. 83; 3 Prest. 219, 221; 1 Tho. Co. Lit. 635, note I.

(*t*) 5 B. & Cres. 111.

(*u*) 2 Bla. C. 144, 106; Co. Lit. 17 a, b, note 1.

(*x*) 1 Saund. 251, n. 1.; 2 Saund. 176; Clift's Ent. 22, n. 5.

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to the nature and custom of each separate tenure. And the like estates may exist as well in relation to corporeal as incorporeal property, although in describing a corporeal inheritance a man shall be said to be "*seised in his demesne as of fee*," but of incorporeal "*seised as of fee*," and not "*in his demesne*." (y) Thus a person may have such an estate in freehold land, copyhold land, an advowson, or a fee farm rent, as that upon his death *the same* will in each case descend to his eldest son; and copyholders have a *freehold interest*, though not a freehold *tenure*. (z) A copyholder may in most manors be tenant in fee simple, in fee tail, for life, by the curtesy, in dower, (then usually termed *freebench*,) for years, at sufferance, or on condition, subject however to the particular custom of each manor. (a)

In tail.

So a person may have an *estate tail* as well in lands of freehold and copyhold, or other tenure, as in incorporeal hereditaments, which savour of the realty, that is, which issue out of corporeal property, or which concern or are annexed to or may be exercised within the same, as rents, estovers, commons, and the like. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed. (b) But property of copyhold tenure can only be *entailed* by the *special* custom of the manor. (c) And the mode of getting rid of such entail is also regulated by the custom of the particular manor, which in some manors is by recovery, in some by surrender only, in others by either of those modes concurrently. Estates tail, being freeholds of inheritance, confer the same right of voting as estates in fee. (d)

For life.

An interest or estate for the *life* of the party himself, or *pur auter vie*, or for the lives of several other persons, or in several successively for the life of each, may also exist in freehold or copyhold, or in land of any other tenure, and as well in incorporeal things as corporeal, provided the limitations be consistent with the rule against perpetuities. So a man may be tenant by the curtesy of some incorporeal things, as an advowson, if in gross, but not if appendant to a manor, unless he had actual seisin of the manor itself during the life of his wife; (e) and a woman may have an estate in dower, not only in all her husband's lands, but also in all his tenements and hereditaments,

(y) Litt. s. 10.

(z) 1 Prest. on Estates; 5 East, 51; ante, 232.

(a) 2 Bla. C. 149.

(b) 2 Bla. C. 112, 113; 7 Co. 33;

Willes, 324.

(c) Id.; 3 Co. 8; 2 Bla. C. 113.

(d) See post.

(e) 2 Bla. C. 127, note 14.

corporeal and incorporeal, subject to some restrictions, as in the case of a castle or of common without stint, (*f*) or of such estates as were vested in the husband as trustee or mortgagee, which latter, though subject to dower at law, are protected in equity against the widow's claim.

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An estate *for years* may be created in all description of corporeal property, and in some things incorporeal, and even in personalty. A person may be lessee for a term of years of a manor, and all the rights of franchise, and being thereby lord of the manor for the time being, may depute a gamekeeper to preserve or kill game within the precincts of the manor. (*g*)

For years.

As respects the *modes* of creating these several and different estates or interests in land, there are in general appropriate words, of the legal import of which all members of the profession must be well informed, in order to determine, upon reading a deed or will, what interest a party takes in different descriptions of property. Estates or interests, whether in corporeal or incorporeal property, may, at least as respects many of them, be created by, 1st, convention, as by conveyance or will; 2dly, by operation of law; or 3dly, by implication. Those by convention are by express words in a deed or will, to which words particular significations have, by a current of decisions, been given. Those by operation of law are principally estates tail after possibility of issue extinct, tenancy by curtesy, and tenancy in dower. Estates by *implication* pass usually by a will, without any express words to direct the course; as where a man devises land to his heir after the death of his wife, here though no estate be given to the wife in express words, yet she shall have an estate for life by implication, for the intent of the testator was clearly to postpone the heir till after her death, and if she do not take it, nobody else can. (*h*) So in cases of *resulting trusts*, the heir may be said to take the estate or interest by *implication*. (*i*)

Estates or interests, how or by what words respectively created;

To create an estate of *inheritance* by express words in a deed, the word *heirs*, in the *plural* number, is essential, in order

Creation of interests of inheritance, by what words created.

(*f*) 2 Bla. C. 132; Co. Lit. 31, 32; 1 Jon. 315.

(*g*) Chit. Game Law.

(*h*) 2 Bla. C. 381; 1 Went. 376. *Aliter*, if the estate had been devised to a stranger,

and not to the heir, for then the heir would be entitled to the intermediate profits, Cr. Jac. 75; 2 T. R. 209.

(*i*) 2 Bla. C. 335.

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Estate of inheritance.

to make a fee or inheritance, for if land be conveyed by deed to a man for ever, or to him and his assigns for ever, or to him and his heir, in the *singular* number, this vests in him only an estate for life; (*k*) but if a person seised in fee of lands under a conveyance to him were to convey the same to another "as fully as they were granted to him," the fee simple will pass without any limitation to the heirs in express terms. (*l*) It is the practice at this day, in conveying an estate in fee, to limit the property to the grantee and his heirs and assigns for ever, but the word assigns is wholly unnecessary and immaterial. (*m*) In a conveyance to a corporation the words of limitation are "*successors*," (not heirs,) and in a grant of lands, even to a sole corporation, the word "heirs" would not convey a fee any more than the word "successors" would in a grant to a natural person entitle the heir to inherit; and a limitation to a person in his politic capacity, and to his heirs, would give him only an estate for life. (*n*) But if the grant be to "heirs and successors," that which is appropriate will operate, and the other be rejected as superfluous. (*o*)

In a *will* an estate of inheritance may pass without any words of limitation to the heirs, whenever it can by any means be collected from the terms of the will itself, but not from *extrinsic* evidence, that it was the intention of the testator to give an estate or interest of that extent; thus, under a devise "to a man for ever," or "to one and his assigns for ever," or to one "in fee simple," *without the word heirs*, the devisee hath an estate in fee simple, for the intention of the deviser is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance; (*p*) and in construing *wills*, the testator is supposed to have wanted that professional assistance of which a party to a *deed* may always avail himself, and wills are frequently prepared with more expedition than in the case of deeds; besides, that being an ex-parte proceeding, probably so much attention and consideration are not exercised as in cases of deeds, where two parties are concerned in framing the same. (*q*) The law therefore regards the intention more than the precise legal import of the words in which the testator has expressed his meaning, and as

(*k*) Co. Lit. 9, a; Com. Dig. Estate, Lit. 8, b; 9 Id. 94, b; 2 Prest. Est. 6, 7. A. 2; Shep. Touch. 101.
 (*l*) Id. *ibid.*; 2 Prest. on Est. 2.
 (*m*) 2 Prest. Est. 3.
 (*n*) 1 Tho. Co. Lit. 191, n. (3); Co. Lit. 8, b; 9 Id. 94, b; 2 Prest. Est. 6, 7.
 (*o*) Co. Lit. 9, a.
 (*p*) 2 Bla. C. 108.
 (*q*) Treat. on Equity, 59, s. 2; 2 Enomus, 47; Latch. 42, *per* Dodderidge, J.

often as it can be collected from any circumstance *in* a will, or can from the whole will taken together and applied to the subject-matter, be reasonably inferred that the testator intended to pass *all his estate* in the property, that estate will pass, although the property be not limited to the heirs of the person to whom the devise is made. (r) But when by a previous current of decisions, certain words of a will have received a lucid exposition and import, they will in general govern, as it may be supposed that wills have been subsequently framed in the same words upon the faith of such decisions. These are therefore to be adhered to, although they will frequently carry no more than a life estate, and although such construction may not effectuate the apparent intention of the testator to give a fee simple. (s) The decisions establish that if a testator by his will give his *estate* or estates *in* or at *Dale*, though neither heirs, assigns, or any other word be annexed to the devisee's name, yet he takes an estate in fee simple, unless there be other words denoting a contrary intention, for the word "*estate*" so used, denotes the *entire interest* of the testator, and not a mere local description of the land; (t) though a devise of "my perpetual advowson" would only give an estate for life in such advowson. (u) So where lands are given *charged* with the payment *by the devisee* of a specific sum, and which is not to be raised gradually out of the rents and profits as they may arise, but to be absolutely paid by the devisee, such a devise, without words of perpetuity, will carry a fee simple, for otherwise the devisee might be a loser, by dying before he had been repaid the sum directed to be paid, and it is not to be supposed but that the testator at all events intended that he should derive some benefit, which he could only acquire by having the fee; (x) and the same reason prevails where land is by the will charged with the payment of annuities, unless where an estate tail is given to the devisee. (y) But if the debts to be paid by the devisee are merely a charge on the *estate* devised, and to be paid only out of the profits thereof, and not a personal charge on the devisee, then he will not take the fee, but only a life estate, unless the will contains express words of perpetuity. (z) And where a

(r) *Per* Lord Mansfield, Cowp. 352, 235. See instances, 2 Prest. Est. 69 to 77; 7 East, 259; 4 M. & S. 369; 4 Taunt. 176; 6 Taunt. 410.

(s) *Per* Lord Tenterden, *Doe v. Tucker*, 3 B. & Adolp. 476.

(t) 7 East, 259; 4 M. & S. 369; 4 Taunt. 176; 6 Taunt. 410; 2 Marsh. 113.

See Rules of Construction of Wills, note (15), 2 Bla. C. 381; *ante*, 159.

(u) *Ante*, 217, note (l)

(x) Co. Lit. 9, b; 3 T. R. 356; 6 T. R. 1.

(y) 5 T. R. 335.

(z) 4 East, 496.

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testator leaves all his "*hereditaments*" to *A.* the latter takes only an estate for life, that term being considered as referring only to the things, and not to the *entire interest* therein. (a) So, "I also bequeath to him *my chambers* in Albany, for which I paid 600 guineas, with all my furniture, except such articles as I may particularly except from this donation," will only pass a life estate, although the testator had recently, before making his will, for the named sum, purchased the fee simple in such chambers, and although the court considered that they had no doubt the testator intended to give the fee. (b) And where a testator devised as follows, "I give and bequeath my freehold estate called *Poimcetts*, &c." after an estate for life therein, it was held to pass only an estate for life in remainder; and Lord Tenterden observed, the term "estate" *may* operate only as a description of the particular lands, or *may* mean also the quantity of the testator's interest in them. (c) A fee also will not pass by general introductory words, by which the testator declares his intention to dispose of "all his estate, both real and personal," if there be not afterwards in the will some specific words passing the fee, for those words, like the term *hereditaments*, are in that case taken to mean only the thing, without regard to the interest therein. But if there were such subsequent words, in some degree ambiguous, then the introductory words "estate," &c. may have some effect, as indicative of the intention of the testator. (d) And a devise to a man and his assigns, without the words "for ever," or annexing words of perpetuity, passes only an estate for life. (e)

Heirship is *implied* in the creation of *nobility*, unless expressly excluded. In creation of nobility by *writ*, the peer, without the word "heirs," bath an estate of inheritance in his title; but not so in creation by *patent*, which is *stricti juris*, and without express words of inheritance there will be no inheritance in the title. (e)

Interest in tail
by what words
created.

An *estate tail general* is usually created by the words "to *A.* and the *heirs of his body*," and by which only his *lineal* descendants can take in exclusion of collateral relations; an estate in *tail male* by the words "to *A.* and the *heirs male* of his body," excluding even lineal females. If lands be given "to a man

(a) 5 T. R. 558; *ante*, 153.

(b) *Lushington v. Sewell*, 1 Sim. 435; *Day v. Parratt*, 3 B. & Adolp. 469. But if instead of "*chambers*" the word "*estate*" had been used, it would have been other-

wise, *Bailis v. Gale*, 2 Ves. 48, cited *id.* 476.

(c) *Doe v. Tucker*, 3 B. & Adolp. 473.

(d) 5 T. R. 15; 6 T. R. 610.

(e) 2 Bla. C. 109.

and the heirs male of his body begotten," this is an estate in tail male general, but if "to a man and the *heirs female* of his *body* on his *present wife* begotten," this is an estate in tail female special. (g) The word "*heirs*" is necessary to create a *fee*, and the word "*body*" (or some other words of particular procreation by a particular person or persons (h), is necessary to create a fee tail, and to ascertain to what heirs in particular the fee is limited; and if omitted, no estate tail will be created. As if a grant be to a man and *his issue* of his body, to a man and his *seed*, to a man and his *children*, or offspring, all these create only estates for life, there wanting the words of inheritance "*the heirs of*." So on the other hand, a conveyance to a man and his heirs male or female (omitting the words body of a particular person or persons) creates an estate in fee simple, and not in fee tail; because there are no words to ascertain the body out of which they shall issue. (i) But in *wills* greater indulgence is allowed, and an estate tail may be created by a devise to a man and his *seed*; or to a man and his heirs male; (k) or by a devise to a man and his children, if he have no children at the time of the devise; (l) or to a man and his posterity: (m) or by any other words which show an intention to restrain the inheritance to certain particular descendants of the devisee. (n)

An interest or estate for *life* may be created, not only by the express words of a deed or will, but also by a general grant or devise, without defining or limiting any specific estate; and in which case it is an intendment of law that the grantor and testator meant that *the donee* should enjoy the thing during the whole of his life. As if *A.* grant to *B.* the manor of Dale, without other words, this makes him tenant for life. (o) So a grant by a tenant in fee at large, or for a term of life generally, shall be construed to be an estate for the life of the grantee, and not for the life of the grantor or other person; because an estate for a man's own life is in legal contemplation more beneficial and of a higher nature than for any other life; and all grants are to be taken most strongly against the grantor, unless

Interest for life,
by what words
created.

(g) 2 Bla. C. 111, 114.

(h) As to a man and the heirs which he shall beget of his wife, see Co. Lit 20, b.

(i) Litt. s. 31; Co. Lit. 27.

(k) Co. Lit. 9, 27.

(l) 6 Co. 17; Moor. 397; Goldsb. 139.

(m) 1 H. Bla. 447; 2 Bla. C. 115, 381, n. 15.

(n) See And. 43; 2 Bla. R. 1083 3 T. R. 373; Doug. 321; 1 East, 259.

(o) Co. Lit. 42.

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against the king. (*p*) We have seen that as an estate for life is a freehold interest it cannot be created by any unsealed instrument excepting by will. (*q*)

Estates for life are either conventional and created by deed or will, or arise by operation of law, as tenant in tail after possibility of issue extinct, (*r*) tenant by the curtesy, and tenant in dower. The express words by which an estate for life is created, are, as just observed, by a general grant or devise of land to *A.* without any word denoting an intention to pass an estate of inheritance, but more generally by using the words "to have and to hold the same (meaning the property before specified) to him the said *A.* and his assigns for and during the term of his natural life;" or "for and during the life of *C. D.*;" or "for and during the lives of *C. D.*, *E. F.* and *G. H.*, and the life of the survivor or longest liver of them." The latter is a usual mode of granting an annuity, and three or more very young persons are named, so that the life of at least one of them will probably endure for a great many years, and thereby save the expense of any insurance, at least, until after the death of one or more of the persons.

Interest for
years or less,
how created.

An estate or interest for *years* might, before the statute against frauds, 29 Car. 2, c. 3, be created by mere verbal demise for any term of years, but that act declares that all parol demises for more than three years shall have at most the force and effect of a tenancy *at will*, now construed to mean from year to year, determinable by a regular notice to quit. (*s*) We have seen that it may, excepting when made by a tenant in tail, commence *in futuro*, in which respect it differs from a freehold interest. (*t*) It must be certain in duration, (*u*) though as *id certum est quod certum reddi potest*, a lease may be valid if made for so many years as *J. S.* shall name. (*x*) With respect however to its *commencement* no uncertainty would prejudice, unless it would also render its *duration* uncertain; for if no day of commencement be named the term begins from the making or delivery of the lease. (*y*) But as regards *duration*, it must be *certain*: thus a lease for so many *years* as *J. S.* shall live, is void from the beginning, because it is neither certain at the time, nor can ever be reduced

(*p*) Co. Lit. 42, 36.

(*q*) 8 East, 167; 5 Bar. & Cres. 221; 8 Bar. & Cres. 293.

(*r*) Tenant in tail after possibility, has some of the qualities of an estate tail, as to be dispunishable for waste, but for most material purposes he is only tenant

for life. See Co. Lit. 27, b.; 2 Inst. 302; 4 Coke, 63, a.; 15 Ves. 419.

(*s*) 8 T. R. 3; 5 T. R. 471.

(*t*) Ante, 244, 245; 2 Bla. C. 143, 144.

(*u*) Co. Lit. 45.

(*x*) Bac. Ab. Leases, L.; 6 Co. 35.

(*y*) Co. Lit. 46.

to a certainty during the continuance of the lease; (z) and it could not operate as a grant for the life of J. S. because that would be a freehold interest, which must be conveyed by feoffment and livery of seisin, or by some deed operating under the statute of uses. (a) And the same doctrine holds if a parson make a lease of his glebe for so many years as he shall continue to be parson of Dale, for this is still more uncertain. (b) So a lease to A. generally, or so long as he should please, would be void, because if he did not determine it, it would at least continue during his life, and consequently pass a freehold interest, which cannot pass by such an instrument, but only by feoffment and livery of seisin, or by deed operating under the statute of uses; and as the lessee only had the power of determining the tenancy, it could not be deemed an ordinary tenancy from year to year. (c) But a lease for twenty or more *years*, if J. S. shall so long live, or if he should so long continue parson, is good; (c) for then there is a certain period fixed, beyond which it cannot last, though it may determine sooner on the death of J. S., or his ceasing to be parson there. But as it is not certain how long the *cestui qui vie* will live, such a tenancy is not for a *term certain* within the meaning of the 1 G. 4, c. 87, in proceeding by ejectment. (d)

Leases or terms for years are of *two* descriptions with different objects; first, those by which lands and other tenements are demised in order to give the party the actual possession during the term, rendering a fine or an adequate annual rent; or secondly, they are mere terms created for conveyancing purposes, as for 1000 or more years, in order to secure the legal right of possession in the lessee as a trustee for some named purpose, and afterwards to attend upon and protect the inheritance, and which conveyancers are in general anxious to keep on foot. Terms for 1000 or 2000 years are in general presumed to be of this nature; (e) and these, after the uses or trusts of the terms have been satisfied, if not recognised as subsisting within twenty years, may and usually are to be presumed by a jury to have been surrendered; (f) but otherwise they will endure till

(z) Co. Lit. 45. *Quere*, if in a will, would not it operate as an estate *pur autre vie*?

(a) 8 East, 167; 5 Bar. & Cres. 221; 8 Bar. & Cres. 293.

(b) Co. Lit. 45.

(c) 8 East, 167. See *ante*, as to the necessary conveyance to pass a freehold interest.

(d) 7 B. & Cres. 2; but an agreement in writing for three months certain is a tenancy for a term certain within that act,

5 B. & A. 766; 1 Dowl. & R. 433, S. C.; and see 2 B. & Adolp. 922.

(e) Cowp. 595.

(f) 2 B. & Ald. 710, 782; 1 Car. & P. 524, 526. The presumption of a surrender is only to be in *favour* of the party who proves himself to be *beneficially* entitled, and not *against* such party, 6 Bing. 174. As to presumptions of a surrender in general, Sugd. V. & P. 407 to 448; *post*, Surrender.

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expired by effluxion of time; and the term must in conveyances, and in actions of ejectment, be traced to its legal owner, who alone is the proper party to recover at law. (g)

A term for years in an incorporeal hereditament (as a several fishery in a navigable year, which is an incorporeal and not a territorial hereditament,) cannot be created without deed. (h) In order to perfect a lease and an estate for years the lessee should enter, and in pleading a title against a stranger, such entry should be averred, for without entry the lessee has only an *interesse termini*. (i) In pleading a term for years as a perfect interest in an estate, so as to give the lessee a preferable right to a subsequent lessee or stranger, the entry of the lessee must be averred, or it must be shown that the lessee elected that the deed should enure by way of bargain and sale to pass the estate. (k)

Tenancy from
year to year, or
less, by what
words created.

A tenancy from year to year may be created by express words, or by implication or inference from the mere letting a person into possession as a tenant. The description of such a tenancy is "that the landlord demised the premises to the tenant to hold the same from the — day of — for and during the term of one year, and so on from year to year, so long as the said landlord and the said tenant should respectively please." But such a tenancy cannot, as we have just observed, (l) be created by word or unsealed demise from year to year determinable only at the option of the tenant, for that would create a freehold for his life, determinable sooner at his option without deed, which is contrary to law. (m). An agreement or covenant to *grant a lease* is prospective, and not a lease or demise, but merely a stipulation to grant a lease, (n) unless the instrument also contain words of *immediate demise*, when it will amount to a *demise*, although there be a stipulation thereafter to grant a more formal lease; (o) but whether an instrument shall operate as a formal lease or only as an agreement for a future lease will depend on the intention of the parties, to be collected from the instrument itself; (p) and if an agreement be in the usual form, that *A.* agrees to let to *B.*, or agrees that *B.* shall hold and enjoy, these, without

(g) 7 T. R. 47.

(h) *Duke of Somerset v. Fogwell*, 5 B. & Cres. 875.

(i) 2 Bla. C. 144; Tho. Co. Lit. Index, *Interesse Termini*; 8 Bing. 92; 5 B. & Cres. 114.

(k) *Miller v. Green*, 8 Bing. 92.

(l) *Ante*, 253.

(m) 8 East, 167.

(n) See note (p) *infra*.

(o) 8 Bing. 178; 7 Id. 590; 6 Id. 206, and cases there cited.

(p) 3 Taunt. 65; 5 T. R. 163; 13 East, 18; 5 Bar. & Ald. 322; 6 East, 530; 3 Dowl. & Ry. 522; 5 Bar. & Cr. 41; 8 Bing. 178.

other qualifying words, operate as an immediate demise.(q) The distinction is important in many respects; for where the instrument operates as an immediate *demise*, the landlord may distrain even for the first quarter's rent; but if it were merely a prospective agreement, no distress could be supported (r) until, by a long holding or by payment of rent, a collateral tenancy from year to year could be inferred, (s) for a *distress* can only be made where a party holds under a *demise* express or implied. (t). A lease or demise for one year, and so on for two or three years as the parties shall agree, has been holden to be absolutely binding on both parties for two years at least, and not determinable by any notice before the end of the second year; (u) but that doctrine has been qualified; and in the case of lodgings taken generally at so much per annum, payable half-yearly, a tenancy only for a year will arise, and not a tenancy from year to year, so that he may quit at the expiration of the first year without any notice to quit. (v) Under an agreement that the tenant should always be subject to quit at three months' notice, he is not tenant from year to year, but from quarter to quarter. (w) And where the taking is at so much per week or month, the tenancy is to be considered as weekly or monthly, determinable by a week's or a month's notice; (w) or by what is termed a *current* notice, as by a notice to a weekly tenant to quit at the end of his tenancy next after one week from the date or the time of his being served: (x) but if it require him to quit on a particular day of the week, that must be the very proper day, viz. the day before that on which the tenancy originally commenced. (y) A notice served on the 28th of September to quit on the ensuing 25th of March is a sufficient half-year's notice to quit, (z), and even if served on the 29th of September, it would suffice, though the tenant were absent, and did not return till a subsequent day. (a) It has been recently determined that a demise by a person who is tenant from year to year to a sub-tenant also to hold from year to year is, in legal operation, a demise from year to year *only during the continuance* of the first tenancy, and may properly be so described in pleading, although at the time of making the second demise no such qualification was mentioned, and consequently that when the first tenancy expires, the second also

(q) 1 T. R. 735; 5 Id. 163; 8 Bing. 182, 183; Vin. Ab. License.

(r) 2 Taunt. 148; 5 Bar. & Ald. 322.

(s) *Mann v. Lovejoy*, 1 R. & M. 355; 13 East.

(t) 2 B. & C. 478.

(u) 1 Wils. 262.

(v) 3 Bar. & Cres. 90.

(w) 5 Camp. 510; and see as to lodgings, 1 T. R. 162; 1 Esp. 94; Adams's Eject. 124; 3 Bar. & Cres. 90.

(x) 6 Bing. 362.

(y) 5 Car. & P. 67; 1 Mood. & M. 10.

(z) 6 Bing. 574; 4 Moore & P. 391, S. C.

(a) 1 Mood. & Malk. 10.

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determines. (b) A tenancy from year to year is considered in law as a tenancy for the residue of a certain term of years, and may be so stated in pleading. (c) Such a tenant, who, after having given notice to quit, holds over for a year, and is liable therefore to pay double rent, according to the 11 Geo. 2, c. 19, may quit at the end of such year without fresh notice, because, by the terms of that act, he is only liable to pay double rent so long as he continues in possession, and he does not, under that act, become a fresh tenant from year to year. (d). As a tenancy from year to year is *capable* of enduring for an indefinite time, unless determined by consent, it has been held that such a tenant may grant a lease for twenty-one years, and that his executor may sustain an action for the breach of a covenant in such lease committed after the death of the lessor, (e) and he has sufficient reversion to enable him to distrain upon his under-tenant. (f)

Tenancies strictly at will or sufferance, how created.

Although when a person is let into possession as a tenant the inference now is, that he is a tenant from year to year, until the contrary be proved; (g) yet that inference may be rebutted. And though such uncertain tenancies but rarely exist, it must by no means be understood that a *strict tenancy* at will, or at sufferance, cannot exist at the present day, for it may clearly be created by the express agreement of the parties. (h) Thus, where a party let a shed to another expressly for so long as both parties should like, on an agreement that the tenant should convert it into a stable, and the defendant should have all the dung for a compensation, and there was no reservation referable to any aliquot part of a year, this was construed to be an estate strictly at will. (i) So where the owner said, "I give you such a close to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it," it was held that these words created a tenancy strictly at will. (j) Where a gamekeeper or other official person has been let into a messuage, buildings, or land, merely as an incident to his office, and without his paying rent, his right to occupy ceases upon his being discharged from such office, and if after demand he retain possession, he may be immediately evicted, or an ejectment sustained. (k)

(b) *Pike v. Eyre & ors.* 9 Bar. & Cres. 909. See *Id.* as to the effect of the first tenant surrendering his tenancy.

(c) 1 Campb. 317.

(d) *Booth v. Macfarlane*, 1 B. & Adol. 904.

(e) *Mackay v. Mackreth*, 2 Chit. Rep. 461, 475.

(f) 1 Mood. & Malk. 493.

(g) 3 Burr. 1609; 1 T. R. 163; 3 T. R. 16; 5 T. R. 471; 8 T. R. 3; 3 East, 451.

(h) 4 Taunt. 128; 5 Bar. & Ald. 604; 1 Dow. & Ry. 272.

(i) 4 Taunt. 128.

(j) Cald. 569.

(k) Moore, 8; Lit. Rep. 139; 16 East, 33.

Where a party enters as tenant under a lease which is void, or is let into possession under an agreement for a lease, he becomes tenant at will, until possession for a year, and payment of rent, and after such possession and payment of rent, he would now be considered as tenant from year to year, (*l*) though it was formerly held, that even after payment of rent he was a mere tenant at will. (*m*.)

A tenant *at sufferance* is an occupier who at first came in by lawful demise, and after his estate ended, continueth in possession, and wrongfully holds over; (*n*) as if a tenant under a lease hold over after it has determined, or tenant *pur autre vie* after the death of the *cestui que vie*; and in other cases, where a person comes into possession of a particular estate by the act of the party, and holds over, he is tenant at sufferance. (*n*)

By the act of 4 Geo. 2, c. 28, s. 1, it is enacted, "That where any tenant holds over after the demand made, and notice in writing given by the *landlord*, for delivering the possession, such person so holding over shall pay double the yearly value of the lands so detained, for so long time as the same are detained, to be recovered by action of debt, against the recovering of which penalty there shall be no relief in equity." But that act applies only to cases in which the *landlord* gives notice to quit. As to those cases where the *tenant* gives notice, it is, by the 11 Geo. 2, c. 19, s. 18, enacted "That in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises by him, her or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, that then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforward pay to the landlord, or landlord's lessor or lessors, double the rent or sum which he, she, or they should otherwise have paid." This act applies as well to parol demises from year to year, as to leases in which there is a power to determine the term, (*o*) but it only operates where the notice to quit is valid, not where it is invalid. (*p*)

Where a mortgagee suffers the mortgagor to remain in possession of the mortgaged premises, without any agreement as to tenancy, or other continuing terms of occupation, the mortgagor is not tenant at will to the former, but only *quasi* tenant at will,

Mortgagee and
mortgagor.

(*l*) 3 B. & C. 483; 2 Taunt. 148; 7 Bing. 451; 5 B. & Ald. 322; 1 Ry. & M. 355; 3 Bing. 361; 2 M. & P. 281; 5 Bing. 185; S. C. 8 T. R. 3.

(*m*) See 1 Wils. 176; Brownl. 30;

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(*n*) Co. Lit. 57, b. The landlord may sue him in case for waste. 1 Campb. 360.

(*o*) 1 Bla. Rep. 530; 3 Burr. 1603.

(*p*) 7 D. & R. 411; 4 B. & C. 922.

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or at most tenant by sufferance only, and it should seem not even the latter, because he may be treated either as tenant or trespasser, at the election of the mortgagee; and in ejectment by mortgagee against mortgagor it is not necessary to demand possession before action brought, and consequently under such circumstances the mortgagor is a mere trespasser.(q) But it has been held that an action for diverting a watercourse may be maintained against a third person by a mortgagor in possession as tenant of the mortgagee.(r)

If a mortgagee accept rent from a tenant in possession he could not afterwards maintain ejectment without some notice to quit, for by the receipt of rent, which amounts virtually to an attornment, the mortgagee acknowledges him as his tenant.(s)

The several incidents of these different degrees of interest.

We have mentioned one general *incident*, that of the right to alienate to the extent of the party's interest, or for a part of it; we will now notice a few other incidents. A person seised of an estate of inheritance in land of freehold tenure (otherwise than as a trustee(t)) may cut timber, and with impunity commit any waste or destruction, on his own land, or pull down, or burn, or commit any waste to his own house, provided it do not injure nor can be intended to injure any insurers or other persons, or to extend to the buildings or property of others, but if it do he is capitally punishable.(u) So if he wilfully set fire to his own woods, so as to injure his neighbour's, he would also be punishable;(x) nor can a person legally place poisoned ingredients on his own land, or in water on his land, with intent to poison any game or poison fish.(y) There is also a common law maxim, *sic uteri tecum ut alienum non lædas*, so that if a person place a glandered horse in his stable so near to that of a neighbour that the infection passes through and infects the neighbour's horses, the latter may sue the former;(z) and a person cannot legally, on his own land, obstruct or divert a watercourse

(q) 1 T. R. 582; 8 B. & Cres. 766; 5 Bing. 421; 2 Moore & P. 749; *semble*, that there is not such election in a mortgagee as to enable him to sue the mortgagor for use and occupation; see also 5 Bing. 426; 7 Id. 322.

(r) 5 B. & Ald. 604.

(s) 7 Bing. 322; see 3 East, 450.

(t) 1 Mad. Ch. Pr. 120; For. 6. At law, a trustee having a legal estate of inheritance cannot be sued for waste, but a Court of Equity will restrain him; 2 Ch. Cases, 32; 3 Wood. Vin. L. 399; so a

mortgagee may be restrained, Amb. 105; 3 Atk. 210, 723; an *annuitant* when, 2 Sim. & Sta. 96.

(u) 7 & 8 Geo. 4, c. 30, s. 2; Burn's J. Burning, I.; R. & M. C. C. 182; *ante*, 230.

(x) See other injuries, Burn's J. Malicious Injuries to Property.

(y) 2 & 3 W. 4, c. 32; and as to poisoning fish, 7 & 8 Geo. 4, c. 30, s. 15; injuring banks of rivers, &c. Id. 12.

(z) Bul. N. Pr.

which of right should flow into his neighbour's ground, and if he do, the latter may enter and remove the obstruction, or sustain an action for the consequential injury. (a) So in the case of an ancient established decoy, a person could not legally shoot, though on his own land, so near as to frighten away the wild fowl resorting thereto. (b) But in general, however wanton and injurious an injury may be, yet if it be confined in intent as well as consequences to the land of the wrong-doer, it is punishable, (c) unless the owner of the inheritance be a trustee, and then a Court of Equity will restrain him from doing any act materially injurious to *cestui que trust*. (d)

The same incidents attend an *estate tail*, for the owner may with impunity commit waste on the estate tail by felling timber-trees, pulling down houses or the like; (e) and where an infant tenant in tail, not likely to live till of age, by his guardian cut down a great quantity of timber, an injunction was refused on behalf of a remainder-man to restrain him. (f)

Of each of these estates of inheritance the wife, if she survive her husband, is entitled to *dower*; and if the husband was actually seised of his wife's estate in fee simple, or fee tail, and a child were born alive, he is entitled to the estate during his life, as tenant by the curtesy. And all estates tail are liable to be barred or destroyed by a fine, by a common recovery, or by a lineal warranty, descending with assets to the heir. (g)

A *copyholder*, though he has an estate of inheritance, cannot without special custom cut timber for sale or otherwise than for repairs, or permit dilapidations, (h) or commit other waste, and if he do, he will forfeit his estate to the lord; (i) whilst, on the other hand, the lord cannot cut trees on the copyhold unless sanctioned by particular custom, and if he do so or dig mines, the copyholder may sue him in trespass. (j)

The owner of an estate for *life*, whether for his own life or for the life of another or of others, is entitled, unless expressly restrained by the terms of the conveyance or devise, to *reasonable estovers* or *botes*, that is, *necessary* wood, such as house-

House and
other botes.

(a) 2 Smith, 9; 3 B. & Adolph. 304.

(b) 11 East, 574; 2 B. & C. 934; ante, 188, 189.

(c) Burn's J. Burning. In France the law renders it penal for the owner of land to suffer it to become so foul with weeds as to become injurious to his neighbour, by the seed of weeds being carried to a distance, a regulation which it would be well to adopt in this country.

(d) 1 Mad. Ch. R. 120; 3 Tho. Co. Lit. 243, note M.

(e) Co. Lit. 224.

(f) Saville's case, For. 6; 3 Tho. Co. Lit. 243, note, M.

(g) 2 Bla. C. 115.

(h) Permissive waste in neglecting to repair, is cause of forfeiture. Tho. Co. Lit.

(i) Ante, 232 to 257; 2 B & Adol. 437.

(j) 4 Maule & S. 340; 10 East, 189; 13 Ves. 236; Co. Lit. 60, b. note 4; 1 Tho. Co. Lit. 657, note C.; 2 B. & Adolp. 437.

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bote, plough-bote, and cart-bote, and hay-bote, or hedge-bote. *House-bote* is a sufficient allowance of wood from off the estate to repair or burn in the house, and sometimes termed fire-bote; plough-bote, and cart-bote, are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing of hays, hedges or fences.^(k) But a tenant for life, unless by the terms of the grant or demise he hold the estate *dispunishable for waste*, cannot legally cut timber, though at maturity and becoming decayed, otherwise than for such purposes of repair, and not for sale, nor can he commit any other waste;^(l) and if he do he may be restrained by writ of injunction in a Court of Equity,^(m) or may be sued by the remainder-man or reversioner by writ of waste; or, now more commonly, by action on the case,⁽ⁿ⁾ and he would forfeit the place wasted.^(o) But the Court of Chancery will permit the timber growing on an estate, whereof a person is tenant for life, to be cut down when in a state of decay for the benefit of the persons entitled to the inheritance, so as no damage be done to the tenant for life;^(p) and so that court *will allow timber* to be cut down for the purpose of paying legacies charged on the inheritance.^(q) But a tenant in tail after possibility of issue extinct, and tenants by statute, recognizance, and elegit, constitute exceptions to this rule;^(r) though each may be restrained from committing malicious, wanton, or extravagant waste, or cutting ornamental timber, by injunction from a Court of Equity,^(s) the clause, "without impeachment of waste," never being extended in a Court of Equity to allow the very destruction of the estate itself, but only to excuse mere permissive waste;^(t) and although by the terms of the grant or devise a tenant for life be declared *dispunishable for waste*, yet he may be restrained by injunction from what is termed *equitable* or malicious waste, and from making any spoil or destruction upon the estate, and from pulling down the family mansion, or cutting down avenues and ornamental timber in pleasure grounds, and young trees not fit for timber, and even trees upon a common, though two miles from the mansion-house, but which had been planted as an orna-

(k) 2 Bla. C. 35; Co. Lit. 41, 54, b.; 3 Tho. Co. Lit. 238, 239.

(l) Co. Lit. 53; 2 Bla. C. 283, 284; Stat. Gloucester, 6 Ed. 1, c. 5; and see a valuable note 3 Tho. Co. Lit. 241, note M.

(m) *Post*, chap. viii.

(n) 2 Saund. 252; 1 Saund. 525; 2 Bing. R. 262.

(o) 2 Bla. C. 283, 284; 3 Bla. C. 229.

(p) 2 P. W. 240.

(q) 2 Vern. 152.

(r) Co. Lit. 27, 54; 2 Rol. Ab. 826, 828; 2 Bla. C. 283, 284.

(s) See 2 Bla. C. 125, note 8.

(t) 1 Mad. Ch. Pr. 115; 3 Tho. Co. Lit. 243, note M.

ment to the estate ; and in the case of the mansion-house such a tenant may be ordered to repair the damage he has committed. (u)

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The executors of every tenant for life, whose estate determines by his own death or that of others, and not by his own fault or act, are entitled to *emblements*, or crops produced by cultivation, and in progress towards maturity, before the determination of the estate. (x) This protection to persons, the duration of whose interests was uncertain, was extended to an incumbent, who, by 28 H. 8, c. 11, was enabled to bequeath by will the corn and grain growing upon the glebe land, mowed and sown at his own cost, but for the above reason a parson who determines his own estate by resigning his living is not entitled to emblements. (y)

The incidents of a tenancy for *years*, in the absence of any stipulation, are, that *he* (the tenant) is entitled to the same *estovers* as a tenant for life, namely, to house-bote, fire-bote, plough and cart-bote, and hay-bote, and wood to repair or burn in the house, to make and repair all implements of husbandry, and for repairing hedges and fences ; (z) and when a tenant for years is legally bound to repair, even at his own charge, or at liberty to repair, he may cut timber trees for repairs, even without the assignment of his landlord, unless they be excepted in the demise, or he be otherwise expressly restrained ; (a) and unless trees be excepted, or there be an express power reserved, the lessor would be a trespasser in entering to cut trees. (b) But when trees are excepted in the lease, the lessor may sue the lessee in trespass, if he either fell or damage them, (c) and the lessor may then enter the demised lands in order to fell and take away the trees. (d) If not excepted, the trees, instantly they have been blown down or severed, become the property of the lessor, and if taken by the tenant or a stranger, the lessor may sue in trespass or trover. (e)

With respect to *emblements*, as the tenancy is to determine at a fixed time, if the lease be silent, and there be no custom of the country, the lessee cannot, after the expiration of his

(u) 2 Vern. 733 ; 1 Bro. 196 ; 3 Bro. 549 ; 6 Ves. J. 107 ; and see in general 3 Woodes. 399, and *post*, chap. viii.

(x) Com. Dig. Biens, G. 1, 2 ; Vin. Ab. Emblements, H. 3 ; Bac. Ab. Executors, H. 3 ; Co. Lit. 55, a ; 2 Bla. C. 122, note 4 ; as to *emblements* in general, *ante*, 91, 94, and 161.

(y) 2 Bar. & Ald. 470.

(z) 2 Bla. C. 144 ; 1 Tho. Co. Lit.

624.

(a) 1 Tho. Co. Lit. 624 ; 3 Id. 237 to 239 ; Mo. 23.

(b) 1 Tho. Co. Lit. 238, note I. ; 1 Saund. 322, n. (5).

(c) Id. *ibid.* ; 1 Lord Raym. 552.

(d) Cro. Eliz. 18.

(e) 7 T. R. 13 ; 3 Tho. Co. Lit. 246, note Q. ; Mo. 23 ; 1 Saund. Rep. 322, and Id., Index, Trees.

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tenancy, enter to sever or carry away crops improvidently sown so late as not to be cleared during the tenancy. (f)

A tenant *from year to year* is not liable to general repairs, or to keep them in what is termed tenantable condition or repair; he is only bound to use the premises in tenant-like manner, but no further; he is not bound to rebuild, in case of damage by fire. (g) But, on the other hand, no tenant has, even in a Court of Equity, any right to require a landlord to expend money he has received from an insurance-office, or to restrain him from suing for rent of the premises when destroyed by fire. (h)

The incidents of *all tenancies*, even of the lowest, and whether of freehold or copyhold land, are, that without an express exception, although the *property* in mines and trees remains in the owner of the fee, yet the *possession* of the whole of the subsoil and every thing upwards is vested in the tenant, so that, although he cannot legally dig mines, or cut trees, except for repairs, yet he has an interest in their continuance, and may therefore sue even his lessor for digging mines, or cutting trees. (i) A tenant strictly *at will* or *sufferance* is equally entitled to some descriptions of *estovers* or *botes* as a tenant for a term of years, but as he is not bound to make substantial repairs, he could not, perhaps, legally cut timber for the purpose of repairs. It is said, that if the landlord enter and cut timber, that is of itself a determination of the will, for otherwise he would be a trespasser. (k) Each of these descriptions of tenants is entitled to *emblems*, when the landlord determines the tenancy, but not so if it be determined by his own act. (l)

Right of voting
for members of
parliament, in
respect of the
beforementioned
different inter-
ests.
Freeholds of in-
heritance.

The old franchise or right of voting, which *freeholders* of inheritance, of the annual value of forty shillings, formerly possessed, (m) is still reserved to them by the recent reform act. (n) But, in order that a party may be entitled to vote, he must be registered according to the provisions of that act, and, in order to this, he must have been in the actual possession, or in the receipt of the rents and profits for his own use, (o)

(f) 1 Tho. Co. Lit. 633; 2 Bla. C. 144, 145; as to emblems, *ante*, 91, 94, 161.

(g) *Per* Gibbs, Holt, C. N. P. 9; 1 Marshall's R. 567.

(h) 1 Simon's R. 146; when otherwise, under the building act, within the bills of mortality, 5 B. & Ald. 1.

(i) *Lewis v. Branthwaite*, 2 B. & Adolp. 437.

(k) Co. Lit. 55; and 2 B. & Adolp. 438.

(l) 10 Bar. & Cres. 720; *ante*, 94; 2 Bla. C. 146, 147.

(m) 8 Hen. 6, c. 7; 10 Hen. 6, c. 2; 7 & 8 W. 3, c. 7, s. 3; Id. 24; 10 Anne, c. 23, s. 5; 18 Geo. 2, c. 18, s. 1; 3 Geo. 5, c. 24; 14 Geo. 3, c. 58; 20 Geo. 3, c. 17; 53 Geo. 3, c. 49; and see 1 Bla. Com. 172 to 175.

(n) 2 Wm. 4, c. 45, s. 75.

(o) Therefore bare trustees and mortgagees not in possession cannot vote, s. 23. But the interest of a mortgagee, which reduced the beneficial value under 40s., took away the mortgagor's right to vote, 2 Lud. 467. But see 2 W. 4, c. 45, s. 23.

for six months previous to the 31st day of July next preceding each annual registration, unless where the party became entitled by descent, marriage, marriage-settlement, or devise, at any time within such period of six months. (p) Such annual value must, however, be over and above all charges and incumbrances, but not including any public or parliamentary tax, nor any church rate, county rate, or parochial rate. (q) But no freehold house or building which is situated in a borough will give a right to vote for a county, if in the occupation of the owner, if it be of sufficient annual value (that is, 10*l.* per annum) to give a vote for the borough; (r) but it is otherwise, if it be in the occupation of a tenant.

Copyholds of inheritance (though formerly not giving any vote (s)), if of the clear annual value of 10*l.*, also confer a right of voting for county members, under the same restrictions as freeholds. (t) But a copyhold house or building, situate in a borough, will not, if of sufficient value to give a borough vote, confer a county vote, whether in the occupation of the owner or tenant. (u)

Copyholds of inheritance.

As to the right of voting in *boroughs*, it may be here stated generally, that, independent of the old rights of voting in scot and lot boroughs and corporation boroughs, the reform act confers a right of voting upon all occupiers, either as owner or tenant of any house or building of the clear annual value, either alone or with land, of 10*l.*, provided the party has been in occupation for twelve months before the 31st day of July preceding the registration, has resided for six months previous within the borough, or seven miles from the same, has been rated to the poor during all the time of occupation, and has paid, before the 20th day of July preceding, all rates and assessed taxes up to the 6th day of April preceding. (x) The receipt of parochial relief forms a disqualification in a borough, but that provision does not extend to a county voter. (y)

Right of voting in boroughs.

The old right of voting is reserved to freeholders *for life* of forty shillings clear annual value, who were seised at the time of the passing of the reform act. (z) But this act requires, as to freeholders for life who become entitled after the passing of that act, that their estate should be of the clear annual value of 10*l.*, (a) and in the actual occupation of the

Freeholds for life.

(p) 3 Wm. 4, c. 45, s. 26.

(q) Id. s. 21, and see *ante*, 262, n. (o).

(r) Id. s. 24.

(s) *Ante*, 30 Geo. 3, c. 35.

(t) 2 Wm. 4, c. 45, s. 19.

(u) Sect. 25.

(x) Sect. 27.

(y) Sect. 36.

(z) Sect. 18.

(a) Id.

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Leaseholds.

Mere occupiers
at 50l. per an-
num rent.

owner, unless his title accrued by marriage, &c. The same restrictions as to registration are required as in the case of freeholds of inheritance.

The owners of leases (not being underleases) originally granted for sixty years, of the clear yearly value of not less than 10l. ; for twenty years of not less than 50l. are entitled to be registered as voters for county members, whether in the actual occupation themselves, or having let to others; and so also are under-lessees for similar terms and like value, if they be themselves in the actual occupation. (b) So also persons actually occupying as tenants from year to year only, or otherwise, any premises for which they are *bonâ fide* liable to a yearly rent of not less than 50l. are entitled to vote, having been previously registered. But in order that such lessees or occupiers may be entitled to be registered, they must have been in actual possession, or in receipt of the rents as above for their own use, for twelve months before the 31st day of July preceding the term of registration, unless they became entitled by succession, marriage, marriage-settlement, or devise.

In *county* votes there is no necessity that the party should have been *rated*, or have paid rates or taxes ; nor in any case is it now requisite that the property should be assessed to the land tax. (c)

IV. TIME OF
ENJOYMENT, as
whether in pos-
session, re-
mainder or
reversion.

The *times of enjoyment* of real property (the fourth subdivision (d) of the subject of real property) are estates or interests in *possession* or in expectancy, as a *remainder* or *reversion* ; the first, when the owner has an *immediate* estate in *possession* or right of possession, and entitled to the actual perannuity of the profits ; the *second*, some estate or interest immediately to *remain* and to follow the former particular estate when it has ceased, and which must be created *by act* of a donor, grantor or testator, together with such particular estate at the same time ; and the last being a *reversion* (from *revert*), is the *residue* of an estate left in the grantor, to return to him in possession after the determination of some particular estate granted out by him or by some former owner of the property. (e) In other words, an estate *in possession* gives a present right of

(b) 2 Wm. 4, c. 45, s. 20.

(c) Id. s. 22.

(d) See general division of subject, *ante*,

145, 147. And see in general 2 Bla. Com. 163 to 179.

(e) 2 Bla. Com. 175, 176.

immediate enjoyment. An estate *in remainder* gives a right of future enjoyment, whether certainly or contingently, depends on the form of the gift; and when the interest is contingent in the limitations, then on the events which shall take place. An estate *in reversion* gives a present fixed right of future enjoyment. (*f*) The subjects of remainders, and reversions, and executory devises, are parts of the most abstruse branches of the law to be studied by conveyancers, and we can here only notice a few points of practical utility.

Almost every kind of real property, whether corporeal or incorporeal, and even personalty, may in general be so granted, leased or devised, as to create an interest in possession, remainder or reversion. But a judicial office is in general an exception. (*g*) An estate in remainder, or reversion, or any estate of *freehold*, could not at common law commence *in futuro*; and there must be an intervening estate to support the remainder or reversion. (*h*) But by a conveyance under the statute of uses there may be a grant of a freehold to commence *in futuro*, and in the mean time the interest undisposed of will be a resulting use. (*i*)

Some of the distinguishing *incidents* of these rights are, that only the party *in possession* is entitled to the enjoyment of the privileges incident to the right to the property; and that he alone, and not a remainder-man or reversioner, can vote at an election; nor were the latter under the now repealed law qualified to kill game; (*k*) nor is a remainder-man or reversioner entitled to interfere with the property until his right comes into possession, excepting that he in general may apply to a Court of Equity for an injunction to stay waste. (*l*) Each however is entitled to immediate possession upon discovery that the tenant for life has forfeited his interest by illegal alienation for more than his interest, or for breach of other conditions expressed in a lease &c., or implied, as in the case of general waste. In cases also of an intervening tenancy for life, the remainder-man

(*f*) 1 Prest. on Estates, 89, &c. And see in general as to estates in possession, 2 Cruise, Dig. 258, id. 6 vol. index tit. Possession. As to estates in remainder, 2 Cruise, Dig. 258, id. 6 vol. index Remainder. 2 Saund. Rep. index Remainder and Contingent Remainder. And as to reversions, 2 Cruise, Dig. 454, id. 6 vol. index Reversion; 2 Saund. Rep. index Reversion; 1 Prest. on Estate, 89, &c. And as to executory devises, see 3 Saund. Rep. index, that title.

(*g*) 11 Coke, 2, 4, a; 1 Tho. Co. Lit. 236, note 12, &c. where see some exceptions enumerated.

(*h*) 2 Bla. Com. 143, 144, 164, 165.

(*i*) 1 Sand. U. & T. 128; 2 Id. 7.

(*k*) The statute 22 & 23 Car. 2. c. 25, s. 3, exempted from penalties for killing game persons "having lands and tenements, &c.," and which words were construed to mean having the same in possession and not in reversion. *Mallock v. Eastley*, 7 Mod. 482.

(*l*) 3 Tho. Co. Lit. 242 to 245, note 27.

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may by proceeding under stat. 6 Ann. c. 18, once a year ascertain whether the tenant for life is still in existence; and a remainder-man or reversioner may, like any owner in possession, alienate or devise his already vested interest, though prospective in enjoyment. (*m*)

It is a rule that very *general* words in a deed or devise will transfer a reversion in any estate the grantor or testator may have, though not particularly named in the deed or will; as by the words "and the reversion, remainder, rents, &c." unless it be qualified by some special subsequent words. (*n*) But a reversion, even after the expiration of a tenancy from year to year, can only be conveyed by deed. (*o*) Another incident of a reversion in fee is, that it is assets to pay the specialty debts of the ancestor from whom the lands immediately descended. (*p*) And that when the owner of a particular estate, as for life, is also the owner of the reversion, there being no intermediate estate, the former merges in the latter. (*q*). A slight recognition of a tenancy under a void lease by a remainder-man, after the death of the tenant for life, renders the occupier tenant from year to year. (*r*)

Injuries and
remedies, in
case of.

As regards *civil injuries and remedies*, they very much depend on the question, whether the right to the property affected was in possession, or in remainder, or reversion. If to property in possession, the owner's remedy is trespass or ejectment for an immediate injury committed with actual or supposed force; but if the right were in remainder or reversion, the remedy for the same injuries would be an action on the case; and then only when the act complained of really occasioned an injury of such a continuing nature, as actually or probably to prejudice the future enjoyment when it may be supposed it will come into actual possession. When an injury is of so durable a nature as if continued it will injure the right in remainder or reversion, then not only the party in possession may bring his action for the immediate injury to his possessory interest, but the reversioner may also sue for the injury to his

(*m*) But a reversioner, even after a tenancy from year to year, can only convey his interest by deed. *Brawley v. Wade*, M'Clel. Rep. 664.

(*n*) Shep. Touchstone, 88; 1 B. & Adol. 593; Lut. 761; 1 Ld. Raym. 187; 2 Ves. 48.

(*o*) M'Clel. Rep. 664.

(*p*) 2 Tho. Co. Lit. 152, note R.; 2

Saund. 8, f. n. 4; 3 Bos. & Pul. 643 to 651.

(*q*) Id.; 5 Bar. & Cres. 120; 2 Bla. Com. 177, 178, *aliter* as to an *interesse termini*, unless the estate for years comes into possession of the owner of the estate for life. 5 B. & C. 111.

(*r*) 1 B. & Adol. 365.

interest; (s) and this, although the injury *might* by removal, even in the course of three days, cease to endure, for there is a present injury to the *right*; and if a reversioner were to be prevented from bringing his action during the existence of the particular estate, the testimony of the witnesses who could speak to the right might be lost; and therefore, in the case of an ancient window, a reversioner may maintain an action for an obstruction or nuisance, although the same produce no present injury to his reversion beyond that to the right, and which may be removed before the reversioner comes into possession. (t) So both the tenant in possession and the reversioner may respectively sue the hundred for damages to their respective interests, by a riotous and felonious destruction of houses and other named buildings; (u) and where there has been a repetition of such a continuing injury, a reversioner may proceed in several fresh successive actions for each repetition. (x) But the injury must be of such a permanent nature as at least will, in the opinion of a jury, occasion some prejudice, injury or depreciation to the interest in remainder or reversion; as where an ancient light is obstructed by a building erected in such a manner as to constitute a permanent obstruction, in which case the tenant in possession may sue, and also the reversioner; (y) and if the injury were merely a transient trespass, as driving carts over a close, without any removal of the soil, such an injury could not well be considered as enduring so as really to injure the interest of the reversioner; and consequently, he could not sue, and the question of injury to the reversion is generally for a jury; (z) and in all actions by a remainder-man or reversioner, it must be averred and proved that the act complained of really produced some damage, though very slight evidence even of probable continuing injury would suffice. (a) In case therefore of a mere trespass, if it be essential immediately to litigate the right to commit, the proceeding must be in the name of the occupier with his concurrence. (b)

So an immediate remainder-man or reversioner, whether of

(s) 9 Bar. & Cres. 134; 4 Man. & Ry. 130, 136 Ancient lights, 4 Burr. 2141; 3 Lev. 209, 359; Com. Dig. Action, Nuisance, B.; 1 M. & S. 284; 1 Taunt. 183, 190; 1 Saund. Rep. 323, b; 2 Saund. 252, b; 3 Car. & P. 617; 2 B. & Adol. 97.

(t) 1 Mood. & M. 350; 2 B. & Adol. 97, S. C. & 3 Car. & P. 615; 4 Burr. 2141.

(u) 9 Bar. & Cres. 134; 4 Man. &

Ry. 130, 136, S. C.

(x) 2 B. & Adol. 97.

(y) Id. *ibid.*; 4 Burr. 2141; 3 Lev. 209, 359, 360.

(z) 1 M. & S. 234; 6 Bing. 379; 10 Bar. & Cres. 145.

(a) 1 M. & S. 234; 1 Taunt. 202; *semble* 2 East's R. 154; 6 Bing. 379; 10 B. & Cres. 145.

(b) 1 Chit. Pl. 5 ed. 72, 702.

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freehold or copyhold tenure, may obtain an *injunction* to prevent waste, or may sue a tenant for life (unless punishable of waste) or a stranger for illegally cutting down trees otherwise than for repairs, or for other injury committed during the particular estate for life. (c)

As regards *criminal offences* affecting a remainder or reversion, in general the offence should be laid as affecting the property of the party *in possession*, and not the remainder-man or reversioner. But to this rule there are exceptions, as between tenants and landlords, for if the former commit any injury to fixtures in the nature of larceny, the offence is punishable as such, and the latter may be described as the property of the lessor, though strictly his interest was, at the time of the offence, only in reversion. (d)

V. NUMBER OF
OWNERS, whe-
ther in severalty
coparcenery,
joint tenancy, or
in common. (e)

All estates or interests in every kind of corporeal and incorporeal real property, may be held either in *severalty*, *coparcenery*, *joint tenancy*, or *in common*. With respect to the modes and words by which these various interests may be created, and their properties and incidents in general, we cannot in this summary attempt to consider them in detail, but at most can notice a few incidents of most practical importance.

Parceners, &c.

One incident as to *parceners* is, that as they take by *descent*, their husbands are severally entitled to vote at an election. (f) But all conveyances or devises made to several persons, for the purpose of splitting and multiplying votes, were declared by the former acts to be void, and only one vote could be received. (g) Where, however, such purpose was not apparent, it has lately, in the proceedings under the reform act, been considered that joint tenants or tenants in common might *each* vote in respect of the same property, if of sufficient value. (h) In the case of a corporation aggregate, neither the whole nor one or more can vote in respect of an estate belonging to such corporation. (i) As to several *joint occupiers*, each of them is entitled to vote, in case the clear yearly value of the premises shall be of an amount which, when divided by the number of

(c) 3 Lev. 130 ; Fisher on Copyhold, 114 ; 2 Saund. 133, 252.

(d) 7 & 8 Geo. 4, c. 29, s. 45.

(e) See ante 147, as to division of the subject ; and see 2 Bla. C. 179 to 195, and notes and works there referred to.

(f) 1 Bla. C. 174, note 37 ; Heyw. 99.

(g) 7 & 8 Wm. 3, c. 25 ; 53 Geo. 3, c. 49.

(h) 2 W. 4, c. 45, s. 29, ante 264.

(i) Heyw. Law of Elect. 71.

occupiers, shall give a sum not less than 50%. in counties, or 10%. in cities or boroughs, for each occupier. (k) Before the repeal of the game acts relating to qualifications, each joint tenant or tenant in common must have had an interest in the entire estate of the clear annual value of 100%. or neither was qualified. (l)

Each coparcener and tenant in common is expressly enabled to *devise* his interest, by 32 Hen. 8, c. 1, explained by 34 & 35 Hen. 8, c. 5; and if a tenant in common devise his estate, a subsequent partition will not operate as a revocation. (m) But a joint tenant is not within the acts, and his devise before partition would therefore be inoperative; and if a joint tenant wish to devise his share, his only course is, *first*, to sever the joint tenancy, which may be effected by a commission from the Chancellor, upon a bill filed in the nature of the common law writ of partition, or by that writ, and he must either make or republish his will after the partition. (n) But there are several other acts which create a severance of a joint tenancy, as a limitation (by deed) to a stranger, or mortgage or lease for life by one joint tenant, or any act which destroys either the unity of interest, of title, or of possession. (o)

As respects *actions and suits*, *parceners* make but one heir, on which account, in case of copyhold, it should seem that upon admission, they are only liable to pay one set of fees. (p) Like joint tenants, before partition, they must jointly sue and jointly avow, (q) and if one sister distrain, she should avow in her own right, and also as bailiff to her other sister for the entire rent. (r) We have seen that in the case of an advowson, where the parceners cannot agree to present jointly, the eldest sister is first to present, and then her sister. (s) Partition is best effected by a bill in Chancery. (t)

Joint tenants must sue and be sued *jointly*, (u) and they must join in an avowry. (x) But one joint tenant may, without the consent of his co-tenant, distrain for rent due to all the joint tenants; and in general, if a party have an interest to entitle him to distrain, the averment of his having acted as

(k) 2 W. 4, c. 45, s. 29.

(l) 7 Mod. 482; Cald. 230.

(m) 3 P. Wms. 169.

(n) 3 Burr. 1488; Amb. 617.

(o) See 2 Cru. Dig. 500, &c.

(p) 3 Bar. & Cres. 173.

(q) 1 Tho. Co. Lit. 770, note, 778; 1 Ld. Raym. 64.

(r) Carth. 364; Bac. Ab. Joint Tenant,

K., Replevin, K.; *infra*, 270, note (y).

(s) Willes, 659; *ante*, 217, note (g); as to presentment after partition, see 7 Ann. c. 18, s. 2.

(t) 2 Bla. C. 189, n. 15.

(u) 1 Tho. Co. Lit. 736, 777 to 779, note K.

(x) Bac. Ab. Replevin; Carth. 328.

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bailiff is not traversable, (y) and joint tenants and tenants in common may have an account against each other, (z) though a suit in equity is frequently preferred. (a) At common law this was only so when one really appointed the other his bailiff or receiver, (b) but 4 & 5 Ann. c. 16, gives this remedy without any such appointment. (c) A notice to quit, signed by one of several joint tenants, though trustees on behalf of himself and the others, is now sufficient to determine a tenancy from year to year. (d) The prior decision, requiring the signature of *all*, turned upon the particular words in a lease, requiring a notice under *their* respective hands, and which was therefore holden to require a signature by all. (e) Joint tenants must all concur in presentation to a living, and if either one present, or they present severally, the ordinary may refuse such a presentee, and after six months may present by lapse; and the same rule holds as to tenants in common of an advowson. (f)

Tenants in common.

Tenants in common being seised by *several titles* ought in *real* and *mixed* actions to sue *severally*. (g) Thus, in the mixed action of ejectment, there should be separate counts on the separate demises of each, unless they have joined in an actual lease to a third person, when the declaration may be on the demise of such lessee. (h)

But in a real or a personal action for an entire thing, as an entire rent, in respect of necessity they should join. (i) So tenants in common shall join in a *quare impedit*, because the presentation to the advowson is entire. (k) So in detinue of charters, tenants in common shall join, and if one be nonsuit the other shall recover; (k) and it is clear that if there be a *joint* lease by two tenants in common, reserving an entire rent, the two may join in an action to recover the same; but if there

(y) 4 Bing. 562; Year Book, 15 Hen. 7, 17 a. An assowry by one of several coheirs in gavelkind, and a cognizance as bailiff of the other coheir, need not aver an authority to distrain from the other coheirs, 2 Brod. & B. 465; 5 Moore, 297, S. C.

(z) 1 Tho. Co. Lit. 783, note R.; Bac. Ab. Account; Willes, 208; Selw. N. P. tit. Account; 3 Woodes. 83; 5 Taunt. 431; 2 Campb. 238; 2 Chit. Rep. 10; 3 Chit. Pl. 1297.

(a) Mad. Ch. Pr. Index, Account.

(b) 1 Tho. Co. Lit. 787, 788, note R.; 1 Leon. 219; Harg. Co. Lit. 172, a, note 8.

(c) Id. *ibid.*; Willes, 209.

(d) *Doe v. Summerson*, 1 B. & Adolph, 135; 3 Taunt. 120.

(e) Id. *ibid.*; 5 East, 491.

(f) Co. Lit. 186, b; 2 Inst. 365.

(g) 1 Tho. Co. Lit. 777.

(h) Adams's Eject. 3 ed. 209 to 211; Selwyn's N. P. 4th ed. 683; *semble* overruling 2 Wils. 232, where it is said that tenants in common cannot make a joint lease; and see 271, n. (l).

(i) Co. Lit. 196, b, 199, b; 1 Tho. Co. Lit. 777.

(k) Co. Lit. 197, b; 1 Tho. Co. Lit. 781.

be a separate reservation to each, then there must be separate actions; and if there were originally a joint letting by parol, and afterwards one of them give notice to the tenant to pay him separately, and his share be paid accordingly, this is evidence of a fresh separate demise of his share, and he must sue separately. (l) And, in general, tenants in common *may* join in a personal action for an *entire* injury to their property, as for trespass or other act which damages their tenements, as for breaking their houses or closes, feeding upon or injuring their grass, cutting their woods, fishing in their fisheries, (m) and for nuisances to their land; (n) for the damages would in case of death belong to the survivor, and it would be unreasonable, when the damage is thus entire, that several actions should be brought for the same injury. (o) And a joint action for mesne profits may be supported by several lessors of the plaintiff in ejectment after recovering therein, although upon separate demises by each. (p) They must, however, *sever* in an *avowry* for rent, for this is in the realty as in an assize, and this, though they might have joined in covenant for the same rent. (q) If sued jointly, each should avow for his own proportion, *unam edietate*, of the *whole* rent, and make cognizance as bailiff of his companion for the residue; or if sued separately, the defendant may avow only for his undivided share. (r) Tenants in common must, it is said, *join* in an avowry for *damage feasant*; and if one be sued, he should avow in his own right, and make cognizance as bailiff of his co-tenant. (s)

As *against each other*, tenants in common may enforce an account by action of account or bill in equity, the same as in the case of joint tenants. (t) With respect to other injuries, unless there has been an actual ouster, such as turning off cattle or wholly excluding a co-tenant from the possession of real property, he cannot sue him in ejectment, (u) nor in trespass *quare clausum fregit*. (x) But one may sue the other for cutting trees of insufficient growth, or destroying *all* the deer in a park,

(l) *Per* Abbot, C. J., 5 Bar. & Ald. 851; 4 Bar. & Cres. 157.

(m) Co. Lit. 198, a.; 1 Tho. Co. Lit. 782; 2 H. Bla. 336; 2 Bla. R. 1077.

(n) Cro. J. 231.

(o) 2 Bla. R. 1077; Bac. Ab. Joint tenants, K.

(p) 5 M. & S. 64; 2 Chit. R. 410.

(q) 4 Bar. & Cres. 157; 6 Bing. 104; 5 T. R. 246, 249; Sir W. Jones, 253; Co. Lit. 198, b; 1 Tho. Co. Lit. 784.

(r) 5 T. R. 246; Salk. 207; 2 H. Bla. 386; *semble* the authority as bailiff would

not be traversable; *ante*, 269, 270, n. (y).

(s) 2 H. Bla. 386; 5 T. R. 246; Sir W. Jones, 253; *semble* his authority as bailiff would not be traversable; *ante*, 269, 270, n. (y).

(t) *Ante*, 270, n. (x), (a).

(u) Co. Lit. 199, b; 1 Tho. Co. Lit. 784, note N.; 1 East, 568. But the tenant sued must, in consent rule, avoid admitting an ouster, 1 Campb. 173.

(x) Co. Lit. 200, a; 1 Tho. Co. Lit. 785.

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or all the pigeons in a dove-cote, or other injury amounting to destruction of the joint property, (y) or any act amounting to waste or destruction in woods or other such property. (z) It has been recently determined that the common use of a wall separating adjoining lands belonging to different owners is *prima facie* evidence that the wall and land on which it stands belongs to the owners of those adjoining lands in equal moieties as tenants in common ; (a) but that where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built of a greater height than the old one, that act was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain *trespass* against the other. (b) In a Court of Equity, between tenants in common, an injunction against *malicious* destruction may be obtained, but not against what is called equitable waste, unless the party committing the waste be insolvent, when it may be obtained. (c) But a tenant in common may obtain an injunction inhibiting waste against another, his co-tenant, who is occupying as tenant of his share. (d) But except under such circumstances, an injunction cannot be obtained between such owners. (e)

VI. Of the TITLES OR MODES of acquiring an interest in corporeal or incorporeal property.

The *titles* or *modes* of acquiring or losing the estates or interests which we have before noticed, (f) whether relating to corporeal or incorporeal things, have been generally arranged under *three principal heads* ; viz. 1. *By mere possession* ; (g) 2. *By descent* ; (h) and 3. *By purchase*. (i) Under the last of which heads is included not only conveyances upon a *sale*, in the ordinary acceptation of the term *purchase*, but every mode of acquiring an estate *otherwise* than by descent. (j) We shall here only take a concise view of this most extensive subject, as it is probable that many improvements in conveyances, especially as respects fines and recoveries, will ere long be introduced.

(y) 8 Bar. & Cres. 257 ; 8 T. R. 145 ; Co. Lit. 200, b. ; 1 Tho. Co. Lit. 787, 788, note S. ; 1 Taunt. 241, 247 ; 4 East, 110.

(z) Id. *ibid.* ; 3 Tho. Co. Lit. 244, note 26.

(a) 8 Bar. & Cres. 257.

(b) 7 Ves. 589 ; 3 Bro. C. C. 621.

(c) 16 Ves. 132.

(d) *Goodwin v. Spray*, 2 Dick. 667 ; 3 Tho. Co. Lit. 244, note 26.

(e) See divisions of subject, *ante* 147.

(f) *Ante*, 238 to 264.

(g) 2 Bla. C. 195 to 199.

(h) Id. 200 to 240.

(i) Id. 241.

(j) Id. *ibid.* ; 2 Woodes. V. L. 250, 265.

It is important to be well-informed upon the subject of titles to an estate, not only to conveyancers and to those concerned at law or in equity in recovering them, but to magistrates and others as regards the right of voting, (k) or in administering the poor-laws, and deciding upon parochial settlements. (l)

In many cases, mere *priority of possession* of corporeal real property, or *long enjoyment* of incorporeal property, as of an ancient light, a way, common, &c., without any real title, is sufficient, and sometimes creates such a title even against the real owner as at least to compel him to dispute the right by a *real* action, and therefore *mere possession* has been treated as a kind of title, though of the lowest order, for it is better policy to protect a person in possession than to encourage a struggle for it by strangers, and in furtherance of that object, various statutes of limitations have been passed, which will be considered in a subsequent chapter, (n) and which, after *twenty years' undisturbed* possession or enjoyment, in general, absolutely bar or preclude the real owner from entering or maintaining an action of ejectment (which must be founded on a right of entry), or from disputing the right to the incorporeal easement in any action, unless he can bring himself within one of the exceptions in favour of infants, feme-coverts, and persons beyond sea at the time his right first accrued. (o). And under the 32 H. 8, c. 2, the mere possession of corporeal real property adversely, as if in fee-simple, and without admitting any other ownership for sixty years, is a sufficient title against all the world, and cannot be impeached by any dormant claim. (p) By these and other acts, the maxim *vigilantibus non dormientibus leges subservient* has been enforced and fixed within certain known limits, and those being considered as *statutes of repose*, are to be liberally and beneficially expounded in furtherance of that object. (q)

First. Mere priority of possession, or long enjoyment. (m)

(k) Reform Act, 2 & 3 W. 4, c. 45.

(l) Burn's J., Poor, Settlement by Estate, &c., 588 to 636; the reference to which will assist in many questions respecting title.

(m) See in general 2 Bla. C. 263, and post, 282, Prescription; and see cases as to parochial settlements by estate, by possession under a doubtful or incomplete title, Burn's, J., Poor, 614 to 618; and *Rex v. Butterton*, 5 T. R. 554; *Rex v. Callow*, 3 M. & S. 22; but see *Rex v. Chew Magna*, Burn's, J., Poor, 616.

(n) 21 Jac. 1, c. 16; Adams's Eject. 3d ed. 77, as to corporeal property; 2 & 3 W. 4, c. 71, and c. 100, as to incorporeal.

(o) 21 Jac. 1, c. 16, as to corporeal rights; and as to incorporeal, 2 & 3 W. 4, c. 71, and c. 100, as to modusses.

(p) See the exceptions, 4 Co. 11, b; 3 Bla. C. 196, n.

(q) 5 Bar. & Ald. 214; 6 Moore; *White v. Parnther*, Knapp's Rep. 226, where see the policy and reasons explained; and see post, chap. ix.

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Twenty years' possession or enjoyment *prima facie* a sufficient title.

Even at common law, and independently of the statutes of limitation, as regards *litigation* with third persons, who cannot themselves establish any right to the real property in contest, it is seldom essential to prove the nature or extent of the interest of the party who is in possession, and who has had long priority of possession, or to show any deeds of title ; for mere proof of *twenty years'* undisturbed possession of real property corporeal, or the enjoyment of real property incorporeal, or the enjoyment by a person who has not within twenty years admitted that he holds by permission, (r) is sufficient, and affords a presumption in favor of the highest or largest estate that a person could have in the subject-matter, and that he is owner in fee ; (s) or in case it should appear that the land is of copyhold tenure, then the claimant has an estate of inheritance therein ; nor would a Court of Equity interfere after 20 years' possession unaccounted for by disabilities. (t) So under the former game law it was held that proof of the possession of land of the annual value of upwards of 100*l.* afforded *prima facie* evidence of a seisin *in fee*, so as to qualify the owner to kill game, though if it had been shown to be leasehold, though for a term of 99 years, it being under the yearly value of 150*l.* the owner would not have been qualified. (u) So that it is rarely necessary, after such long enjoyment, to produce title deeds, or show the precise estate ; (x) and though it is a common doctrine that in an action of ejectment the lessor of the plaintiff must recover on the strength of his own legal title, and not on the weakness of that of his opponent ; yet it is now clearly established that it suffices to prove *undisturbed possession* of an estate by the claimant or his ancestor *for twenty years*, from which a perfect title in fee simple is to be presumed until the contrary be proved ; (y)

(r) *Doe v. Barnard*, Cowp. 595, where it was held as to real property corporeal, that if no other better title appear, a clear possession of twenty years is strong presumptive evidence of a *fee*, and see 7 Bing. 346.

(s) *Doe v. Clark*, 8 B. & Crea. 717.

(t) 1 Turn. & R. 107 ; see *post*, chap. on Limitations of Actions.

(u) Caldecot, 230 ; 9 Price's R. 257 ; 3 B. & Ald. 341, so that there may be not only a presumption of right to the property, but also of the *highest* or largest estate or interest in the same.

(x) *Doe v. Barnard*, Cowp. 595, where it was held as to real property corporeal, that if no other better title appear, a clear possession of twenty years is strong presumptive evidence of a *fee*, and see 7 Bing. 340.

(y) *Doe v. Cook*, 7 Bing. 346. On the trial in autumn assizes, 1830, lessor of plaintiff proved that his father had let the premises and received rent from 1797 to 1811, and that lessor had received a higher rent from 1816 to 1819, and that he was heir. The defendant proved that he had been in possession ever since 1819, and after argument for a rule for a new trial, Tindal, C. J. said " It was proved that the father of lessor of plaintiff and his son held the premises for twenty-three years, and during that time received and increased the rent, an unequivocal act of ownership, from which the law presumes a seisin in fee. The father died seised, and he is his heir. That would be enough even in a writ of right to call on the tenant to establish a stronger claim. I cannot see why any period short of twenty

and it should seem that proof even of a very short possession of a person prior to an ouster, even much less than twenty years, would suffice against a party who obtained possession under such person or from him by force or fraud. (x) And a presumption arises, from length of possession, of grants, and releases, and even of acts of parliament, in favour of long possession, and of whatever may be necessary to constitute a right; (a) and, as was strongly expressed by Lord Kenyon, even a grant from the crown, or one hundred grants may be presumed, if it were a case in which the crown could grant, and if not, then a private act of parliament in favour of long possession might be presumed, if it could have been legal. (b)

A lessee, whose tenancy is determined, will not in general be admitted, in defence of an action of ejectment, to show "that his lessor had no title to demise or to recover," (c) nor will a third person, in such case, be allowed to come in and defend as landlord. (d)

The rule is still stronger in *trespass* in favour of a person in possession, even under a void lease, or void license, or demise from the crown, for he may support trespass against a mere wrong-doer, or any one who cannot show a title to disturb him; (e) and the contractors for making a navigable canal, having the permission of the owner of the soil, and erecting a dam of earth and wood upon his close across a stream, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrong-doer; (f) but we have seen that commissioners of sewers, and sometimes the owners of the navigation, are not considered to have any

years' possession by the defendant should raise a presumption sufficient to outweigh the presumption arising from the first twenty years. In many cases it would be extremely hard to cast on the lessor of the plaintiff the burthen of showing how the defendant came into the possession. The lessor of the plaintiff may have been an infant, or out of the kingdom at the time. The earlier presumption therefore must prevail till a better title is shown. See also Lord Raym. 741; *Devey v. Read*, 8 East, 358; Adams's Ejectm. 3 ed. 77. But the presumption may be rebutted even by the defendant, a stranger, who himself has no title, 11 East, 488.

(x) *Doe v. Dyball*, 1 Mo. & M. 346; 3 Car. & P. 610, S.C.; and see *Allen v. Rivington*, 2 Saund. 11, and notes; 4 Taunt. 548, n. (a); 1 Chit. Pl. 5 ed. 218, note (c); 2 Bla. C. 196, n.

(a) 1 Jac. & W. 63.

(b) 11 East, 280, 488; Cowp. R. 102;

Lofft, 576; when not against ecclesiastical property, 4 Bar. & Ald. 579, or against the king, 9 G. 3, c. 16; Wightwick, Rep. 236. In cases where proof of mere possession would be sufficient, it would be injudicious to produce title deeds which might unnecessarily disclose some outstanding term or other defect in the legal title of the lessor of the plaintiff.

(c) 2 Bla. R. 1259; 7 T. R. 488; 4 M. & S. 347; but after the expiration of a notice to quit by landlord, it is said that the tenant may show a title in another, under whom he claims, 4 T. R. 683; 3 M. & S. 516; 1 Dowl. & R. N. P. 1; 2 Camp. 11, and Peake's Evid. 318; *sed quare* see Adams's Eject. 3 ed. 276.

(d) 4 M. & S. 347, 348; 2 Young & J. 88.

(e) 1 East, 244; 11 East, 65, 74; Willes, 221; 4 Taunt. 547; 5 Bing. 9; 2 Car. & P. 83; 4 B. & Cres. 574.

(f) 5 B. & Ald. 600.

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Incorporeal
property. (h)

possession or interest, but merely jurisdiction, and therefore cannot sustain trespass. (g)

So at *common law*, with respect to *incorporeal* property, as rights of common, ways, watercourses, ancient lights, markets, fairs, and other easements and privileges, *twenty years' uninterrupted enjoyment* (i) of either has long been considered sufficient *prima facie* evidence of a grant, in the absence of evidence to the contrary, to establish a perfect right; and if such long uninterrupted enjoyment were during a tenancy in fee, it would be too late for him or any succeeding owner, against whom such right was set up, to dispute the claim, unless he could show that it was exercised expressly under a mere qualified permission, which such owner was at liberty at any time to revoke; (j) though as the assent of a tenant for life, or of a parson, the owner of glebe, in right of his benefice, to the enjoyment, ought not to prejudice a subsequent owner; the latter might defeat the effect of such long enjoyment by proving that it was during the tenancy for life, (k) or the time of a previous incumbent. (l) This common law rule has been confirmed and rendered more clear by the recent enactment. (m)

Secondly. Title
by descent.

With respect to *descent*, this is one of the most frequent and in general simplest titles to real property, whether corporeal or incorporeal; but still the whole law upon the subject is replete with learning and fills volumes. (n) In establishing a claim by descent it must first be shown who was *last legally seised*, (or, in other words, in actual possession or in receipt of the rents of the property sought to be recovered, technically termed in *real* actions the *esplees*), (o) and then to prove his death, and next all the different links in the chain, which will show that the claimant is the next and proper heir of the person so *last actually seised*, (p) and the *times* of each death, or at least to show successively through whom the *right* from time to time descended,

(g) 2 Moore, 266; 1 B. & C. 205, 221; 2 Dowl. & R. 316; *ante*, 239, 240.

(h) See *ante*, 204, 205, as to modes of claiming incorporeal property, and *post*, *Prescription and Custom*; 2 & 3 W. 4, c. 71.

(i) See important observations on these words in *Benest v. Pisson*, Knapp's Rep. 60; *post*, chap. ix.

(j) 1 Saund. Rep.

(k) 11 East, 372; 2 Saund. 175, d.

(l) 4 B. & Ald. 579; but see *post*, *Prescription*. 282, 286.

(m) 2 & 3 W. 4, c. 71; *post*, 285.

(n) See in general Chitty, H. on Descents; 2 Bla. C. 200 to 240; 2 Woodes.

V. L. 250, 265.

(o) Proof of possession, or receipt of rents, is presumptive evidence that the ancestor was seised in fee simple, and continued so seised till he died, Bull. N. P. 103.

(p) 2 Wils. 45. In a count in a real action every stage of the descent must be stated; and it will not suffice to claim as second cousin and heir of the person last seised without showing the intermediate relations, and how second cousin, 2 Saund. 45, a; 5 East, 272; 3 Bos. & Pul. 453. See exceptions, 2 Chitty on Pleadings, 5 ed. 571, a, note (a).

or, had they been living, would have descended, from the person last seised to the claimant. If the claimant insist that he is *lineal* heir, he is to prove the death of the person who so died seised, and his marriage, and the birth of his son, and then the marriage and death of such son, and the birth of his son, and his marriage and death, and the birth of the claimant. If he claim by *collateral* descent, then the marriages, births, and deaths, and the identities of each relative through whom the pedigree is to be established, must be shown, so as to prove that the claimant is the nearest and oldest surviving collateral heir. If in any part of the pedigree the claim be through a *younger* brother of several, then the deaths of the elder brothers, or other elder collateral relations, must be shown; and it is usual and prudent to *be prepared* to prove affirmatively that each of them died unmarried, or at least without issue, so as to avoid any doubt upon the trial. It has even been supposed and stated in a very valuable work, that this latter evidence is essential even in the first instance; (*q*) but that supposition has been recently refuted; and it suffices on a trial in ejectment (at least in the *first instance*) to prove the death of every elder relative; and then, if the opponent should prove his marriage and the birth of his child, the claimant may prove *in reply* that he died at *a time*, such an age, or under such circumstances, so as not to impede the course of descent relied upon. (*r*) Thus it was held that proof by an old member of the family that many years before, a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *primâ facie* evidence that the party was dead without lawful issue, to entitle the next claimant by descent to recover in ejectment; Lord Ellenborough observing, "The evidence was sufficient to call upon the defendant to give *primâ facie* evidence at least that the younger brother was married; for what other evidence could the lessee of the plaintiff be expected to produce that he was not married, than that none of the family had ever heard that he

(*q*) *Richards v. Richards*, 15 East, 294, note; and see Adams's Eject. 3 ed. 282. It has recently been gravely argued by counsel that as marriage is enjoined by Scripture, and increase a natural result, it *must be inferred* that every man has married, and has issue, until the contrary be proved, and that therefore the negative ought to be proved. But the Court (Ld.

Tenterden, Bayley, Holroyd and Little-dale, J.) treated such argument as wholly untenable.

(*r*) K. B. A. D. 1826. It is however always safer to be prepared to prove the death without issue in the first instance, so as to clear the title from the least suspicion of defect.

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was. (s) But in deducing a title to a purchaser, it is usual, unless where such fact may happen to be disclosed by recitals in old deeds executed twenty or thirty years back, to require some satisfactory evidence of the death and failure of issue capable of inheriting of every person through whom the title must be deduced.

It is usual on the trial to produce a *pedigree* at least to assist the judge and perhaps the jury in following the evidence. (t) There are two modes of establi^g a pedigree; the first by the testimony of old witnesses well acquainted with every member of the family and the events respecting them; and the second by copies of registers and proof of identity of the parties therein referred to. Hearsay and reputation is admitted in evidence in cases of pedigree; (u) and it is usually found that the evidence of perhaps one old intelligent witness (especially if a female) will dispense with the necessity for any other proof, though it is certainly advisable to have in court copies of the registers of marriages, births, and burials, ready to be proved by a witness who has examined the same with the originals, so as to assist or corroborate the witness as to dates and other facts. The course of descent may be shown and traced by numbers in a collateral pedigree somewhat in the following form. (x)

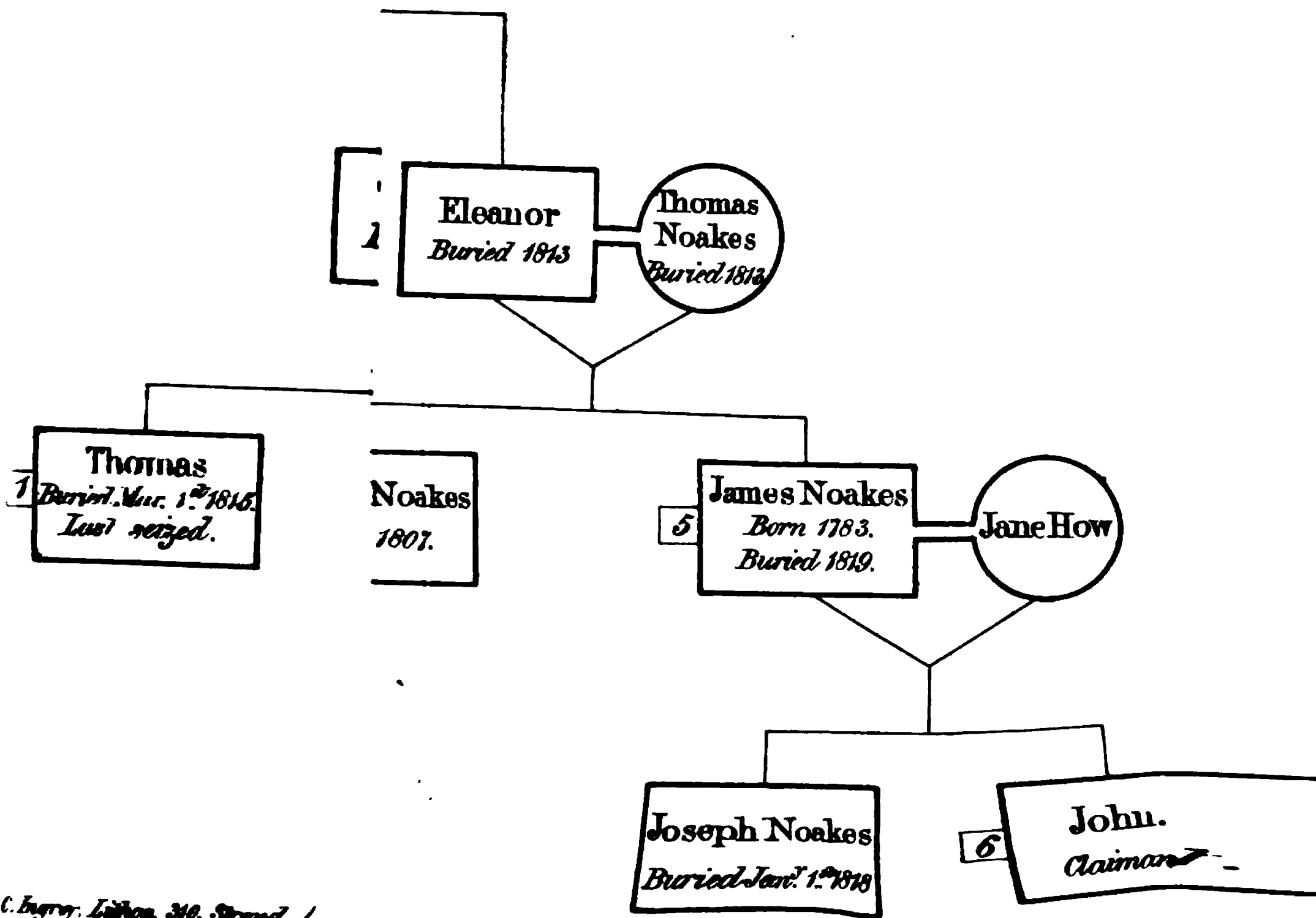
(s) 15 East, 293; and see Bull. N.P. 294.

(t) *Doe v. Lord*, 2 Bla. Rep. 1099. See the table of collateral descent annexed.

(u) 10 East, 120.

(x) The form of the *pedigree* produced upon a trial of an action of *ejectment* or of a *real* action, may be as annexed. The *numbers* show the course of descent; the *squares* the relations through whom the relationship is traced; and the *circles* the persons with whom the relations married, so as to show the parentage.—Thomas Stiles (No. 1) was *last legally seised*, John Noakes (No. 6) claims as his cousin; and on the death of said Thomas Stiles, the right descended to his brother James Stiles (No. 2), who survived him; and on the death of James the right descended to his son William (No. 3), and on his death to Eliza (No. 4), and on her death to James Noakes (No. 5), her first cousin, (the other prior and intermediate relations having previously died,) and on the death of said James Noakes, in 1819, the right descended to his son the claimant John Noakes (No. 6). Here the claimant must prove, 1st, The seisin of Thomas Stiles (No. 1) (the grandson), by proving his receiving rent, recently before his death, from the defendant's father as tenant;

2dly, His death in 1815, and if it be shown that he was married, then that he died without issue; 3dly, The marriage of his father, Thomas, with Eliza Betts; 4thly, The birth of the said Thomas Stiles (No. 1); 5thly, The births of James Stiles and Eliza Stiles (Nos. 2 & 4); 6thly, The death of their said father; 7thly, The marriage between James Stiles (No. 2) with Emma Elms; 8thly, The birth of their son William; 9thly, That the said William the son died in March 1817 without issue; 10thly, That Eliza Stiles died in 1818, also without issue; 11thly, That Thomas Stiles the grandfather married Eleanor Jones; 12thly, That said Thomas (the father) and William and Eleanor were their children; 13thly, The death of the said Thomas Stiles the grandfather; 14thly, The death of said William Stiles, his son, without issue; 15thly, The marriage between Eleanor Stiles, the daughter, and Thomas Noakes; 16thly, Her death; (but the death of Thomas Noakes need not be proved, because as his wife was never actually seised, he could not be entitled to the estate as tenant by the curtesy); 17thly, The births of their sons Thomas and James Noakes; 18thly, That Thomas



/ C. Henry. Lidley. 310, Strand. /

... as Joseph Noakes, his brother, without issue, previously in 1818; and lastly, The disclaimer by the defendant before the demise in the declaration. The claimant must throughout be prepared to prove the identity of each party, for fear any confusion or doubt should arise.

It will be observed that it is essential to be prepared to prove the times of the deaths, in order to show how the right successively descended. In a count in a real action, as in a writ of right, it is necessary to allege accurately, as well as to prove as alleged, through whom successively the right descended, showing very

456; 1 New Rep. 233; Tidd, 9 ed. 699. But in such real actions it is not necessary to state in the count the times when the descents took place.

(y) See divisions, ante, 272, 4 Burn's J. Poor, Settlement by Purchase, 618 to 631.

(z) See divisions, ante, 272, and see in general, Cruise's Digest, and Com. Dig. 3 Chit. Eq. Dig. Escheat; 3 Bla. C. 244.

(a) Co. Lit. 13.

(b) Hob. 214; Hard. 490; 1 Mad. Ch. P. 437.

(c) See cases 1 Mad. Ch. Pr. 456, h.

(d) 1 Mad. Ch. P. 457.

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fit. (e) When the crown is entitled, it has been questioned whether it is not necessary for an office to be found, in order to vest the property, and at least the crown cannot, without such office, vest any interest in a *third* person by grant or otherwise. (f)

It is the ordinary rule for the crown, upon petition, to give a lease or grant to the party discovering an escheat, with a view to encourage discovery. (g) And where *A.* and *B.* having joined in a petition to the crown, representing an estate to have escheated, procured a grant, it was held in a Court of Equity that *A.* could not afterwards set up a claim to one part under a prior title in himself, while taking the benefit of the grant as to the rest, (h) and a grant from the crown made under a mistake may be recalled, notwithstanding any derivative titles depending on it. (i)

Land of copyhold tenure, it is said, cannot escheat to the crown but to the lord of the manor of which it was holden. (k) It is not forfeited by conviction of felony not followed by attainder, unless by particular custom, (l) and then only for life of the offender, except in case of treason or murder. (m) And the lord can only seize for want of an heir *quousque*, that is, until one appear; nor is a copyhold forfeited by neglect of the heir coming to be admitted, without a special custom, and then not until after presentment of the death of the copyhold tenant, and three proclamations at three consecutive courts. (n) And if a copyholder be convicted of a capital felony, and obtain even a conditional pardon before the lord has seized, he will be restored to his estate and beneficial enjoyment, and may maintain trespass against an intruder. (o)

2. Special occupancy. (p)

2. With respect to title by priority of *possession*, we have already seen that it is sufficient against a wrong-doer, and that twenty years' uninterrupted possession of corporeal or incorporeal property will be a *primâ facie* title against all the world, at least as respects personal and mixed actions. (q) But we are here only to notice that interest which is termed *title by*

(e) 1 Bla. R. 123; but see 2 Jac. & W. 338, note, and cases Chit. Eq. Dig. tit. Escheat.

(f) 8 Hen. 6, c. 16; 18 Hen. 6, c. 6; 12 East, 76; 5 B. & Cres. 587.

(g) 7 Ves. 71; 6 Ves. 809.

(h) *Cumming v. Forrester*, 2 Jac. & W. 334.

(i) Id. 342.

(k) 2 Ves. jun. 169; but see 2 Sim. & St. 498.

(l) 5 B. & Ald. 510; Burn's J. For-

feiture, I.

(m) 54 Geo. 3, c. 145.

(n) 1 B. & Adolph. 736; see 3 T. R. 162.

(o) 5 B. & Cres. 584.

(p) See divisions, *ante*, 279; and see in general 2 Bla. Com. 244, 258 to 263, in notes; Com. Dig. Estates, F.; Bac. Ab. Estates for Life and Occupancy, B.; 1 Cruise, 90; 3 Id. 336; Vin. Ab. Occupant; 6 T. R. 291; 7 Bing. 178.

(q) *Ante*, 273.

special occupancy, that is, the interest intervening between the death of a tenant *pur autre vie* and the death of the *cestui que vie*.^(r) This is now regulated by 29 Car. 2, c. 3, s. 12, and 14 Geo. 2, c. 20, s. 9, the first in effect enacting that every estate *pur autre vie*, whether there be a special occupant or not, may be devised like other estates in land, by a will attested by three witnesses; and if not so devised, and there is a special occupant, (that is, where the *heirs* are named in the limitations of the deed or will, creating the estate *pur autre vie*,) then it shall be assets by descent in the hands of *such special occupant*; but if there be no special occupant, then it passes like personal property to executors and administrators, and shall be assets in their hands; and the 14 Geo. 2, c. 20, s. 9, enacts, that the surplus of such estate *pur autre vie*, after payment of debts, shall go in a course of distribution like a chattel interest.^(s) This estate is not, strictly speaking, as sometimes inaccurately termed, a *descendible* freehold,^(t) because the heir, when named in the grant, does not take by descent; but the estate partakes *somewhat* of the nature of a personal estate, though it is not a chattel interest for many purposes, but before the new reform act gave a qualification to vote for members of parliament, and to kill game, and some others.^(u) If an estate *pur autre vie* be limited to a man, his heirs, executors, administrators and assigns, and be not devised, it descends to his heir as the named special occupant in preference to the executors, and is only liable for specialty debts,^(x) unless in the case of traders.^(y) But if it were limited to a man and his *executors*, the executor takes it in that character, and subject to the same debts as personal estate;^(z) and the interest, if any, beyond the debts, belongs to those who are entitled to the personal estate.^(a)

As regards corporeal or incorporeal property of *freehold* tenure, there is no difference, since the 29 Car. 2, c. 3, between a grant of corporeal and incorporeal hereditaments *pur autre vie*, and that statute, in case of rents and other incorporeal hereditaments, does not enlarge, but only *preserves* the estate of the grantee;^(b) and a rent charge *pur autre vie*, if the grantee die, living *cestui que vie*, goes to the grantee's executor,

^(r) 2 Bla. C. 258.

^(s) See explanation and observations on these acts, 6 T. R. 291; 7 East, 186; 7 Bing. 178, and notes to 2 Bla. C. 258 to 263.

^(t) See Vaugh. 201; 2 Bla. R. 1148.

^(u) Per Lord Kenyon, in 6 T. R. 291.

^(x) 4 T. R. 229.

^(y) 11 Geo. 4, and 1 W. 4, c. 47.

^(z) 4 T. R. 224, 229.

^(a) 7 Ves. 425.

^(b) 3 P. Wms. 264, note; 7 Bing. 178.

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though not named in the grant. (c) This estate may be entailed, but *any* alienation of, or even a devise by, the *quasi* tenant in tail, will bar the interest of him in remainder. (d)

With regard to occupancy of copyholds, it appears that there could not be a *general* occupancy, because no one could gain a copyhold by such means, but only by admission of the lord, the freehold being in the lord, and occupancy being allowed by the common law, upon feudal principles, for supplying the freehold. (e)

But a *special* occupancy by the heirs, if named, may be of a copyhold, because by the limitation to the heirs, the lord has expressly excluded himself during the life of the *cestui que vie*. (f) But it must be observed, that the above mentioned statutes, 29 Car. 2, and 14 Geo. 2, do not extend to lands of copyhold tenure, and therefore it was held, that a person who had been admitted tenant upon a claim as administrator *de bonis non*, to the grantee of a copyhold *pur autre vie*, had no title in such character, and could not recover in ejectment by virtue of such admission, as upon a new and substantive grant by the lord. (g)

3. Prescription
or custom. (h)

3. Title by prescription or custom only relates to incorporeal hereditaments, such as common of pasture, turbary, or ways, and other easements, for a right to *corporeal* property cannot be so claimed; title by *custom* is properly a *local usage*, as for *all* the inhabitants of a parish, &c. or for all copyholders in a particular manor, or for all copyholders of a particular copyhold tenement in a manor, by custom to *have* common of pasture over the lord's waste, or to *be excused* from some liability, as in the case of a *modus*; whereas title by *prescription* is merely a *personal* usage, as that *A.* and *his ancestors* (when the right is in *gross*,) or that *A.* and *those whose estate* he hath in such land, &c. (when the right is *appendant* or *appurtenant* to named corporeal freehold property,) have from time immemorial used and enjoyed a certain incorporeal advantage or privilege, as a right of way or common; (i) and all *prescription* must be either in a man and his *ancestors*, or in a man and

(c) *Bearpark v. Hutchinson*, 7 Bing. 178.

(d) 3 Cox, P. Wm. 266; 6 T. R. 293, and 2 Bla. C. 261, note 4.

(e) 1 Roll. Ab. 511; 2 Ld. Raym. 1000; 7 East, 186.

(f) Gilb. Ten. 326; 2 Bla. R. 1148.

(g) 7 East, 186; and see Amb. 152;

Scriv. Cop. 106.

(h) See division, *ante*, 279, and title by mere possession, *ante*, 273, and see in general, 2 Bla. C. 244, 263 to 266. Cruise's Digest, Prescription, and *post*, "Grant," which prescription presumes. See further *post*, chap. ix. Knapp's Rep. 60.

(i) Co. Lit. 113; 2 Bla. C. 263.

those *whose estate* in some named incorporeal real property he hath, which last, in respect of such estate, and from the words in italics, is called prescribing in *a que estate*.^(k) If a party claim an easement by prescription as a member of a *corporation*, then he must prescribe under the corporation, stating that *such corporation* have immemorially been entitled to have for themselves and their burgesses common of pasture, &c., and then aver that he was a burgess, &c.^(l) Where a *copyholder* claims common or other profit in *his lord's soil*, he cannot *prescribe* for it in his own name, on account of the baseness and weakness of his tenure, (which we have seen is, in consideration of law, only a tenancy at will,) neither can he prescribe in the lord's name, for the lord could not prescribe even on behalf of his tenant for common or other profit in *his own soil*; consequently of necessity a copyholder must, according to the evidence he can adduce, entitle himself by an allegation of a *custom* in the manor for *all* copyholders therein to have common of pasture in the lord's waste, or for the copyholder of his *particular* customary tenement to have such common, &c. But where a copyholder claims common or other profit in the soil of a *stranger*, as on the wastes of an adjoining manor, he must then *prescribe* in the name of his own lord, viz. that such lord and his ancestors, and all those whose estate he hath in his manor, have had common, &c. in such a place for himself and his customary tenants, &c.; and then state the grant of the customary tenement to himself, and the consequent right to the enjoyment of the easement, for the lord has the fee of all the copyholds of his manor.^(m)

All *customs*⁽ⁿ⁾ suppose an original *actual deed or agreement*, and all *prescriptions* suppose an original *actual proper grant*, founded on adequate consideration, but which has been lost, though to be presumed from long user, as in the case of a *modus* for tithes.^(o) It must have had a reasonable and *appropriate* commencement, or even at this day neither the custom nor the prescription could be supported.^(p) But the general rule is, that every such claim is good if it *might* have had a legal commencement;^(q) such, however, must, in legal contem-

(k) 1 Saund. 346, note 2; 4 T. R. 718; Cro. Car. 599.

(l) 1 Saund. 340, b.

(m) 4 Coke, 31, b; 6 Coke, 60, b; Hob. 86; Cro. Eliz. 390; Moore, 461; 1 Saund. 349; 5 Taunt. 365.

(n) 2 Bla. Com. 30, 31.

(o) Id. 264, 265.

(p) Id. 30, 31, 264, 265; ante, 153 to 158, as to appendants and appurtenances.

(q) 1 T. R. 667.

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plation, have been *immemorial*, that is, technically, "from time whereof the memory of man runneth not to the contrary," and which by law commenced in the beginning of the reign of Richard the First, A. D. 1189, so that until the late act, (r) any custom or prescription might have been destroyed by evidence of its non-existence in any part of the long period from that time to the present, (s) though *nonuser* for sixty years precluded any person from afterwards setting up a claim to a prescriptive right. (t) But the production of an ancient grant without date was holden not *necessarily* to destroy a prescriptive right of the same precise nature, because such undated deed might have been executed either prior to the time of legal memory or in *confirmation* of such prescriptive right, and not necessarily establishing that such right did not previously exist; (u) and it has been considered that a prescriptive right will not be destroyed by implication merely from the terms of an act of parliament. (x)

It has also long been established in practice that as well customs and prescriptions would be sufficiently *prima facie* proved by twenty years' uninterrupted user, or exercise of the claimed right or exemption, from which evidence a jury ought to be directed that they should infer and find the existence of the right immemorially; (y) and from upwards of 20 years' *uninterrupted enjoyment* of an easement or profit *a prendre*, grants, or as Lord Kenyon said, a hundred grants would be presumed even against the crown, if by possibility they could legally have been made. (z) There is, however, an exception to that general rule in the claim of *toll thorough*, where it is necessary to show expressly for what consideration it was granted, though such proof is not necessary in respect of toll traverse. (a) But notwithstanding this rule of evidence in favour of a custom or prescriptive right, still they, especially the latter, were liable to be defeated by actual proof negating the supposition of an

(r) 2 & 3 W. 4, c. 71.

(s) 2 Inst. 238; 2 Bla. C. 31, note (n); but *per* Ellenborough, C. J. there may be a good *modus* to include *turkies*, though that bird might have been introduced into this country within time of legal memory, as if there were a *modus* "for all domestic fowl," 12 East, 35. So although *coaches* were not in common use till after the reign of Elizabeth, yet a right of way might extend to them under a lost grant of way for "all carriages, &c." See also *Ld. Kensington v. Pugh*, 1 Young, 125; and 2 & 3 W. 4, c. 100.

(t) 32 Hen. 8, c. 2; but see excep-

tions, Chit. Col. Stat. 697, in notes.

(u) 2 Bla. R. 989.

(x) 3 B. & Ald. 193.

(y) 2 B. & Cres. 54; 2 Saund. 175, a.; Peake, Ev. 338; 4 Price, R. 198; 2 Price, R. 450, as to *customs*, and as to *prescriptions*, Id.; 11 East, 284, 495.

(z) 11 East, 284, 495. As to the necessity for the usage and enjoyment having been *uninterrupted*, see *Benest v. Pisson*, Knapp's R. 60. It must have been *possessio longa continua et pacifica, nec sit legitima interruptio*, Id. *ibid*.

(a) 1 T. R. 667; 1 Bar. & Cres. 223.

ancient agreement or grant, or by showing how the right had actually commenced, and that under circumstances which negatived any permanent right; and to remedy which the recent most important act, 2 & 3 W. 4, c. 71, was passed, entitled, "An Act for shortening the Time of *Prescription* in *certain cases*," and which recites, "whereas the expression, time immemorial," or "time whereof the memory of man runneth not to the contrary," is now by the law of England, in many cases, considered to include and denote the whole period of time from the reign of King Richard the First; whereby the title to matters, that have been long enjoyed, is sometimes defeated *by showing the commencement of such enjoyment*, which is in many cases productive of inconvenience^(a) and injustice; (b) and then enacts, that claims by custom, prescription, or grant, to a *right of common or other profit or benefit*, to be taken and enjoyed from or upon any land of the king's, or upon any ecclesiastical or lay person, or body corporate, (except as therein excepted, and tithes, rent, and services,) shall not be defeated after *thirty years'* enjoyment by actual proof of the commencement, but provides, *that nevertheless such claim may be defeated in any other way by which the same was, at the time of passing the act, liable to be defeated.* (c) But that after *sixty years'* enjoyment of such a right it should be absolute, unless had by consent or agreement, expressly made or given for that purpose by deed or writing. (d) There is then a similar enactment, as to any way or other easement or watercourse, or to the use of any water (e) uninterruptedly enjoyed for *twenty years*, subject nevertheless to be defeated as aforesaid; and a claim to the use of *light*, uninterruptedly enjoyed for *twenty years*, is indefeasible, unless shown to have been under a consent by deed or writing; (f) and it is provided, that no *interruption* shall prejudice unless submitted to for a year. And then follow regulations with respect to the form of pleading, authorizing the mere statement of the long continued enjoyment without pleading in a *que estate*, as was before essential, with exceptions as to infants and other persons, and enjoyments under tenants for life. (g) It will be observed that the principal objects of this act were two,

(b) The ancient rule was not objectionable in its commencement, see 2 Bla. C. 31, note (u). It will be observed from the words in italic that the act only extends to that particular mode in which a prescriptive right might be defeated, and that the act does not extend to other cases, such as extinguishment by unity of seisin, &c.

(c) *Semble*, therefore, that proof of unity of seisin might still defeat a claim of common or profit a prendre.

(d) 2 & 3 W. 4, c. 71, s. 1.

(e) *Semble*, this does not extend to a right of fishing.

(f) 2 & 3 W. 4, c. 71, s. 2, 3.

(g) *Id.* s. 4 to 8.

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first, to prevent a claim by custom or prescription from being defeated by proof that it *originated* within the ancient time of legal memory; and secondly, to simplify the course of pleading; but that it expressly reserves other objections to such claims, such as *extinguishment* by unity of seisin; and therefore it will be found that much of the ancient law still remains unaffected. The *act* affects the king, ecclesiastical persons, and corporations as well as lay persons, so that now an incorporeal right may exist after twenty years' possession against the king or the successor of a rector or other ecclesiastical person; (*h*) and consequently it is still advisable in conveyances to introduce fresh words of grant of common or way, &c. so as to provide for or prevent the consequences of any such extinguishment. (*i*) There is an enactment upon the same principle as to modusses and exemptions from *tithes*. (*k*)

Fourthly, Title
by forfeiture. (*l*)

Fourthly, Title by *forfeiture* we have seen is the fourth subdivision of title by purchase, and was again sub-divided by Blackstone into forfeitures—1st. By crimes and misdemeanors; 2dly, By alienation contrary to law and disclaimer; 3dly, By lapse or non-presentation to a benefice in due time; 4thly, By simony; 5thly, By non-performance of conditions; 6thly, By waste; 7thly, By breach of copyhold customs; and 8thly, By bankruptcy; (*m*) to which may be added other means of total or partial forfeiture, or loss of an estate; 9thly, By insolvency; and 10thly, By judgment and *elegit*, or extent, &c.

1. Forfeiture for *crimes and misdemeanors* are for treason, felony, misprision of treason, premunire, &c. (*n*) We have seen that the 54 Geo. 3, c. 145, prevents any attainder, except for high-treason or murder, or for abetting the same, from dis-inheriting any heir, or prejudicing the claim of dower, or the right of any other person than the offender; and the forfeiture is only for the life of the offender; and even to that extent there should be an office found. (*o*)

(*h*) 2 & 3 W. 4, c. 71, s. 1, 2; but see s. 7 & 8; 4 B. & Ald. 579.

(*i*) *Ante*, 156, 157, as to *appurtenances* and as to rights of common. In a recent case, K. B. Hil. T. 1833, it was held that though the conveyance professed to pass all ways appurtenant or *belonging* to the principal messuage, yet that unity of previous seisin destroyed the claimed way, because the word *belonging* was only synonymous to appertaining; not like

the words, all ways therewith *used*, &c.

(*h*) 2 & 3 W. 4, c. 100; and 1 Young, 125.

(*l*) See division, *ante*, 279, and in general 2 Bla. C. 267 to 287.

(*m*) 2 Bla. C. 267, chap. xviii.

(*n*) See in general 1 Chitty's Crim. L. 727 to 737; Burn's J., Forfeiture; *ante*, 279, as to *escheat*.

(*o*) 5 Bar. & Cres. 587.

2. Forfeiture may also be by conveying to an *alien*, who may take but cannot hold, and upon office found the king is entitled in case of freehold tenure. (p)

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3. *Alienations* by a *particular tenant* for a time, or in a manner inconsistent with the nature of his qualified interest or estate, is a ground of forfeiture, and entitles the person next in remainder or reversion to enter and enjoy the estate; as if a tenant for his own life alien by feoffment, or fine, or recovery, for the life of another, or in tail, or in fee, these being estates which either must or may last longer than his own, and the creating them is not only beyond his power, but inconsistent with the nature of his interest, and a fraudulent attempt to prejudice those in remainder or reversion, and consequently are forfeitures of his own particular estate. (q). But we have seen that some conveyances are termed *innocent*, and do not occasion a forfeiture; (r) and that a lease and release, or bargain and sale, by a tenant for life, though *professing* to pass the fee, are of this nature, because no estate passes by those modes of conveyance other than what might legally pass. (s) So a fine of an *equitable* tenant for life will not work a forfeiture. (t) So the alienation in fee by *deed* by tenant for life of any thing which lies in grant, as an advowson, common, &c. does not amount to a forfeiture; (u) though a *fine* in fee of such an estate would be a forfeiture. (u) But the forfeiture by such improper conveyances will not prejudice leases, &c. by him previously granted. (x)

Disclaimer is a denial by a tenant of his landlord's title either by refusing to pay rent, or by setting up a title in himself or a third person, and this is a distinct ground of forfeiture of the lease, or other tenancy, (y) whether of land or tithe; (z) but a *qualified* denial, as an offer to pay rent, if the claimant by derivative title will adduce reasonable evidence of his right, will not necessarily amount to a disclaimer. (a)

4. Forfeiture by *lapse* applies only to *advowsons*, and the exercise of the right of presenting an ecclesiastical person to a vacant church and its incidents, and which presentment must

(p) Co. Lit. 2, b; 5 Co. 52; as to copyhold, see 1 Mod. 17; All. 14.

(q) *Ante*, 243, 244; Co. Lit. 251; 1 Co. 14, b; and see reasons, 2 Bla. C. 274, 275; and see as to these forfeitures, 1 Saund. R. 319, b, &c.

(r) *Ante*, 243, 244.

(s) *Ibid.*

(t) 1 Prest. on Convey. 202.

(u) Co. Lit. 251, f.

(x) *Id.* 233.

(y) Bul. N. P. 96; when a qualified denial will not operate as a disclaimer, see Peake's R. 196; Adams's Eject. 124, 125; 2 Bla. C. 275.

(z) 1 Brod. & Bing. 4.

(a) Peake's R. 196; any more than a similar answer would necessarily import a *conversion* in trover, 5 B. & Ald. 247; 3 Campb. 215; 2 Bulstr. 312; 2 Bos. & Pul. 464; 5 Moore, 259; 1 Esp. R. 83.

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be made within six calendar months, to prevent the suspension of religious worship in the parish, or the right will, in most cases, be forfeited for that turn, and until another fresh vacancy. (b)

5. The offence of *simony* is defined and punished as a distinct act of forfeiture by the 31 Eliz. c. 6, s. 3. (c)

6. *Forfeitures by breaches of covenants* in leases and other deeds are by far the most frequent subjects of litigation, (d) and to take advantage thereof it is not essential that the party should have any reversion. (e) But the proviso operates only during the term. (f) We may here observe in general, that the breach complained of must come within the *very letter* of the covenant, or the lease will not be forfeited; (g) and though courts have formerly and not merely inclined a construction against forfeiture; (h) but of late a more correct rule has been observed, and covenants as well as clauses of re-entry are to be fairly construed and given effect to according to the words and apparent intention of the parties, precisely in the same manner that all other contracts ought to be construed at law, leaving the party whose lease may be thereby forfeited to seek any *equitable* relief to which he may be entitled in a Court of Equity. (i)

Waivers of forfeitures may be either by express declaration, or by act inconsistent with the supposition of a forfeiture, and, in effect, admitting a *continuing* tenancy, as acceptance of rent that has accrued due *since* the act of forfeiture, or encouraging the tenant to make subsequent improvements; and these are to be liberally

(b) 2 Bla. R. 276; Mirehouse on Advowsons, 162; 44 Geo. 3, c. 43.

(c) See *ante* 164, and in general 2 Bla. C. 279, and notes; *Fox v. Bishop of Chester*, 2 Bar. & Cres. 635; Ambl. 268; 2 Bla. R. 1052; 2 Bro. Parl. Cas. 811; 5 B. & Ald. 835; 4 M. & S. 66; 1 East, 391; 6 Taunt. 333, and notes; 2 Bla. Com. 279, 280; 8 B. & Cres. 25.

(d) See in general the cases ably collected and observed upon in Adams on Ejectment, 3d ed. 73, 158 to 174, as to forfeiture for non-payment of rent, and 175 to 198, as to forfeiture by other breaches of covenant.

(e) *Doe v. Bateman*, 2 B. & Ald. 168.

(f) 2 Wils. 127.

(g) Adams's Ejectment, 176; 3 Bar. & Adol. 299, S. P.; as to the modes of completing and taking advantage of forfeiture

for non-payment of rent, see chap. v. *post*.

(h) 2 Term R. 739, 744; and see Co. Lit. 201, b., 202, a; 7 Co. 28; and 1 Saun 1. 287, in notes, where it is said that the law leans against forfeiture.

(i) Lord Tenterden uniformly observed to juries, in actions of ejectment for forfeiture, "that they were not to indulge any prejudice against the action on the ground of forfeiture being supposed odious, but merely to consider whether, upon the evidence, there had been a substantial breach of covenant." And see 4 M. & S. 265, and cases cited 3 B. & Adolp. 301. As it is not always for the benefit of a landlord that a forfeiture should be taken advantage of and a lease treated as forfeited, a Court of Equity will sometimes restrain an action of ejectment for a forfeiture of a lease of a *lunatic's* estate, 1 Turn. & R. 34.

though not indiscriminately given effect to. (*k*) So, if the lessor by his conduct mislead the tenant, and himself insure in his own name, instead of the tenant, he may be precluded from taking advantage of the forfeiture. (*l*) So a distress for rent that accrued due after the forfeiture waives it, (*m*) but not a distress for rent antecedently due and distrained for within six months after the forfeiture. (*n*) And where a lease contained a clause of re-entry in case the rent should be in arrear twenty-one days after notice, and there should be no sufficient distress, it was held, that the landlord having distrained within the twenty-one days, though he continued in possession afterwards, did not waive his right of re-entry; (*o*) and where a lease contained a general covenant to repair, and also a covenant to repair upon three months' notice, it was held, that the landlord, by a notice to repair *forthwith*, had not waived his right of re-entry for the breach of the general covenant, (*p*) though, in a subsequent case, where the notice was to repair within *three months*, it was held, that the giving it suspended the right to take advantage of the breach of the general covenant until the expiration of that time. (*q*) To render the waiver effectual, it must be shown that the landlord well knew of the act of forfeiture at the time of the supposed act of waiver, for otherwise the supposed waiver will not have that effect; (*r*) and a complete waiver will not affect the right to treat a *subsequent* breach of a continuing covenant, as to keep in repair, reside on the demised premises, insure, &c., as a fresh ground of forfeiture; (*s*) and a mere knowledge of a cause of forfeiture, without immediately proceeding, nor mere passive suspension of proceedings without receipt of rent, or encouraging or knowingly permitting the tenant to make improvements, will not constitute any waiver. (*t*)

It has been laid down that even in leases *for years* there is a distinction as to the effect of a waiver when the clause of forfeiture is that the lease shall be wholly null and void to all intents and purposes, and when it is merely that it shall be *lawful* for the lessor to enter, &c., and that, in the former case, no acceptance of rent or other waiver will set up such lease, but at

(*k*) See cases collected in Adams's Ejectment, 3d edition, 192 to 197; but *semble*, that the *Nisi Prius* decision in 2 Car. & P. 348; that a notice to quit is a waiver, is not law, Adams, 192, note (*d*).

(*l*) *Doe v. Elms*, 1 Ry. & M. 29.

(*m*) 3 Coke, 64, b.

(*n*) 1 Hen. Bla. 5.

(*o*) 1 Stark. R. 411.

(*p*) 2 Campb. 520.

(*q*) 4 Bar. & Cres. 606.

(*r*) Knowledge of the forfeiture in every question of *waiver* is a material and issuable fact, 3 Coke, 64, b; 2 T. R. 425, 430.

(*s*) 3 Taunt. 78; *Doe v. Bliss*, 4 Taunt. 735; *Doe v. Woodbridge*, 9 Bar. & Cres. 376; *Doe v. Bank*, 4 Bar. & Ald. 401.

(*t*) *Doe v. Allen*, 3 Taunt. 79.

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most constitute a new tenancy from year to year; (*u*) but that, in the latter, a waiver would set up the lease. (*x*) But this distinction only applies to the breach of a *condition*, and not to a breach of *covenant*, for, in the latter case, whatever may be the terms of the clause of forfeiture, and whether it be in a lease for *years* or for *lives*, the act of the lessor may waive the forfeiture, and confirm the lease. (*y*)

In all cases, although the lease declare, in express terms, that it shall be null and void, it is only in *the option* of the *landlord*, and *not* of the *lessee* or his *surety*, to take advantage of his own tortious act of forfeiture. (*z*)

Courts of Equity always relieved against forfeitures for *non-payment of rent*; (*a*) though now, when a landlord proceeds in ejectment under the statute 4 Geo. 2, c. 28, s. 2, in case of rent in arrear, and no sufficient distress, and not at common law, a Court of Equity can only relieve within six calendar months after execution has been executed. But Courts of Equity will not relieve against a forfeiture for not insuring, (*b*) nor in any case where the forfeiture has been incurred by a breach of covenant sounding wholly in *damages*, and where the parties cannot be placed in *statu quo*, (*c*) as the breach of a covenant to repair generally; (*d*) and although in one case of the breach of a covenant to expend a fixed sum in repairing the demised premises, Lord Chancellor Erskine relieved against the forfeiture; (*e*) in a subsequent case that decision was treated as going to the utmost verge, if not beyond, the limited jurisdiction of the court. And no relief will be afforded against a forfeiture by breach of a covenant not to assign. (*f*)

7. *Waste* is another ground of forfeiture, though now but seldom proceeded for as such, but rather by action on the case for damages, or as a breach of express covenant. (*g*) 8thly, Forfeitures also affect *copyhold estates* by breach of the *customs* of the manor. (*h*) The cutting timber trees for sale, or otherwise

(*u*) 1 Saund. R. 287, c, d, in notes of Mr. Serjeant Williams; and *Goodright v. Dowd*, Cowp. 804; Adams's Eject. 3d edition, 196, 197.

(*x*) Id. *ibid*.

(*y*) 6 Bar. & Cres. 519; 4 Bar. & Ald. 401; *Reed v. Farr*, 6 M. & S. 121; 1 Saund. R. 287, a.

(*z*) 4 Bar. & Ald. 401; *Reed v. Farr*, 1 Saund. R. 287, d, note (*g*).

(*a*) 10 Ves. 67; 3 Ves. & Beames, 30; see cases Comyn, Landlord and Tenant, 493; Chit. Eq. Dig. Covenant VII., VIII.

(*b*) 2 Meriv. 459; 2 Price's R. 206, n.,

212.

(*c*) Comyn's Landlord and Tenant, 493; *Bracebridge v. Backley*, 2 Price's R. 200.

(*d*) 16 Ves. 402; 18 Ves. 56; 19 Ves. 141; 2 Price, 209; when otherwise, 2 Meriv. 65.

(*e*) 12 Ves. 282; 9 Mod. 91; but see 19 Ves. 141.

(*f*) 18 Ves. 56.

(*g*) What is waste, and what are the remedies, will be presently considered; and see 2 Bla. C. 281.

(*h*) *Aate*, 234, 235; 2 Bla. C. 284; 2 Watkins Copyhold, Index, Forfeiture.

than for repairs, is an act of this nature. (i) 9thly, *Bankruptcy* has been treated as a title by forfeiture by Blackstone; (k) the 6 Geo. 4, c. 16, s. 66, 67, 73, takes from the bankrupt all his estate real and chattels real, and copyhold estate, for the benefit of his creditors, with the exception of the right of presenting to a church vacancy. (l) And 10thly, The *Insolvent Act* contains similar provisions with respect to persons discharged under that act. (m)

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5thly. *Title by Alienation* arises from the *transfer* by one party to another, by *mutual consent of both*, and is effected either, *first*, by written feoffment or DEED; *secondly*, by matter of RECORD, as by private acts of parliament, the king's grants, fines, and common recoveries; *thirdly*, by SPECIAL CUSTOM, as in case of copyhold, by surrender, presentment, and admittance; and *fourthly*, by DEVISE. It will be found that some of these are only used to convey real property *corporeal*, whilst others, such as grants, &c., are most commonly proper in passing *incorporeal* rights.

5thly. Title by
Alienation. (n)

First. Title by *deeds* are termed the *common assurances of the realm*, whereby it is said (o) (with what truth others will determine) every man's estate is assured to him, and *all controversies, doubts and difficulties are either prevented or removed*. (p) These deeds and instruments operate either as *conveyances*, or as *charges*. Deeds of *conveyance* are, *first*, at *common law*, and include feoffments, gifts, grants, leases, exchanges, partitions, releases, confirmations, surrenders, assignments, and defeazances; *secondly*, deeds of conveyance are under *the statute of uses*, as covenants to stand seised to uses, bargains and sale, lease and release, deeds to lead or declare uses, and deeds of appointment and revocation; and *thirdly*, deeds and instruments which do *not convey*, but *only charge or discharge* lands, are obligations, recognizances, and defeazances. (q)

First. Alienations by feoffment or deed, &c.

There are, however, some other bargains and instruments applicable to real property, which here require to be noticed, such as *licenses* to use or have an easement over land; *awards*, whether by agreement or under inclosure acts, as far as they

Other instruments and modes of alienation.

(i) *Ante*, 234.

(k) 2 Bla. C. 285.

(l) *Ante*, 236, note (s).

(m) 7 Geo. 4, c. 57.

(n) See division, *ante*, 279.

(o) See division, *ante*, 279; and see the various titles by alienation enumerated and considered, 2 Tho. Co. Lit. 223; 2

Bla. C. 287 to 294.

(p) 2 Tho. Co. Lit., 223, note G.; 2 Bla. C. 294. Considering the numerous litigations upon the construction of title-deeds, it might be supposed that this definition were given ironically.

(q) See division, 2 Bla. C. 310.

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affect the title to real property; legal and equitable *mortgages*; *voluntary conveyances*, charges upon corporeal or incorporeal real property, acquired by *judgment* and *elegit*, or *extent*; or by statute staple, or merchant, which Blackstone considers as estates upon condition. Jointures and deeds of *settlement* also are instruments materially affecting the interest in land and other corporeal and also incorporeal property.

It is proposed to notice each of these several titles and instruments in proportion to their practical importance, much as when we considered the means of acquiring a title to *personal* property. (r) But *first* we will consider the effect of the statute against *frauds* upon agreements and title-deeds; *secondly*, the conduct to be pursued by a vendor or purchaser, antecedent to the formal conveyance; and *thirdly*, the general rules influencing the choice of the proper conveyance, whether of a legal or equitable interest.

First. How the statute against frauds, 29 Car. 2, c. 3, s. 1 to 4, affects agreements and parol contracts relating to an interest in land, &c.

At *common law* a *verbal* feoffment or contract, followed by immediate livery of seisin, was a *perfect conveyance* of an estate in fee simple, whereof the party conveying was seised in fee simple, and whatever passeth by livery of seisin, either in deed or law, might pass without deed. (s) But the statute against frauds put an end to all *verbal* agreements and conveyances of *real* property, and even of *chattels real*, by enacting, "for prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury, that all *leases, estates, interests of freehold*, or terms of *years*, or any *uncertain interest* of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put *in writing* and *signed* by the parties so making or creating the same, or their agents thereunto lawfully authorized *by writing*, shall have the force and effect of leases or estates only *at will*, (t) and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates to the contrary notwithstanding.

Section 2. Except, nevertheless, all leases *not exceeding* the term of three years from the *making* thereof, (u) whereupon the

(r) *Ante*, 102 to 112.

(s) 4 Cruise Dig. 10, 11; 1 Tho. Co. Lit. 205, 224, note A.

(t) The construction of these words, at will, is, that a parol lease for more than three years is not void, but creates a tenancy from year to year. 8 T. R. 3; 8

East, 165.

(u) And not from a future day, 1 Ld. Raym. 736; but a prospective lease to commence at a future day, and not to extend beyond 3 years is valid, 1 Stra. 651; Bul. N. P. 173; Holt's C. N. P. 47.

rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised.

Section 3. And moreover, that no leases, estates, or *interests*, either of freehold or terms of years, or any *uncertain* interests, (*x*) (not being copyhold or customary interest,) of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, be *assigned*, granted or *surrendered*, unless it be by deed or note in *writing*, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized *by writing*, or by act and operation of law. (*x*)

The 4th Section enacts, "That no action shall be brought upon any *contract* (*z*) or sale of lands, tenements or hereditaments, (*a*) or any *interest* in or concerning them, unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party so charged therewith, or some other person thereunto by him lawfully authorized."

Upon concluding any agreement either to sell or demise, or otherwise relating to real property, corporeal or incorporeal, it is always expedient immediately to have reduced into writing, and signed by each party, the heads of the bargain agreed upon, specifying all particular stipulations as to price and time of payment of rent, &c., and the substance of the bargain, and then concluding with the stipulations that all usual and proper covenants and provisions shall be inserted in the ultimate and final conveyance, lease or deed, and then taking care that such preliminary agreement be duly *signed* by each party, or by his agent lawfully authorized *in writing*, so as to prevent the

Secondly. Expediency of having agreements and covenants preliminary to actual conveyance.

(*x*) *Uncertain Interest.* A parol assignment of a parol demise from year to year is void, 1 Camp. 318; nor is a parol license to quit, a sufficient surrender of such a tenancy, although the tenant quit accordingly, 2 Camp. 103; nor if the landlord endeavour to re-let, as by putting up a bill, any discharge of the tenant, 3 Esp. R. 225; 2 Stark. Ev. 590; and the giving an insufficient notice to quit is not a surrender or determination of the tenancy, though it be accepted, 4 B. & Cres. 922.

(*z*) The word "*or*" is in the statute, *sed quere* if it should not be "*of*" or "*for*."

(*a*) See the doctrine of specific performance of parol agreements on the ground of part performance, and of *equitable mortgages*, which seem in contravention of this rule, as it is easy to swear to a ver-

bal agreement to deposit the deeds and charge the estate, 1 Mad. Ch. 537, 538; 4 Mad. Rep. 249; 1 Bro. C. C. 269; 11 Ves. 403; 12 Ves. 197; 5 Esp. R. 105; 3 Esp. R. 103; 3 Young & J. 150, *post*. The words in this section "*lands, tenements or hereditaments*," are construed to have been used to denote a fee simple, and the others to denote a chattel interest, 5 Bar. & Cres. 839. Thus an agreement to occupy *lodgings* at a yearly rent, at a future day, and possession not being taken, is an *agreement* within this section, and should be in writing, 1 Stark. R. 12. As to growing crops, if the crop be of such a nature as would constitute *emblements*, the sale of it would not be of an interest in lands, but a sale of goods, under 17 sect. 9 Bar. and Cres. 577.

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statute of frauds from impeding either the specific performance, or action, or successfully defending an action for breach of the contract. (b) Every experienced person knows that vendors and lessors, and purchasers and lessees, after having secured their object of selling, buying, letting, or hiring, are too frequently disposed to think that they have agreed to sell or let on too moderate terms, or that they have agreed to purchase or rent at too high a price or rent, and unless they be bound down by a written or signed contract, they are apt to attempt to vary, if not to get rid of the terms: therefore every solicitor is blameable, if he do not, immediately he has been consulted and has settled the terms, take care to obtain a full and explicit signed agreement; and parties themselves would act prudently, when about to enter into any bargain of this nature, to obtain from their solicitors, and well consider what will be a judicious ready prepared agreement for sale or lease, containing at least all usual and proper terms, and capable of being easily altered, according to the final agreement of the parties, so as instantly to be signed before they separate. And as agreements to convey or demise, though under seal, do not require an *ad valorem* stamp, a 35 shillings stamp would suffice. (c) It will be advisable that such preliminary agreement should be under seal, so as to bind heirs as well at law as in equity. (d)

The terms of the preliminary agreement will necessarily vary according to the nature of the property, and the intended agreement in each particular case. The *price* or amount of the purchase money or rent should be expressly fixed, for a Court of Equity will not enforce an agreement to pay a sum to be fixed by arbitration or by surveyors, (e) and it may be legally stipulated without constituting usury, that if the purchase money be not paid on the precise day, it shall bear more than 5l. per cent. interest. (f) The precautionary stipulations and

(b) As to the necessity for all stipulations being inserted, see *ante*, 118. Sometimes solicitors will attempt to excuse themselves for the omission to have a regular preliminary agreement, by insisting that frequently, by requiring such a preliminary formal contract in writing, parties fly off from their bargain, and that therefore they think it better to wait until they have executed or accepted a conveyance or a lease. But this conduct is frequently very prejudicial to their clients, and they might be sued for negligence, the same as an auctioneer for neglecting

to take a deposit.

(c) 6 Bar. & Cres. 506.

(d) 9 Mod. 106. A covenant under seal for one self and heirs to surrender copyhold, binds the heir, and equity will direct him to surrender. 2 Freem. 109.

(e) 2 Sim. & Stu. 130, 418, 423; 14 Ves. 400. *Per Vice Chancellor*, "It is quite settled that this Court will not entertain a bill for specific performance of an agreement to refer to arbitration."

(f) 7 B. & Cres. 453, 1 Man. & R. 143, S. C.

measures on the parts of vendors and purchasers, are perspicuously stated in one of the ablest modern publications, and which should be read by every person about to sell or purchase an estate. (g) Some other precautions will be collected from the following observations.

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An intended vendor should, before he publishes his intention to sell, have a *perfect abstract* of his title prepared and carefully examined with the deeds in his possession, and in which all the facts, such as marriages, births and deaths, connected with his estate, should be faithfully stated, and he should be well assured of his ability to produce all documents, and verify all facts so stated; and he should then obtain the *opinion* of an experienced conveyancer upon the sufficiency of his title, and upon the expediency of delivering a corresponding abstract, or omitting any, and what part, and also upon the necessity of providing in the particulars and conditions of sale against the production or proof of any deed, or other fact, so as to compel any purchaser to accept a conveyance without the same. (h) A vendor should not advertise, or at least deliver particulars of sale, till he is already prepared to deliver such an abstract; for if after delivery of an abstract, the vendor should have to answer and remove objections reasonably made to the title as disclosed thereby, not only much delay may ensue, but he will have to pay the intervening costs, although he may ultimately succeed in compelling a specific performance. (i)

Secondly. Conduct of vendor and purchaser before formal conveyance, as in preparing abstract, taking opinion thereon, preparing advertisement and particulars and conditions of sale, and agreement of purchase.

Supposing that it has been ascertained that the intended vendor can make a good title, then, and not before, should the estate be *advertised* for sale.

With respect to the *advertisement*, and particulars with conditions of sale, it has been judiciously advised not to leave the description of the property to be sold to an auctioneer, who is generally too apt to indulge in luxuriant and sometimes erroneous description. (k) If there be any material misrepresentation it may avoid the contract, or at least entitle the purchaser to compensation and reduction from the agreed price, (l) and terms in an advertisement will sometimes be equal to a contract; (m) we have seen the consequences of a material mistatement in the quantity of the land. (n) The *conditions* must explicitly state all the qualifications of the purchaser's right to require documents, proof, &c. for in general, especially in sales by auction,

Advertisement and particulars and conditions.

(g) Sugd. V. & P. Introduction, and see ante, 118, and see post, chap. v.

(h) See some suggestions, Sugd. V. & P. 8th ed. 12; 1 Jac. & W. 623.

(i) 1 Jac. & W. 623, 624.

(k) Sugd. V. & P. 8th ed. 12; and Introduction, per tot. and 283 to 294.

(l) Id. *ibid.*, and see 1 Russ. & M. 128;

(m) Knapp's Rep. 344.

(n) *Ante*, 180, 181.

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such *conditions* form the basis and terms of the contract, because it is usual for the purchaser merely to sign a short memorandum at the foot of the conditions, agreeing to purchase on those terms, and there is not time to prepare a more explicit agreement, as in the case of *private* sales.

If it be apprehended that there will be the least difficulty in establishing any particular part or parts of the title, the right to require proof thereof should be expressly provided against either in the conditions, or by a more formal agreement, to be signed by the purchaser, so that he may, by his own express contract, be precluded from requiring the production or verification of documents or other facts, which the vendor thinks he will not be able readily to produce or establish. (o) It would be as well also to stipulate that the expense of tracing and vesting in any legal representative any outstanding term, if required, shall be at the expense of the purchaser, and not excuse any delay in paying the purchase money, for without such stipulations no purchaser is bound to accept a title, unless he gets either the title deeds themselves, or documents or covenants which would entitle and enable him to enforce the production of such deed; (p) and if a vendor retain the title deeds and covenant for further assurance, the purchaser may, under that covenant, compel him to enter into a covenant for the production of the deeds; (p) and if there be no stipulation providing for accident, a purchaser is not bound to accept the title when the title deeds have been destroyed by fire, although after they had been examined with the abstract. (q) And if the title deeds relate to other estates, it should be expressly provided that the vendor shall only give copies, at the expense of the purchaser, and shall not be required to produce the originals, except in certain specified events, for an express or implied general covenant to produce deeds runs with the land, for the benefit of sub-purchasers, though not for the benefit of vendors. (r) And the non-performance of it, when unqualified, might subject the vendor and his heir, or assignee of his retained land, to successive litigation.

It should be further stipulated, whether or not upon any and what terms the purchasers shall be forthwith at liberty to take possession before completion of the purchase, without preju-

(o) *Barclay v. Raine*, 1 Sim. & Stu. 464, 465; 1 Jac. & W. 263, 623.

(p) 2 Sim. & Stu. 533.

(q) 4 Russ. R. 1. And yet if a house purchased in fee be burnt after the sale,

the purchaser must bear the loss. Sugd. V. & P. 255; he should, therefore, insure immediately after the agreement of purchase has been signed.

(r) 1 Sim. & Stu. 449.

dice and without precluding him from afterwards objecting to the title; (s) also providing that no trees or underwoods shall be cut, nor waste, or any alteration of the premises made before the purchase has been completed; and that, in the event of the purchase not being completed, possession shall be restored, and certain mesne profits or stipulated damages, proportioned to the time of occupying, be paid or allowed to the vendor, and on the other hand, the interest on the deposit and purchase money, kept unproductive, shall be allowed to the purchaser.

It should further be stipulated whether precise performance on each side on the appointed day for completion shall be peremptorily insisted upon; (t) and it is even legal to stipulate that more than 5 per cent. interest shall be paid in case of delay in paying the purchase money; (u) and it should be stipulated how the house or land or business or farming shall be managed, as well before that time, and at whose expense, and what compensation shall be made by the party who should not complete the contract. (x) If there be a sale of several lots, it may be advisable to stipulate that a defect in the title of one or more, where several lots are purchased by the same party, shall not affect the contract of purchase as to the others; (y) and there may be an apportionment of rent in such case. (z) It is also usual to provide that misdescriptions, if any, of a specified or other trifling nature, shall at most entitle the purchaser to moderate deduction, and not invalidate the sale. An agreement for a sale, though not under seal, passes no *legal* interest, but only entitles a party to call for performance of that agreement in a Court of Equity.

A *purchaser* who has property in the *funds*, or any other property which the vendor may be willing to take in *exchange*, or as a mode of paying the purchase money, should stipulate for that mode of paying, by which he would avoid the necessity for paying the *ad valorem* duty. (a) He should also stipulate in the agreement what covenants shall be introduced, if he resolve to

(s) 3 Russ. R. 171. Without such a stipulation or understanding, the taking possession might be treated as a waiver of a strict title, Sugd. V. & P. 16, 107, 233.

(t) *Ante*, 120.

(u) 7 B. & Cres. 453; 1 Man. & Ryl. 143, S. C.

(x) 1 Sim. & S. 122; 2 Id. 393.

(y) 3 Sim. 29; 1 Russ. R. 325; 1 Russ. & M. 29; but this is not in general necessary, Sugd. V. & P. 268, 270.

(z) 1 Jac. & W. 181, 426.

(a) The 55 Geo. 3, c. 184, schedule, tit. "Conveyance," and "Exchange," only applies to *sales*, and affects the purchase money, and does not seem to extend to exchanges, excepting as respects money paid for equality of exchange, 7 B. & Cres. 392; 4 B. & Cres. 243; 6 B. & Cres. 234. The opinions of three of the most eminent conveyancers to that effect are in the possession of the author.

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have any that are not *usual*, such as an absolute covenant for good title, not (as usual) only against acts of the vendor; also how the premises shall be cultivated until the conveyance shall have been executed; also that the deposit money shall not remain unproductive in the hands of the auctioneer, but be invested in the most productive public funds, and at whose risk as to rise or fall; or else the payment of interest should be provided for; (b) because, however considerable the deposit may be, and however long the ultimate conveyance may be delayed, the auctioneer will not be liable to pay interest, although he may in fact have derived great profit from the use of the money. (c) Any deterioration of the estate before the conveyance has been executed should also be provided for. (d) In the absence of an express agreement to the contrary, a purchaser who has not been in possession is bound to pay interest on the purchase money, and take the rents and profits only from the time when a good title is first shown, and not from the time fixed by the agreement for the completion of the purchase. (e) And where a contract of purchase contained a stipulation that if by reason of an unforeseen or unavoidable obstacle the conveyance could not be perfected for execution before the day fixed for the completion of the purchase, the purchaser should from that day pay interest at 5 per cent. on his purchase money, and be entitled to the rents and profits of the premises, and the vendor did not show a good title till long after the specified day, it was held that he was not entitled to interest except from the time when a good title was first shown. (f)

Abstract.

The vendor will be enabled, by adopting the beforementioned precaution of examining and taking advice upon his title before he actually sells, immediately after the signing of the contract, to deliver a clear and perfect *abstract* of the title, as already advised upon, which will avoid any imputation of delay against him, and probably much expense and loss. (g) Thus where the title in the abstract was not satisfactory, and the purchaser on that account refused taking possession, although finally a specific performance was decreed, yet it was on the terms of the vendor accounting for the rents received, or which, without his wilful default, might have been received: (h) and it is incumbent on the vendor seeking a specific performance, and still more suing at law, to show that he had his title prepared,

(b) 1 Sim. & Stu. 122; 2 Id. 393.

(c) 1 B. & Adolp. 577.

(d) 1 Sim. 530.

(e) 4 Russ. R. 118.

(f) Id. 121, 122.

(g) *Ante*, 295; Sugd. V. & P. 12.

(h) 1 Jac. & W. 36.

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and sent a proper abstract of it in the first instance and in due time to the purchaser, and that he answered all reasonable inquiries on the part of the purchaser within a reasonable time after the same were made; and therefore where the abstract delivered was imperfect, it was decreed that the vendor should pay the costs up to the time of the defects being supplied. (i)

A purchaser of a share in a copartnership business, and in freehold, leasehold, and copyhold lands, does not waive objections to the title by taking possession of the property and acting as a partner, where the contract stipulated that a good title should be made by a specified day, and it appeared to have been the intention of the parties that the purchaser should *immediately* and before that day have the possession. (k) It is better however in the agreement of purchase to insert express stipulations to the same effect, and also to regulate the terms of possession in case the contract should not be completed. (k)

Purchaser's taking possession before conveyance.

If a purchaser of a lease and stock of liquors, furniture, and goodwill of a public-house improperly object to complete the purchase, he will be compelled to do so, and will be charged with rent, taxes, and other outgoings paid by the vendor from the time when he ought to have completed, and also with the purchase money and interest from the same time; and if the vendor be obliged to keep open the house to prevent the loss of the goodwill of the trade, the purchaser will not be entitled to any rebate or allowance for occupation rent for the use of the house and furniture by the vendor between the time when the contract ought to have been and the time when it really was completed; but that the purchaser was not liable to purchase any fresh or substituted stock of liquors, &c., or to pay any losses in the trade. (l) In such a case it seems at least advisable for the vendor to give the purchaser notice of the necessity of carrying on the business or the cultivation of the farm, &c.; and that if the purchaser will not take possession, the vendor must carry on the same, and at the risk of the purchaser. (m) It is better to stipulate expressly for such an event. (n)

Purchaser's improperly refusing possession at time appointed, and proceedings thereon.

At law, in an action against a purchaser for not completing a contract of purchase, the question is, whether the offered title was strictly and substantially perfect? (o) But a Court of Equity will not, unless otherwise specially agreed, enforce spe-

(i) 1 Jac. & W. 623.

(k) 3 Russ. R. 171.

(l) 2 Id. 170.

(m) See suggestions in 2 Russ. Rep.

179, 180.

(n) See 2 Russ. R. 181.

(o) 7 Bing. 379; 8 Bing. 326; 6 Bing.

121.

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Agreement for
lease.

Agreement to
secure money
on mortgage
and mortgage
lands, &c.

cific performance, if the title may give rise to a contest at law, or be doubtful, though it might after discussion at law be holden sufficient. (p)

In preliminary agreements for leases, it is better to enumerate particularly in concise terms all the intended stipulations and covenants, (q) and they may be arranged under several enumerated heads, as in the form in the note. (r)

Under the words "with *all usual and reasonable* covenants," a covenant not to underlease or assign will not be implied, and cannot be insisted upon by the lessor; (s) and where there has been an agreement by brewers to grant a lease of a public house with all usual covenants, it should seem that a covenant to buy all beer of the lessors is not an usual covenant. (t)

It frequently occurs that before a *formal mortgage or charge* upon property has been made, there is a preliminary agreement, and which is extremely essential for the security of both parties, for if there be no stipulation in writing to advance the money, the intended mortgagee might ultimately, without adequate reason, decline to make the promised advance, and the proposed mortgagor would have no remedy for the disappointment and expense he had incurred; and on the other hand, the agreement should stipulate, that in case the proposed security should not, in the opinion of one or more conveyancers, be sufficient in *title*, or upon a survey, at the expense of the intended mortgagor, be inadequate in *value*, or the bargain should fail to be completed, without fault of the proposed mortgagee, then the intended borrower shall pay all reasonable expenses and interest on monies provided and kept unpro-

(p) Id. ib.; 1 Jac. & Walk. 169; *Sharp v. Adcock*, 4 Russ. R. 374. See further, *post*, chap. viii. as to *specific performance*.

(q) See in general, *ante*, 118; 1 Chit. Eq. Dig. tit. Leases, VII. 620; *Covenant*, V. 259.

Suggested form
of an agreement
for a lease.

(r) Memorandum of an agreement made this — day of — A.D. — between A. B. and C. D. for executing and accepting a lease of a farm, buildings and land, with the appurtenances of said A. B. in the parish of — on the following terms: 1. *Premises* as aforesaid, messuage, buildings, land, containing at least — aeres, with common appurtenant and ways at any time heretofore used with said premises, (trees, woods, underwoods, game and fisheries, and liberty to enter to hunt, shoot and sport for same excepted). 2. Term, twenty-one years from Lady-day last, determinable at option of either party, at expiration of first seven or fourteen years, on giving half-year's previous notice.* 3. Rent, £ — per annum, payable quarterly, free from any deductions, except land tax. 4. Covenants to pay rent and taxes, except land tax and sewers' rate, to repair, and keep and leave in repair, (damage by fire and tempest, or acts of incendiaries excepted). *Husbandry* covenants as follows: [*here enumerate heads of special stipulations*]. Lease to contain all other usual and proper covenants. Signed, A. B. and C. D. Witness to signatures, E. F. and G. H.

(s) 12 Ves. 179, 186; 3 Bro. C. C. 632; 15 Ves. 528, 258, 264. But see 3 Anst. 700, where it was held that such a covenant might be implied, unless the custom of the country were generally against it.

(t) Peake, Rep. 131.

* Unless especially provided, the option is at law and in equity only in lessee, 3 Bos. & Pul. 399, 442; 17 Ves. 563.

ductive, or that the money should, pending the investigation of the title, be vested in some productive fund. In general, in a Court of Equity, where there has been an agreement to grant a rent charge or other security, even on particular lands, the engagement will be construed to have been effectually to charge every other land of the party agreeing, in case the title to the particular land should turn out defective, and performance will be decreed accordingly, but it is advisable for a mortgagee to require a specific covenant to that effect. (u)

2. *Requisites of Conveyances in general.* We cannot here assume to consider all the requisites of deeds of conveyance or lease even in general, and can only refer to the general works and notice a few material recent decisions not perhaps to be found in other treatises. (x)

2. Requisites of conveyances in general.

In describing the *premises* in the *conveyance*, it is advisable, especially when the estate is copyhold, or intermixed with copyhold, to preserve the ancient descriptions, and if there has been any alteration or fresh survey, to add a very minute and accurate modern description, (y) as thus, "heretofore known and described as, &c. (stating the old description,) and as containing by estimation — acres more or less, but now more commonly called and known by the name and description of, &c. and containing by recent admeasurement — acres statute measure." We have further considered the expediency of ascertaining whether a supposed right of common, or any other easement, the benefit of which the purchaser intends shall be included in his purchase, has not been extinguished by unity of seisin, and if there be the least doubt, then not only to insert the usual description of all appendants and appurtenances, but a fresh express grant of such common, or way, &c. and to add, and "all commons, ways, &c. now or heretofore usually had, *used or enjoyed*, with the principal property conveyed, or any part thereof." (z) It has recently been decided, that a conveyance of a messuage, with all ways thereto appertaining or *belonging*, would not pass a way used with the premises, but which had been extinguished by unity of seisin, the word "*belonging*" being synonymous to "*appertaining*," and not equivalent to the term *used*. (a)

Premises.

(u) 1 Sim. & Stu. 612, 621.

(x) See in general Com. Dig. Fait.; Sugd. V. & P.; 2 Bla. Com. with the notes, 295 to 344; Preston on Conveyancing; Cruise's Digest.

(y) *Ante*, 237, note (l); 4 Russ. R. 267; 7 Bar. & C. 243.

(z) *Ante*, 156, 157.

(a) *Barlow v. Rhodes*, K. B. Hil. T. 1833.

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Conveying
words.

Deeds having
several opera-
tions, and who
to elect how it
shall operate.

As a deed may operate various ways, and on different estates and interests in the same property, conveyancers usually insert various terms, to enable the grantee to elect to take the estate by various means, and this seeming superfluity of words is therefore still recommended. (b)

A deed or proposed conveyance, when executed, may operate in various ways, and he to whom the deed is made shall have the election which way to take it, and may take it in that way as shall be most for his advantage; (c) and therefore if a man for money demises, grants, bargains and sells his land to *J. S.* for years, the latter has his election to take it either by demise at common law, or by bargain and sale, (d) but such election must be made by the party to the deed, and not by a stranger, (e) therefore unless it be averred that in fact *J. S.* entered so as to perfect the estate for the term under the demise, he had merely an *interesse termini*, unless it be averred and proved that *J. S.* elected to take the term as under a bargain and sale, and operating under the statute of uses, (e) and therefore where a defendant in replevin made cognizance under a power of distress, for an annuity granted by *G. T.* to *H.* in Sept. 1806, and the plaintiff pleaded that previously, viz. in May, 1806, said *G. T.* for securing another annuity, and in consideration of 3,000*l.* granted, bargained, sold and demised the premises in White Acre to *F.* for 99 years; this was held no bar, without alleging entry by *F.*, so as to make the demise for 99 years operate and pass that term as a lease at common law, or that *F.* elected that the deed should enure by way of bargain and sale. (f) Deeds are to be construed and be given effect to, if possible, so as to effectuate the intent of the parties, (g) and where a double purpose is intended, and the words are large enough, such double purpose may be carried into effect; as where the same lease and release were held to pass not only a reversion in fee, but also a term out of which a shorter term had been carved, so as to entitle the vendee to receive the improved rent payable by the sub-lessee, and *not* to merge the intermediate term in the reversion in fee. (h) In *pleading* a deed containing several words, and which might operate various ways, the pleader should, when the sense and legal operation is clear, state such operation accordingly, (i) but when the legal opera-

(b) *Ante*, as to the double operation, and note, 151, 152; 1 Preston on Abstracts, 93.

(c) Shep. T. 83; 8 Bing. 106.

(d) 2 Coke, 35, b.

(e) 8 Bing. 106.

(f) 8 Bing. 94.

(g) Shep. T. 87; Willes, 327.

(h) 7 Bing. 761.

(i) See 2 Saund. 976; 1 Chit. Pl. 334 to 336.

tion is uncertain, then it seems to be the safer course to state that part of the deed verbatim. (k) In the latter case, however, it is necessary to aver such facts as were essential to completely pass the legal interest, as an entry of the lessee, or his election that the lease should operate as a bargain and sale. (l)

To constitute a deed, it must have been *delivered* as such; (m) but a *signature* is not essential, unless in cases under the statute against frauds, and in deeds executed under powers; (n) and a release, to be effectual, need not be *signed* as well as sealed. (o)

In a conveyance of corporeal or incorporeal property, the *estate* or interest passes though a trustee do not execute, or only one of them; for it is a legal *inference* that all deeds, whether deriving their effect from the common law or the statute of uses, do, immediately upon their execution by the grantors, divest the estate out of them, and vest or put it in the party to whom the conveyance is made, though in his absence and without his notice, till some disagreement to such estate appear. (p) If, however, neither trustee executed or assented, but dissented, it might be otherwise; (q) and if a debtor, with a view to delay an execution creditor, or his creditors in general, were to execute such a conveyance, and the grantee do not in fact accept the benefit of the conveyance, it should seem that the same might be treated as inoperative; and in such case no formal disclaimer by deed would be necessary, though where one trustee accepts, and the other not, disclaimer by *deed* might be advisable. (r) And it was on these principles held that where an insolvent, by a composition deed, conveyed to four trustees, upon trust to sell and apply the proceeds rateably in discharge of his debts amongst all his creditors who should execute the deed, provided that the trustees and creditors should, on a named day, make proof of their debts, if required, and *execute that deed*, and the creditors thereby, as a release of their debts, covenanted not to implead the insolvent, and the deed was executed by only two of the trustees, it was held that the deed was not therefore void, and that the debt of a trustee who had executed it was thereby extinguished, and that he could not sue out a commission of bankruptcy, the property being vested in the two trustees. (s) A conveyance, like other

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Signature and sealing of the parties, and consequences of all grantors or parties not executing.

(k) Per Abbott, C. J. and Bayley, J. in 3 B. & Ald. 69, 70; 1 Bar. & C. 358.

(l) 8 Bing. 92, 106.

(m) 2 East, 257; Com. Dig. Fait, G. As to *escrow*, see 6 Taunt. 12, *infra*, 304, n.

(n) 17 Ves. J. 459; Com. Dig. Fait, B. 1.

(o) *Taunton v. Peplea*, 6 Mad. Rep. continued by Geldart.

(p) 4 Cruise, 12; Gilb. Uses, 224, 505; and see reasons, Com. Dig. Fait, G. ed. by Hammond; 2 Vent. 201; 3 Mod. 296.

(q) *Small v. Marwood*, 9 Bar. & Cres. 300; 4 Ves. 97.

(r) As in 4 Ves. 97; 9 Bar. & Cres. 307 to 309; and see 3 Bar. & Ald. 31, as to disclaimer by *deed*.

(s) 9 Bar. & Cres. 300; 4 Ves. 97.

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Consequences
of mistakes and
alterations.

deeds, may be delivered as an *escrow*, but the bargainee cannot be divested of the estate if he afterwards duly perform his part. (t)

Although any material alteration in a deed, without a party's concurrence and after it has been executed, will invalidate the deed, and preclude any person from suing him thereupon, (u) and also render a fresh stamp necessary; yet, as far as respects the *transfer of estates*, or interests in *real* property or chattels real, it equally passes as if there had been no alteration, and remains in its former state; and therefore, where a deed of conveyance, under which the lessor of the plaintiff claimed title to certain soil, in an action of ejectment, was proved after it had been executed to have been altered in a material part, it was held that although the deed was thereby rendered wholly inoperative and void, yet that as the estate which originally passed by it *remained vested*, the deed ought to be admitted in evidence. (v) So the filling up the blanks in a deed after it has been executed by the conveying party will not prevent the estate from passing. (x) So where by mistake a conveyance had been executed to certain uses therein expressed, and which were afterwards by another deed revoked, and different uses declared by another deed, the latter was held inoperative, because the estates were already vested by the first deed; and it was held to be necessary to resort to a Court of Equity to compel the parties in whom the interest had vested to convey such interests to the new uses. (y) And the defacing or cancelling a deed will not in any case divest property which has once passed; (z) and this is one reason why mere cancelling a lease will not operate as a surrender. (z)

Custody of abstract and drafts of deeds.

Whilst the contract of sale or mortgage is open and proceeding, the *abstract*, though prepared by and at the expense of the vendor, is the property of the purchaser, and he might maintain trover for it against the vendor; but after the sale has been broken off, it, as well as any opinion thereon, is the

(t) 6 Taunt. 12; and see 2 Ves. & B. 148; 9 East, 360.

(u) Com. Dig. Fait.; and see 1 Bar. & Cres. 682, as to the effect of alterations at common law; and under stamp act in general see Chitty on Bills.

(v) 4 B. & Ald. 675; 2 Bla. C. 308, n. 25; and see per Holroyd, J. in 3 Stark. Rep. 60, 61, note. In 4 Bar. & Ald. 675, Holroyd, J. stated that to be the rule of law, and that a most material alteration, after the principal conveying party of the legal interest had executed, but before the other parties executed, did

not prevent the deed from passing the estate; and Lord Tenterden and Bayley and Littledale, J. concurred. But see distinctions in 2 Tho. Co. Lit. 233, note 13, as to fraudulent alterations by a party to whom a conveyance has been made.

(x) 5 Bing. 368; 2 Moore & P. 663, S. C.

(y) 3 Taunt. 342, 376; 3 Russ. 399.

(z) 2 H. Bla. 263; 4 Bar. & Ald. 675; and see 1 Bar. & Cres. 682, as to breaking off the seal of one of several parties.

property of the vendor, for otherwise his title might, at any indefinite time, be exposed to strangers; (a) and, for the same reason, no copy can in that case be kept by the purchaser. (a)

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The *drafts* of conveyances and *deeds* prepared at the expense of the purchaser belong to him and not to his attorney, unless he have a lien, and then only until it has been satisfied. (b)

At present the necessity for *registering* conveyances and incumbrances on estates is confined to particular counties, as Middlesex, certain parts of Yorkshire, and Kingston-upon-Hull. (c) It would be beyond our present purpose to discuss the expediency of extending the local provisions to the whole of the United Kingdom. It should seem essential to prevent a *second* charge, for no indictment for fraud in obtaining money by a second transfer or mortgage, concealing a prior incumbrance and even covenanting absolutely, is sustainable. (d)

Registry of
deeds, and
notice thereof.

We have seen that the statute against frauds now requires a *writing signed* in all cases, though at common law a *parol* contract of sale accompanied with livery was valid; (e) the statute however neither at law nor in equity makes any difference in *pleading* a feoffment or other writing whatever, either in a declaration (f) or bill in equity. (g)

Thirdly. The several sorts of deeds or modes of conveyance, charge or license, in general.

It has always been necessary to have a *grant* or demise under *seal* to pass any *interest* in *incorporeal* things lying in grant and not in livery; (h) and a *parol* license could not at common law, still less since the statute against frauds, pass any *interest* in any thing *incorporeal*; (h) and therefore it has been held that in case of a lease for a term of years of *tithes*, (i) or of a *several fishery* in an arm of the sea, that not being a territorial possession, (k) will not, without instrument under seal, vest any legal interest in the grantee. So where a rector demised his *tithe* by instrument not under seal, it was held that the lessee could not be deemed the legal owner or occupier so as to be rateable to the poor, and that therefore the lessor must be considered to be still the owner and occupier. (l)

First. When a deed is necessary.

So no *freehold* interest in *land* or other corporeal property,

(a) 2 Taunt. 276, 278; Sugd. V. & P. 386, 387.

(b) 7 Bar. & Cres. 528.

(c) Sugd. V. & P. 8th ed. 693, 484, and Index, tit. Register; 2 Bla. C. 343, 344.

(d) *Rex v. Codrington*, 1 Car. & P. 661. As to clandestine mortgages, 4 & 5 W. 3, c. 16; Chit. Col. Stat. 389, and notes; and see 5 B. & Ald. 142.

(e) *Ante*, 292, 293.

(f) 1 Saund. 211, note 2; 276, note 1, 2; 1 Chit. Pl. 254, 332; but *quere* in a plea, Id. *ibid.*; Raym. 450; Steph. 2 ed. 418, 419.

(g) 1 Sim. & Stu. 543.

(h) 7 Bing. 687, 691; 5 B. & Cres. 221, 875; 8 Id. 293; 9 Id. 479; 4 Man. & Ryl. 427; *ante*, 220.

(i) 9 B. & Cres. 479.

(k) 5 Id. 875.

(l) 9 Id. 479; *ante*, 220.

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as for the term of life, can be effectually created without deed; (m) and therefore it was held that a demise from year to year, determinable only at the option of the tenant, was void, because it amounted to a lease for his life, which, being a freehold interest, could not pass without deed. (n) And on the same ground it was held that a parol license, though for adequate consideration, by the rector to a person to erect a vault, and that the party shall have the sole right of burying therein, is inoperative for want of a deed, and revocable at pleasure; so that the latter could not sue the former for introducing the body of another person into the vault. (o)

Another rule is, that no *common law* conveyance, as a feoffment, can pass a freehold estate to *commence in futuro*, unless by remainder or reversion. Thus a common law conveyance to B. to hold to him and his heirs from Michaelmas next, or from the end of three years, is void; though such a conveyance to hold immediately to A. for the term of three years, and from the expiration of that time to B. for ever, then the conveyance will operate accordingly. (p) But deeds operating under the statute of uses, such as bargain and sale, covenant to stand seised, or a conveyance to uses, or even a devise, may give an estate of freehold to commence *in futuro*; as a *bargain and sale* to A. and his heirs from and after Michaelmas day now next ensuing, is good, and the use in the mean time results to the bargainor or to his heir. (q)

Another rule is, that no *reversion*, even after a tenancy from year to year, can pass without deed. (r)

We may here notice another general rule, that conveyances to uses are to be construed the same as common law conveyances. (s)

We shall, when considering parol and other *licenses*, find what exceptions have been allowed in their favour from these rules. (t) In the instances where a deed is essential to create an interest or continue a right, we shall observe that the instrument, however imperfect, will, until countermanded, so far operate as a license as at least to render what the party *has done* under it lawful or excusable; and perhaps, if *suddenly* prohibited from continuing to enjoy the property or easement, he would be entitled to emblements.

(m) 8 East, 167; 7 Bing. 688.

(n) 8 East, 167.

(o) 5 B. & Cres. 221, 875; 8 Id. 288, 293; 9 Id. 479; 8 East, 167; 7 Bing. 687, 691.

(p) 2 Bla. C. 165.

(q) 2 Prest. Conv. 157; 1 Saund. Uses & Trusts, 128; 2 Id. 98.

(r) 7 B. & Cres. 243.

(s) Wills, 160.

(t) Post, 336, 337, tit. "Licenses."

With respect to the choice of the particular mode of conveyance or *kind* of deed, there are no certain general rules to be followed by conveyancers, but it must in each particular instance depend upon the peculiar circumstances, and more especially with reference to the nature of the subject-matter of the conveyance and of the title of the party conveying, and whether he has the legal or equitable estate, and whether it is in possession, remainder, or reversion, and whether the interest in it be vested or contingent. In treating of the several conveyances we shall have occasion to consider their propriety as connected with many of these facts.

The same modes of conveyance are to be adopted to pass an estate by way of *mortgage* or in *settlement* as if it were an *absolute* conveyance, with the exception of the difference in mortgage deeds of provisos for redemption, and covenants for repayment of money advanced, and for title, the latter of which are more general, and not limited to the act or omission of the grantor.

In conveyances of *equitable* interests or of equities of redemption of mortgages in fee, (u) subject to the prior charge, the difference arises principally from the circumstance of the legal estate not being in the party conveying, and the rule that a person cannot be seised of an equity to a use. Where the equitable interest is intended to be conveyed to the party in *possession*, in whom the legal estate is or is supposed to be vested, a release alone is sufficient, operating at common law, or by mere contract or grant; but where such interest is to be transferred to a *stranger*, the proper and formal mode of effecting such object would be either by assignment, or grant, or by devise. Such an interest cannot be conveyed by feoffment or bargain and sale, nor, strictly speaking, by lease and release. But both in this and the former case it is most usual in practice to adopt the conveyance by *lease and release*, for this reason, that in case there should be any freehold estate or interest left in the mortgagor, then the bargain and sale or lease for a year would operate on such estate, and with the release pass that also; and if there should not be, then the release would operate as a common release to pass the equity. But in the latter case, of a conveyance of the equity to a stranger by lease and release, it would, it is apprehended, be advisable, after the word release (in the latter deed), to superadd words of assignment, so as to give a corresponding double operation.

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Secondly. Of the general rules influencing the choice of a particular mode of conveyance.

(u) An equity of redemption on a mortgage for years is like a reversion in any other person, to be conveyed as any other freehold expectant on a term, whether by lease or otherwise; 7 Bar. & Cres. 243.

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1. Common Law Conveyances.—The principal conveyances at common law were by feoffment and grant; the former applicable to corporeal, the latter to incorporeal property. With respect to corporeal property, the leading feature which distinguishes the feoffment or conveyances at common law from those which derive their effect from the statute of uses, is this, that in conveying by feoffment, the principal and most material fact to be attended to is the actual delivery of seisin or possession in fact, by the party selling to the party buying, which must be done either by the parties themselves in person, or by some person duly authorized by regular power of attorney, consequently rendering it necessary that the parties or their agents should be actually present upon the land sold and intended to be conveyed. But in respect of those conveyances the operation of which depends upon the statute of uses, it is quite different, for it is not necessary that either of the parties, or any person by their authority, should be upon the land, or should ever have seen the property which forms the subject-matter of the conveyance: and thus an estate in Yorkshire, of ever so great value, may be conveyed by one party to another in London, or at any other great distance. (x)

1. Feoffment.
(y)

1. A *Feoffment* with livery of seisin, excepting from the inconvenience of livery of seisin, is the best mode of conveying real property corporeal of small value, and the title to which is merely long possession exceeding twenty years, or is shown by a clear lineal descent from grandfather to father, and from father to son, and which is not encumbered by outstanding terms, and of which the vendor himself being in possession may readily, in the presence of several witnesses, deliver seisin to the purchaser. And if a tenant for years and not for life be in possession, the lessor may, with the *consent* of the tenant, convey the fee by feoffment and livery of seisin. (z) And it should seem, that when there is an outstanding term, the fee may nevertheless be conveyed by feoffment, and the term by distinct assignment to a trustee. (a) A feoffment by *deed* to a near relation and his heirs, but without livery of seisin, will be construed and given effect to as a covenant to stand seised. (b)

(x) See 2 Sand. on Uses and Trusts, a work which cannot be too deeply studied.

(y) See in general Com. Dig. Feoffment; 2 Bla. C. 309 to 327; Tho. Co. Lit. Feoffment, and see form, 2 Bla. C. Appendix.

(z) Watkins' Conv. 161; and see 7 Bar.

& Cres. 247, 248; 2 Bla. Com. 315; post, §18, n. (g), Surrender.

(a) 2 Scho. & Lef. 73; and 3 Bar. & Cres. 383; Sugd. V. & P. 274, note I.

(b) 2 Ves. Jun. 226; 4 Bro. C. C. 353; 1 Vern. 40, 141.

But the trouble of the vendor attending on the premises to deliver seisin, and the risk of being unable to prove livery of seisin at a future time, and the circumstance of no expense being saved on the stamp, generally induce conveyancers to prefer a conveyance by lease and release, which contains words, and is capable of operating in various ways in favour of the purchaser. Where, however, a deed of feoffment has been followed by possession, a jury ought to presume the livery of seisin to have been made. (c) In stating a feoffment, whether in a declaration or a plea, it suffices to allege that *A. B.* enfeoffed *C. D.* without alleging livery of seisin. (d)

Though feoffments are not so frequently in use as conveyances under the statute, yet they are frequently adopted, where, by their tortious operation, they may have an effect not to be produced by the latter, as, for instance, in barring or destroying contingent remainders, future uses, and powers, in clearing disseisins, &c., and otherwise in curing defective titles.

2. and 3. *Gifts and Grants* are distinguished only by the term *give* being introduced into the deed when the conveyance is *gratuitous*, and which expresses rather the motive of the party conveying than any particular description of conveyance, for, in other respects, the terms are the same as in any other conveyance, which may equally well operate as and be termed a gift, if it be not for *valuable* consideration. A grant is either by indenture or *deed-poll*, by which the grantor conveys some property, (usually *incorporeal hereditaments*, (f)) such as common of pasture, an advowson, (g) exclusive use of light and air over a man's land, or the use of flowing water, (h) a several fishery in a navigable river, and tithe; interests in which, we have seen, can only be created by instrument under seal, they not being capable of passing by livery of seisin, and lying only in grant. (i) So a deed is essential to create or pass a *freehold right*, as for term of life, in any easement. (k) A grant under seal also is a *proper* conveyance to a stranger without livery of a *reversion*, expectant on the determination of a tenancy for years, or from year to year, and without a lease and release, which are not essential, though generally adopted. (l)

2. and 3. Gifts
and grants. (e)

(c) See 2 Bac. Ab. Feoffment, 648.

(d) 1 Chit. Pl. 253; 2 Saund. 305, note 13; Co. Lit. 303, b.; Cro. Eliz. 401; Cro. Car. 101.

(e) See in general 2 Bla. C. 316, 317; Tho. Co. Lit. Grant; Com. Dig. Grant.

(f) 7 Bing. 691; 5 B. & C. 221, 875, Tithes; 9 Bar. & Cres. 478; 8 Bar. & C. 293.

(g) Com. Dig. Grant.

(h) 7 Bing. 691.

(i) Id. ibid.; ante, 203, 204.

(k) 5 Bar. & Cres. 221; 8 B. & C. 293.

(l) *Doe v. Cole*, 7 Bar. & C. 248, 249; *sed quere* whether, by consent of the tenant in possession, a *feoffment* might not be made to a stranger, Id., Watkins on Convey. 161; *post*, 318, n. (g).

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All lands and *corporeal* hereditaments lie in livery or in grant, and they do not lie in livery when the party intending to convey cannot give immediate possession. When, therefore, lands are in possession even of a tenant from year to year, the landlord cannot strictly (excepting by his consent *(m)*) convey by mere feoffment and livery, for he is only a reversioner, and he may therefore, without lease and release, and by mere deed of grant, convey his reversion, for his estate properly lies in grant. *(n)* Conveyancers prefer a *lease and release* in all cases, because those modes of conveyance operate in all ways, and contain words to pass estates in possession as well as in reversion; *(n)* and another reason for adopting the lease and release is, that there is then no necessity for adducing proof that there was a particular estate or term in existence to make it a remainder.

A grant at common law is an innocent not a tortious conveyance, and passes only such an estate in the property conveyed as the grantor may lawfully have, and consequently will not cause a forfeiture. *(o)*

A *grant* is generally used for the purpose of passing incorporeal hereditaments, which may be also, it is observable, conveyed by surrender, lease and release, and bargain and sale, without the word "grant," and hence it is said that any other words which show an intention to pass the property will be equally efficient: but this must be understood with reference to those conveyances which will, if perfect, pass the same, but not as a grant; and, if there be any defect in them, so that they could not have their ordinary operation, if the subject-matter were corporeal hereditaments, then, if the word "grant" be omitted, they will not operate as such upon incorporeal property intended to pass. *(p)*

But although a grant not under seal does not operate to pass an interest in the cases before noticed, yet it will be equivalent to a *license*, and excuse a trespass done under colour thereof, and before countermand. *(q)*

4. Leases. *(r)*

4. *Leases*. We have already considered the estates or interests for *years*, and from year to year, usually created by leases or demises; *(s)* and we have seen that even the latter is deemed to be an estate for *years*; *(t)* and that, though the lease be for 1000 years, or perpetually renewable, yet it is, in legal estima-

(m) *Ante*, 309; *post*, 318, n. *(g)*.

(n) *Doc v. Cole*, 7 B. & Cres. 243, where see form of deed given effect to.

(o) *Ante*, 243 to 287.

(p) See 2 Sand. Uses and Trusts, 40.

(q) 5 B. & Cres. 221.

(r) See in general 2 Bla. C. and notes, 317 to 323; Bac. Abr. tit. Leases.

(s) *Ante*, 254, 255.

(t) 1 Campb. 317; 7 B. & Cres. 246.

tion, not strictly *real* property, though certainly an interest therein, but is *personal* estate for most purposes, (*u*) though, as it is connected with land, it gives a right to vote for a county member of parliament. (*v*)

A lease for *years* of *corporeal* real property, though usually sealed, need not, even since the statute against frauds, (*x*) be under seal, though it be for a long term of years, (*y*) and, indeed, for not exceeding three years, might still be by parol. (*z*) If the instrument be signed, and contain words of immediate demise, although it has prospective terms of granting a more formal lease at a future period, it will operate immediately as a lease, and must be stamped as such. (*a*) The stamp is to be upon the sum *expressed* in the lease, without regard to what may have been really paid, or agreed to be paid. (*b*) To perfect the interest of a lessee for years of corporeal property, it must be alleged in pleading, and proved in fact, that he *entered*, or that he elected to take, as if the lease operated as a bargain and sale under the statute of uses; (*c*) or he will have only an *interesse termini*, which, however, will not merge in an estate for life, unless the owner of the latter have possession. (*d*)

When a lease is granted under and in pursuance of a leasing power by a tenant for life, there is not to be upon his death any apportionment of the rent, but the succeeding owner is entitled to the whole of the accruing rent, (*e*) and he may sue for the same and for other breaches of covenant, as if he were strictly the assignee of the reversion. (*f*) With respect to what shall be considered an *under-lease*, and not an assignment, it has been held, that if a party having a term which expired on 11 November 1826, let the premises verbally from 11 September to 11 November in that year, for 270*l.* payable *immediately*, this is a sufficient legal parol demise, and not an assignment requiring a writing under the statute against frauds, 29 Car. 2, c. 3, sect. 4; but that being a demise of the *whole* of the interest, the lessor could not distrain; (*g*) and where there has been a lease from *G.*, the owner in fee-simple, to *A.*, and then a sub-lease by *A.* to *B.* for a shorter term, at an improved rent, *A.*'s *grant* to *G.*, the reversion of the sub-lease, and the benefit of the improved

(*u*) *Ante*, 84, n. (*a*), 145, n. (*a*); 2 Bla. C. 386, 433.

(*v*) *Ante*, 264.

(*x*) *Ante*, 292, 293.

(*y*) 1 T. R. 735; 12 East, 168.

(*z*) *Ante*, 292, 293.

(*a*) 1 T. R. 735; 12 East, 168, what amounts to a lease, or only an agreement, *ante*, 254, 255.

(*b*) 10 B. & C. 673; 3 Dowl. & R. 186.

(*c*) 8 Bing. 99.

(*d*) 5 B. & Cres. 111.

(*e*) 1 Swanst. 337; 2 Saund. R. 288, note 2; 10 Ves. 66. The 11 Geo. 2, c. 19, s. 15, when applicable, is defective in not giving any remedy by *distress*.

(*f*) 3 M. & S. 382.

(*g*) 5 Bing. 24; 2 Moore & P. 57, S.C.

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rent, will not merge or prejudice the first lease, so as to preclude *G.* from suing *B.* for the improved rent; and if *G.*, by lease and release, convey the premises and reversion to *H.* in fee, by way of mortgage, the latter may sue *B.* in covenant for the improved rent. (*h*)

We have seen the necessity for inserting in leases all proper express stipulations, as well on the part of the lessee as of the lessor; (*i*) and as the destruction of a demised house by fire will not suspend the tenant's liability to pay rent, although the lessor may have received insurance money, unless expressly provided otherwise, leases should contain express covenants in that respect. (*j*)

A lease for *years* of *incorporeal* property must always be *under seal*, or it will operate merely as a license, as of tithe, (*k*) or of a several fishery in an arm of the sea or navigable river. (*l*)

So a lease to create a *freehold* interest, as for term of life, must be under seal, or it will be wholly inoperative, as in the instance before mentioned of a demise from year to year, determinable only at will of lessee, who thereby would, in effect, take an estate for his life. (*m*)

5. Exchange. (*n*) An *Exchange* is a reciprocal grant of *equal* interests or estates, and qualities, the one in consideration of the other; and the word *exchange* is essential in such mode of conveyance. (*o*) But the estates need *not* be of equal quality, if of equal quantity, (*n*) nor of equal value, and the stamp act 55 Geo. 3, c. 184, expressly subjects only the *money* paid for *equality* of exchange to the *ad valorem* duty; (*p*) and an exchange is not a *conveyance* under that act, so as to subject the value of the estate, but only the *money* paid for equality to that duty. (*q*) Upon a conveyance strictly of exchange, it was essential that actual entries should be made on the properties exchanged on both sides, and if either died before such entries, the exchange was void for want of notoriety, (*r*) for which reason Mr. Butler has observed, that an exchange by lease and release is to be preferred, because in that case the statute executes the possession instantly upon execution of the deeds. (*s*)

(*h*) 7 Bing. 755.

(*i*) *Ante*, 118 to 120.

(*j*) *Leeds v. Cheetham*, 1 Sim. R. 146.

(*k*) 9 B. & Cres. 479; 4 Man. & R. 434; 5 B. & Cres. 875; 7 Bing. 691.

(*l*) 5 B. & Cres. 875.

(*m*) *Ante*, 306, note (*m*); 8 East, 167.

(*n*) See in general, 2 Bla. Com. 323; see Lofft, 416; 2 Bla. Rep. 936; 3 Wils. 468; 7 B. & Cres. 399; 2 B. & Cres.

663; 7 Dowl. & R. 185, S. C.; Com. Dig., Exchange.

(*o*) 3 Wils. 458, 485.

(*p*) Schedule, tit. "Conveyance," "Exchange."

(*q*) *Doe v. Preston*, 7 B. & Cres. 392.

(*r*) Co. Lit. 50.

(*s*) Co. Lit. 271, b. note (*l*), Mr. Butler's note.

An exchange can properly be only between two parties, though the number of persons is immaterial.^(t) In an exchange, properly so called, the word "exchange" only is the operative and indispensable word, and implies a warranty. Where an exchange is effected by lease and release, there are two operative parts, by the first of which *A.* in consideration of the conveyance after made in exchange by *B.* to *A.*, releases &c. to *B.*; and by the second, *B.*, in consideration of the conveyance before made in exchange by *A.* to *B.*, releases &c. to *A.* There is one great difficulty attending exchanges, that each party, in making out his title to the lands which he takes in exchange, is required to show the title not only to the lands or other property *taken*, but also to that *given* in exchange. From the great difficulty and expense attending such investigation, it may be a subject worthy the consideration of both parties, whether it would not be better to have a distinct conveyance from each to the other of the properties given and taken in exchange, in consideration of a sum of money expressed in the deed, (about the value of the same,) upon which an *ad valorem* stamp will be payable, but the expense of which will, it is apprehended, in most cases, be found to be the least; or at all events each property will thereby be afterwards more marketable.

Partition is the mode by which coparceners, joint tenants, and tenants in common divide their interests, so that each may have a separate and distinct interest in certain parts of the property, over which, before, all interests extended. This must, since the statute against frauds, be effected by *deed*.^(v) Each joint tenant being seised of the whole, livery of seisin was never necessary in this case.^(w) A partition is now usually effected by the intervention or means of a *third* party, to whom the property is limited or conveyed in the first instance. When the property is of such a nature as to be capable of being limited to a use, it may be effected by one instrument conveying to a trustee all the property, to the use of each party separately of such portion of it as it is intended he should take in severalty. Where the estate is leasehold, or of such a nature that it cannot be limited to an use, the partition must be effected by several deeds. By the first, the whole estate is transferred to a trustee, upon trust to re-transfer to each his

(t) 2 Bla. R. 936; 5 Wils. 468; Lofft, 401, 404.

(u) 2 Bla. C. 323, 324.

(v) 20 Car. 2, c. 2; 2 Bla. C. 324.

(w) Co. Lit. 200, b.; but see 2 Bla. C. 24, *contrd.*

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allotted portion, which re-transfer may be effected either by a deed or several deeds indorsed on the first, though it is advised that in all cases there should be a separate deed for each party, which would be attended with but little more expense, and there should, in all events, be a covenant by the party retaining the principal deed with each party to produce such deed in support of his title.

Then follow certain common law conveyances, which, as Blackstone states, presuppose some other conveyance precedent, and only serve to *enlarge, confirm, alter, restrain, restore, or transfer* the interest granted by the original conveyance, such as *releases, confirmations, and surrenders.* (x)

7. Releases.

With respect to *Releases*, if one joint tenant *assign* to the other, it operates as a release, and must be so pleaded.(y) There must be a privity of estate between the *releasor* and the *releasee*, in the case of a release by way of *enlarging* an estate, but on a release *per mitter le droit*, as to a disseisor, it is otherwise.(z) In the former release there must be an *immediate* remainder or reversion, for if *A.* have a term for years, remainder to *B.* for years, remainder or reversion in fee to *C.*, *C.* cannot pass his interest to *A.* by such release, for want of privity, and on account of the intermediate term in *B.*(a) The several sorts of releases are:—1. By way of enlargement of a prior particular estate; as by conveyance from a remainder-man in fee to the owner of the particular estate. 2. By way of passing an estate; as a release by one joint tenant or co-parcener to the other. 3. By way of passing (that is extinguishing) a right; as a release by a disseisee to a disseisor. 4. By way of extinguishment; as a release by the owner in fee to the grantee of a particular tenant. 5. By way of entry and feoffment; as a release by a disseisee by one of two disseisors. The *first* of these is that species of conveyance which is in most common use, and forms part of the assurance by lease and release, which we shall presently consider; the lease for a year, or bargain and sale, being that part of the conveyance which vests the possession in the bargainee under the statute, and upon which the release operates by way of enlargement of the estate. But this conveyance by release is equally used in those cases in which the possession was *already previously* vested in the party to whom the release is made, without reference to or in contemplation of such release. As if *A.*, the owner in fee, by lease demise lands

(x) 2 Bla. C. 324.

(y) 2 Cruise, 527.

(z) Co. Lit. 274, a., note S.

(a) 2 Bla. C. 324, 325.

(b) Co. Lit. 273, b.

to *B.* for a term of 21 years, with intent merely to create an ordinary tenancy, and *afterwards* the lessee *B.* agrees with *A.* to purchase the fee; in that case *A.* might always, at common law, convey to *B.* such fee by *release*, and without feoffment and actual livery, the tenant *B.* being already in possession under his previous common law lease.

A Confirmation is defined to be an act by which an estate or right *in esse*, otherwise voidable, (but not absolutely void,) is made sure and unavoidable, or whereby a particular estate is increased.^(c) And the words of making such confirmation are, "have given, granted, ratified, approved and *confirmed*." ^(c) Thus if tenant for life leaseth for forty years, and dieth during the term, here the lease for years is voidable by him in reversion; yet if he had *confirmed* the lease *before* the death of the tenant for life, it would no longer be voidable but sure.^(d) When a tenant for life and the remainder-man in fee join in making a lease, it should not be pleaded as the *lease* of both in its *inception*, because, whilst the tenant for life is living, it is only *his* lease, and the confirmation of the remainder-man; but it should be stated that the former *demised*, and that the latter *confirmed*.^(e) The distinction between *void* and *voidable* leases must, in these cases, be kept in view, for if a lease be absolutely void a confirmation would have no operation upon it.^(f) And although generally the acceptance of rent by a person who is entitled to set it aside will confirm it,^(g) yet acceptance of rent by a tenant in tail, on coming into possession, or suffering the tenant to make improvements, is no confirmation of a lease made by a tenant for life, because that was absolutely void at his death.^(h) And where a lease, executed by a tenant for life, in which the reversioner, who was then under age, was named, but the same was not executed by him, was void on the death of the tenant for life, it was held that an execution *afterwards* by the reversioner was too late, and no confirmation of it even so as to subject the lessee to an action of covenant for subsequent breaches;⁽ⁱ⁾ and the receipt of rent by a remainder-man will, in these cases, only create a new tenancy from year to year, requiring notice to quit before pro-

8. Confirmation.

(c) See in general Com. Dig. Confirmation; 2 Bla. C. 325.

(d) Co. Lit. s. 516.

(e) 6 Coke, 14, b., 15, a.; 2 Cases and Opinions, 148, ed. 1791.

(f) Gilb. Ten. 75.

(g) Per Kenyon, C. J. 2 Esp. R. 677.

(h) Bul. N. P. 96; Doe v. Butcher, 1 Dougl. 50; Cowp. 482.

(i) 1 T. R. 86; 7 T. R. 83; 2 Esp. R. 501.

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ceedings in ejectment; (*k*) and where a lease is granted by a tenant for life, who has a leasing power, but such lease was not confirmable, it was held that a recital of the lease in a conveyance afterwards executed by the remainder-man, was no confirmation. (*l*) The operative words of a confirmation are "ratified and confirmed," though it is usual, also, from prudential motives to insert the words, "given and granted also," so that the deed may also have the operation of a new grant.

9. Surrenders.

Surrenders are the rendering back, yielding up, returning, or relinquishing of a particular estate, as for life or years, to him that hath the *immediate* estate in reversion or remainder, and by which such particular estate merges, or is drowned in the larger interest by becoming vested in the same person. (*m*) But if a lessee grant only *part* of his estate to his lessor, whereby a reversion continues in himself, this is not a surrender; as if a lessee for twenty years grant all his estate to his lessor, except one year, month or day, at the end of the term, this is not any surrender, because the lessee hath a reversion. (*n*) Surrenders are either in *fact* or by *operation of law*; we have seen that the former must be, in writing and signed by the surrenderor, but that the latter are expressly excepted from that enactment. (*o*) Surrenders in *fact* must therefore be in writing and signed or will be void, (*p*) or there must be circumstances from which such surrender *in fact* may and ought to be *presumed*. The word *surrender* is usual though not essential. (*q*) Almost any signed note in writing will amount to a sufficient surrender in fact, and therefore where a mortgagee wrote on the mortgage deed, "Received of *A. B.* for principal and interest, and I do release and discharge the within premises from the term of 500 years;" this was holden to be a *sufficient note in writing* and a valid surrender. (*r*) The surrenderee should *re-enter*, but it is not ne-

(*k*) 1 Hen. Bla. 97; 1 Bos. & P. 531, 532; 7 T. R. 83; 10 East, 261; Adams's Eject. 3d ed. 110, 111; *ante*, 266; and *Doe v. Morse*, 1 B. & Adolph. what acceptance by remainder-man of reserved rent, &c. creates a *new* tenancy.

(*l*) 2 Dowl. & R. 716.

(*m*) Co. Lit. 337, b.; and *per* Tindal, C. J. 7 Bing. 757.

(*n*) *Id.* *ibid.*, and therefore where *L.* being seised in fee, demised to *B.* for twenty-one years, from June, 1814, and then *B.* demised to *M.* for the like term, but wanting twenty-one days, and then by deed-poll *B.* granted to *L.* (the first lessor) such sub-lease and the premises and improved rent thereby reserved, to hold to

L. for the term demised to *M.*; and then *L.* by lease and release conveyed all his interest in the premises to the plaintiff in fee by way of mortgage, it was held that such deed-poll from *B.* to *L.* did not surrender or merge the chattel interest in the fee, or suspend the right of the plaintiff to sue *M.* on the covenant in the lease to him; and that the conveyance by lease and release properly included and conveyed the chattel interest. *Burton v. Barclay*, 7 Bing. 745.

(*o*) *Ante*, 293; 29 Car. 2, c. 3, s. 3; 9 B. & Cres. 288.

(*p*) *Id.* *ibid.*

(*q*) Cro. Jac. 169; Wils. 127.

(*r*) 2 Wils. 26.

cessary to aver it in pleading, and it suffices to allege generally that the tenant surrendered his term without even showing that he did so in writing.(s)

The mere *cancelling* a lease, as by tearing off the seals and erasing the names, and verbally declaring the intention to surrender, even in the presence of fifty witnesses, and with the express intention to determine the lease, cannot in law, and against the express terms of the statute, amount to a surrender, and, at least at law, the interest and liability of the lessee will continue, for cancellation is a mode of attempting to put an end to a term which the law does not allow.(t) And though after a lapse of time, coupled with other circumstances, a sufficient surrender may be *presumed* to have been made; yet the mere production of a lease in a cancelled state will not be sufficient to raise the presumption; and therefore where the lease, when produced out of the lessor's possession, appeared to have had the names of the parties torn off, yet this was held not to be a surrender by operation of law, nor *prima facie* evidence of a surrender by deed or note in writing, and that the lease, as so produced, was evidence of the lessee's title.(u) And an acceptance of a surrender in writing is not to be presumed from the circumstances of the same rent having been paid not by the original tenant but a third person.(x)

With respect to the *presumption* of the surrender of long terms of years, created for the purposes of settlement or by way of mortgage, much discussion has arisen when or not such a presumption should prevail.(y) One rule appears to be, that a surrender shall in general only be *presumed in favour* of a party who has proved himself to be *beneficially* entitled, and not *against* such party; nor in favour of a party who proves no right of beneficial enjoyment.(z) But such a presumption may be made *against* as well as for the legal owner, if the justice of the case require; as if a mortgagor set up a term that existed at the time of the mortgage against his own mortgagee, but of which, in honesty, he ought to have secured the benefit to the mortgagee, and not to have reserved it in his own power, as an instrument to defeat his mortgage.(a) One of the *general* grounds of a presumption of this nature is *the existence of a state of things which may most reasonably be*

(s) Cro. Car. 101.

(t) *Roe v. York, Arbp. of*, 6 East, 86; 9 B. & Cres. 288; 296. When a Court of Equity will relieve a tenant, see 2 Vern. 112, *post*, 319, note (o).

(u) *Doe v. Thomas*, 9 B. & Cres. 288.

(x) 1 Stark. R. 96.

(y) See in general Sugd. V. & P. 8 ed. 408 to 417; Adams's Eject. 3d ed. 88, 89; 2 B. & Ald. 710, 782.

(z) *Doe v. Cooke*, 6 Bing. 174, *per* Tindal, C. J.; 2 B. & Cres. 710, 782.

(a) *Per* Abbott, C. J., 2 B. & Cres. 782.

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accounted for by supposing the matter presumed."(b) If no evidence be given of the existence of a term to attend the inheritance for thirty years, and the owner in fee has acted as if it had been surrendered, it was held that the jury might presume that it had been surrendered, the purpose for which the term was created having been long since fulfilled.(c) But if such a term has been recognized in a recent deed, executed within twenty years of the time of trial, it should seem that then a surrender could not in general be presumed.(d) In the case of a plain trust, where the trustees were directed to convey, the jury may presume a conveyance, and consequently a surrender, even within twenty years.(e) But the presumption, like all others, may be rebutted, and the jury ought, upon the whole evidence adduced, not to presume a conveyance or surrender unless they are satisfied that it did take place.(f)

A surrender by *operation of law* takes place where a lessee for life enfeoffs him in reversion in fee; or where the lessee and lessor join in a feoffment; or where a lessee for life or years accepts a *new* lease or demise from the lessor.(g) The acceptance of any new valid term is clearly a surrender by operation of law, the last being inconsistent with the first.(h) So a new agreement by parol, if valid, and *varying* from the first entered into between the parties, may operate as a legal surrender or abandonment of the prior interest.(i) So the verbal acceptance of a new tenant, with the assent of the first, may operate as a surrender of the interest of the first.(k) And if in a tenancy from year to year, created by a parol, the landlord give a parol license or notice to quit, although in the middle of the quarter, and the tenant consent, and the lessor accept possession, the tenancy is thereby surrendered.(l) But in these cases, especially of an irregular notice, the consent of all parties is essential to complete the surrender;(m) and it has been held that an insufficient notice to quit, though accepted, is not a

(b) *Ante*, 317, n. (a); Adams' Eject. 3d ed. 90.

(c) *Bartlett v. Downes*, 5 Dowl. & R. 526; 1 Car. & P. 522, S. C.

(d) 11 East, 478.

(e) 4 T. R. 682.

(f) 5 B. & Ald. 232. In practice the decision of a common jury upon a question of presumption of a surrender, is not the exercise of their *understanding*, but will be regulated by the direction of the judge; and, therefore, the verdict should be set aside upon any misdirection, and not treated as the result of a finding upon facts, unless the judges should think that

they would have come to the same conclusion; and see cases and observations, Sugd. V. & P. 444 to 447, against the doctrine of presuming a surrender of terms, especially when to attend the inheritance.

(g) *Per* Littledale, J., 9 B. & Cres. 298.

(h) Com. Dig. Surrender.

(i) 5 B. & Cres. 269.

(k) 2 B. & Ald. 119.

(l) 5 Taunt. 518.

(m) 2 B. & Ald. 50, 119; 2 Moore, 262; 3 B. & Cres. 478; 1 M'Clel. & Y. 141.

legal surrender. (n) In a Court of Equity, where a lessee for years, having agreed to surrender his lease to the lessor, delivered up the key, which the lessor accepted, but afterwards refused to accept the surrender, it was decreed that the lessee was discharged from the rent. (o) The operative words in a surrender are "*surrendered* and yielded up;" but they are usually *ex abundante cautela* preceded by the words "granted." The word "release," will also operate as a surrender. (p)

We have seen that by the express terms of the statute against frauds every *transfer* of *any* interest in real property must be in writing; and a verbal assignment even of a parol tenancy from year to year is void. (q) An *assignment* is a transfer of the *whole* of a party's interest, and usually of an estate or interest for *years*; whereas if there be a reservation of any part of that interest, even for one day, the instrument is an *under-lease*; and the operation of the two instruments is perfectly distinct, for an assignee of a lease is liable to be sued by the lessor, but not an under-lessee; (s) and though in general when the legal effect of the instrument was *intended* to be an assignment of the whole interest it will so operate and should be so pleaded, yet when otherwise intended, and where there is an improved rent reserved to the grantor, it will for some purposes be construed and given effect to as a lease or demise, so as to enable the lessor to sue in assumpsit or covenant, though the grantor, having no reversion, could not distrain, unless by virtue of an express clause in the nature of a real charge. (t) A chattel real, as a lease for years, may pass by assignment under the general words in a lease and release of the reversion in fee. (u)

With respect to the *liability* of an assignee, he is liable to be sued for the breach of all covenants running with the land, as it is technically termed, that is in general all covenants for the support and protection of the thing demised; (x) and it is immaterial for this purpose whether he have entered or taken possession, (y) or be an absolute assignee, or merely a mortgagee. (z) And in the case of a mere equitable mortgage by

(n) 4 B. & Cres. 922.

(o) *Batchbolt v. Porter*, 2 Vern. 112.

(p) And see *ante*, 316, n. (r), as to what words will suffice.

(q) See in general 4 Cruise's Dig. 160; Com. Dig. Assignment.

(r) 1 Campb. 518.

(s) Dougl. 183; but for wilful waste an under-tenant may be sued, 1 Moore, 100; 6 Taunt. 301; 1 New R. 290.

(t) 2 Moore & P. 57; 5 Bing. 24, S. C.;

1 Stra. 405; 1 T. R. 445, *ante*, 311, Leases.

(u) 7 Bing. 760.

(x) As to what covenants run with the land and bind an assignee, see Platt on Covenants, and 1 Chit. Pl. 5 ed. 55, 56; 2 Chit. R. 608; 2 Hen. B. 133; 5 Co. 16.

(y) See several cases, 1 Chit. Pl. 56, note (a), 5 ed.

(z) *Williams v. Bosanquet*, 1 Brod. & Bing. 238; 3 Moore, 500, S. C.; *Barton v. Barclay*, 7 Bing. 761, 762.

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deposit of a lease, a Court of Equity might compel him to accept an assignment, so as to subject him to complete liability at law. (a)

The assignee of a lease is bound to *protect the lessee*, although the assignment contain no covenant to do so; but when the assignee has executed no covenant the remedy against him must be *assumpsit*. (b) And if an assignee take from a lessee *leasehold* by indenture, *sealed* by the assignee, and indorsed on the lease, *subject* to the rent reserved in the lease, he is liable to be sued in *covenant* for the rent which the lessee has been called upon to pay to the lessor subsequent to the assignment. (c) But an assignee by operation of law, as the assignee of a bankrupt, is not liable, unless he elect to take the benefit of the lease, which is a question of fact occasioning frequent discussion. (d)

But an assignee, unless he be under a covenant to perform covenants, may, as well in equity as at law, *get rid of continuing liability* by purposely assigning over even to a married woman or a pauper; (e) and this, notwithstanding the lease contains a covenant not to assign. (f) Hence it is in general expedient for a lessee, substantially intending to part with his interest, to grant an under-lease, reserving a reversion, and with proper covenants, so as to enable him to distrain or sue, or at least to assign by indenture containing express covenants on the part of the assignee, and restrictive upon him, and stipulating expressly that he and all claiming under him shall perform the covenants in the original lease, and to indemnify against all liability, damages, and costs, and even to pay interest on any money the original lessee may be obliged to pay. In these cases, if the lessee be sued, it is advisable to give the sub-lessee or assignee notice, and require him to indemnify, though such notice is not strictly necessary. (g)

Although an assignment is an assurance most commonly used for the purpose of transferring a *leasehold* estate from lessee to assignee, or from assignee to assignee, yet there are other cases to which an assignment is applicable. Thus *equitable interests* of longer duration than a term, as an equity of redemption

(a) *Lucas v. Comerford*, 3 Bro. C. C. 166; 1 Ves. 235, S. C.

(b) 5 B. & Cres. 589.

(c) 9 Bing. 60.

(d) 7 East, 335; 1 B. & Ald. 593; 1 R. & Mood. 207; Peake's R. 238; 6 G. 4, c. 16, s. 75.

(e) Cases at law, 1 B. & P. 21; Platt, Covenants, 503; in equity, 3 Russ. R. 158; 2 Mad. 330; 2 Atk. 546; 1 Bro. P. C. 516; 8 Ves. 95.

(f) 1 Scho. & L. 310; 8 B. & Cres. 486.

(g) 3 Bar. & Adolp. 407.

in fee, when it is to be transferred to a *stranger*, should be passed by assignment. (*h*)

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11. Defeasance.

11. The last of the common law deeds usually enumerated are *defeazances*, which are defined to be *collateral* deeds, made at the same time as a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created might be defeated. (*i*) These deeds have not unfrequently been used for fraudulent purposes as against third persons or the public, so as to conceal the real transaction; as where grants of rents-charge have been executed to create a qualification to kill game, or other purposes, and then the grantee has at the same time executed a deed of this nature, with the view of preventing him from setting up the grant against the grantor. (*k*) Fraudulent grants, containing an agreement to reconvey or to defeat the estate granted, are expressly declared void, and not to create a qualification to vote for a member of parliament, but the estate is absolutely vested in the person to whom it is so granted, and the parties are subjected to 40% penalty. (*l*) Where a father, on the expected marriage of his son, and to induce a supposition on the part of the father of the intended wife, that the son was beneficially entitled to an estate, conveyed the same to him absolutely, a secret deed, intended to counteract its effect, was held, by a Court of Equity, to be wholly void, as a fraud upon the father and his daughter, and on the marriage contract. (*k*)

To a defeazance there are six requisites, 1st. That it be made by the same species of assurance as the principal instrument. 2d. That it recite or refer to the deed to which it relates. 3d. That it be made between the same persons as are parties to the deed to be defeated. 4th. That where, as in case of feoffment, the estate is executed, it be made at the same time as the principal instrument. 5th. That in case of bonds or other executory instrument, it be made at the same time or subsequent (not previous) to the bond, &c. 6th. That it be made of a thing defeazible.

Though some deeds of defeazance may be made by a *sepa-*

(*h*) *Ante*, 307.

(*i*) 2 Bla. C. 327.

(*k*) When or not such fraudulent deeds are operative, see 2 B. & Ald. 367; 3 Y. & Jer. 168; 2 Jac. & Walk. 391, 565; Chit-

ty's Game L. 2d ed. 58, note (*b*). *Samble*, a Court of Equity will not grant relief to either party, in case of a fraudulent deed, unless the deed itself provide it, *Id. ibid.*

(*l*) 10 Ann. c. 23, s. 1.

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rate instrument, yet such practice is extremely inconvenient, and generally discountenanced. In the case of a warrant of attorney, the defeazance must be on the same piece of paper or parchment as the warrant, (m) and does not require a separate stamp. (n)

Of deeds operating under statute of uses, 27 Hen. 8, c. 10.

Deeds *operating under the statute of uses* are next to be considered. It would be beyond the scope of this undertaking, to examine very particularly the history, provisions, or operation of that statute, (o) and we shall merely state a few *practical rules*, showing when the *legal estate* and interest is transferred, or as technically termed, *executed* and *vested* in the *cestui que trust*, who is also in general *beneficially* interested; or when the legal estate remains, or is only partially executed, and is vested in a person who has no beneficial interest, but is merely a *trustee* for another. The general rule is, that at *law* all legal proceedings (excepting an action of *trespass* against a wrongdoer, who has no title whatever,) must be in the name of the person who has the *legal* interest, as especially in the action of ejectment, and consequently it is of the utmost importance for all legal practitioners to be well able to determine in whom, upon the due construction of deeds or wills, the legal estate is vested. All conveyances to uses in general are to be construed the same as a common law conveyance. (p)

When or not the use is executed, or *converso* when the legal estate remains in a *trustee*.

With respect to what uses are executed by the statute of 7 Hen. 8, c. 10, so as to vest the *legal* interest in a party beneficially interested, or what is a *trust* estate where the use is not executed, there are several rules.

1st. The statute does not affect estates of *copyhold* tenure, because it is against the nature of that tenure that any person should be introduced or interposed without the consent of the lord. (q)

2dly. The statute, speaking only of persons *seised*, does not extend to leases or *terms for years*; as where *A.*, possessed of a lease for years, assigns it to *B.* to the use of *C.*; the statute does not affect this use, and the legal estate will remain

(m) 3 Geo. 4, c. 39, s. 4. See 10 Bar. & C. 500.

(n) 1 New R. 279.

(o) See the principal act, 27 Hen. 8, c. 10; and see in general, Sanders on

Uses and Trusts; Sugden, Gilb. U. & T., 1 Saund. 254, note 6; 2 Saund. Index, Uses and T.; 2 Bla. Com. 328 to 340.

(p) Willes, 180.

(q) Gilb. Ten. 170.

vested in *B.*, and *C.* will only have an equitable interest; and if a term of 1000 *years* be limited to *A.* for the use of or in trust for *B.*, the statute does not execute this use, but leaves it as at common law.^(r) The creation and continuance of such terms has long been a great object in conveyancing, and we have seen when or not a presumption will be allowed of their having been surrendered.^(s)

3dly. When a use is limited upon a use, it is not executed, but the legal estate is vested in him to whom the *first* use is limited, and no further.^(t) As where an estate is conveyed to another in these words, "to *A.* and his heirs, to the use of him and his heirs, in trust for or to the use of *B.* and his heirs, the use is not executed in *B.*, but in *A.*, and the legal estate is vested in *A.* as a trustee.^(u) So where an estate was limited to *A.* to the use of *A.*, to the use of *B.*, it was held that *A.* took the legal estate, and that although he took it by the common law, and not by force of the statute of uses, yet the second use could not be executed by the statute.^(v) So where *E.* made a settlement to the use of himself and his heirs, until his then intended marriage, and afterwards to the use of his wife for life, and after her death to the use of trustees and their heirs, during the life of *E.*, upon trust to permit him to take the profits, remainder to the first and other sons of the marriage, &c. remainder to the use of the heirs of the body of *E.*; it was adjudged that *E.* took only a trust estate for life, for the use to him could not be executed upon the use which was limited to the trustees for his life, and consequently that the legal estate for his life was executed in them by the statute of uses; and the limitation to the heirs of *E.* operated as words of purchase, and created a contingent remainder.^(x)

4thly. When something is to continue to be *done by the trustees*, which render it necessary or expedient for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of a testator, or to pay rates and taxes and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate.^(y) In general the distinction

(r) Poph. 76; Dyer, 369; 2 T. R. 448; 2 Bla. C. 336; 2 Inst. 671.

(s) *Ante*, 317, 318.

(t) Dyer, 155.

(u) Cas. T. Talbot, 138, 139, 164; 2 P. Wms 146; 1 Sand. U. & T. 153.

(v) *Doe v. Passingham*, 6 Bar. & Cres. 305. See the rule stated 1 Sand. 153, that a use cannot be limited to arise out

of the estate of a *cestui que use*, taking the legal estate at the common law.

(x) Carth. 272; Comberb. 312, 313; 1 Ld. Raym. 33; 4 Mod. 380; see also 7 T. R. 342, 438, S. C. 433; 12 Ves. 89.

(y) 3 Bos. & Pul. 178; 2 T. R. 444; 6 T. R. 213; 8 East, 248; 9 East, 1; 12 East, 455; 4 Taunt. 772. See instances 2 Bla. Com. 335, note 60.

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under the latter rule is, that where the limitation is to trustees and their heirs, in trust for *them* to receive and pay over the profits, the legal estate is vested and continues in them, so as to enable them effectually to perform the declared object; but that where the trust is to *permit and suffer* the party beneficially interested to *receive* for his use, then the legal estate may be executed and vested in the latter. (z) Where however the person beneficially interested is a married woman, then to prevent loss from the interference of the husband, the construction of the terms of the trust is in general in favour of the trustees retaining the legal interest. (a)

The following general rules are laid down by a very eminent conveyancer concerning *equitable* estates : (b) 1st. The *cestui que trust* is the beneficial owner in equity, and has an equitable estate. 2dly. This estate gives the like power of alienation in equity as may be rightfully exercised at law by the owner of a like legal estate. 3dly. The like limitations may be made of the equitable as may be made of the legal ownership. 4thly. The limitations of trust or equitable estates receive the like construction as if they were limitations of the legal estate. 5thly. Whenever a limitation of an use would be good by the rules of law, a like limitation of the trust or equitable ownership will be valid in equity. 6thly. Any limitations which, as tending to a perpetuity, would be void if it were of an use, will be void if it be of the trust or equitable ownership. 7thly. Of equitable estates there cannot, in a technical sense, be any disseisin; and therefore, notwithstanding adverse possession, there may be transfers or dispositions by the equitable owner either by deed or will. (b)

The several deeds operating and having their principal legal efficacy under the statute, are these, 12thly, a covenant to stand seised to uses; 13thly, a bargain and sale; 14thly, a lease and release; and which, especially the latter, have long become and continue to be the principal modes of conveyance, where the grantor has a freehold interest.

12. Covenant
to stand seised
to uses. (c)

12. *Covenant to stand seised to uses.* This is a mode of conveyance under seal, by which a person, at the time of making it, being actually seised of freehold property *corporeal*, cove-

(z) 2 Taunt. 109; 5 East, 163; 7 T. R. 433; 8 T. R. 597. And see other cases, 2 Bla. Com. 336, note 60; 2 Sand. U. & T. 206.

(a) 7 T. R. 652.

(b) 1 Prest. Ab. 144; and see post, division VII. as to the distinctions between *legal* and *equitable* estates.

(c) See in general 2 Bla. C. 338.

nants, in consideration of blood or marriage, that he will stand seised of the same to the use of his child, wife or kinsman, for life, in tail, or in fee. Here the statute of uses at once executes the estate, although the party in whose favour the deed has been made is never actually placed in corporeal possession, (d) and such a covenant is good, though the use be of freehold to commence *in futuro*; though we have seen that such an estate could not in general be created by a common law conveyance. (e) Such a use can only be in favour of a relation, and if declared to be for the use of a relation and a stranger, it will operate exclusively in favour of the former; (f) and even if there be any limitation to trustees, in trust for a blood relation, such uses will be void for want of the consideration of blood in the *trustees*, so strictly is this rule construed, (g) and this is one reason why this mode of conveyance is fallen into disuse. (h) The degree of relationship is not clearly defined to which a use may be limited, but it seems that at all events it may be to a *cousin*, (i) and there seems no reason why it should not extend to any *blood relation*, (j) but a use will not arise in favour of an *illegitimate child*, who is considered as *filius nullius*. (k) The usual words in a deed of this nature, are "covenant to stand seised to the use, &c." but these are not essential, for in this as well as in a bargain and sale, the instrument is to be distinguished rather by the nature of the instrument than by express words, so that if these express words be introduced in a deed in favour of a *stranger*, it will not operate as a covenant to stand seised, but it will, if duly inrolled within six months as a bargain and sale, operate as the latter, although the words bargain and sale be not introduced; (l) and on the other hand, a deed in favour of a near relative, although intended as a bargain and sale, if defective for the latter purpose, as on account of its not stating a pecuniary consideration, may operate as a covenant to stand seised, provided the deed state, as it always should, the near relationship. (m) So indentures of lease and release, the latter creating a fee tail to commence *in futuro*, although void as a release, were held to be valid as a deed of covenant to stand seised to uses; (n) and a deed which may

(d) 2 Bla. C. 338.

(e) 4 Taunt. 20.

(f) 2 Rol. Ab. 784, pl. 2, and 4; Cro. Jac. 181.

(g) See 2 Sand. U. & T. 2.

(h) Id. 82.

(i) 7 Co. 40.

(j) Who a relation in this sense, see

ante, 109, 110, n. (u).

(k) 2 Rol. Ab. 783; Co. Lit. 123, n. 8; 2 Sand. U. & T. 82.

(l) 7 Coke, 40, b.; 2 Lev. 10; 1 Prest. Conv. 38.

(m) 2 Saund. 96, b., 97; 2 Wils. 22.

(n) 2 Wils. 75; 2 Keny. 239.

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take effect as a covenant to stand seised to uses is good, although the use is to arise after the decease of the covenantor, and although he do not affect thereby to dispose of the freehold in the mean time, and although the use is to arise at a period which may not happen until long after the covenantor's death, the use resulting in the mean time. (o) There are certain rules for pleading the operation of such a conveyance. (p)

13. Bargain and
sale. (q)

13. A bargain and sale of *real* property (r) is a contract under seal for *pecuniary* consideration and obtains its origin thus: (s) when the bargainor, for a sum of *money* paid down, bargained for or contracted to convey the same to the bargainee, and did so either without any conveyance or by one which was defective for want of livery of *seisin*, the bargainor, under the construction of the Court of Chancery, thereby became instantly a trustee for the bargainee, and an equitable interest in land thus became transferable by a formal conveyance by this name. Then came the statute of uses, which executes the use or legal estate in possession in the bargainee, without his actually taking possession and without livery. At first, after the statute of uses, this sufficed, but in the same session the 27 Hen. 8, c. 16, (r) was passed, in order to retain some form of notoriety in the transfer of estates, requiring *an inrolment within six months* after the date in one of the courts at Westminster, or with the *custos rotulorum* of the county, or the same will be void. And this regulation is construed strictly, for although the indenture be antedated, yet the six months are to be calculated from the date. (t) The statute of inrolment requires that the bargain and sale shall be made by writing indented, sealed and inrolled, &c. but mentions those cases only "whereby any estate of inheritance or freehold shall be made." It does not, therefore, extend to a bargain and sale for a year or years, and it is under this omission that the usual bargain and sale or lease for a year, which precedes the release and forms with it the ordinary conveyance by lease and release, is effected. We have just seen when a defective bargain and sale may operate as a covenant to stand seised; (u) and on the other hand

(o) 4 Taunt. 20.

(p) How a covenant to stand seised is to be pleaded, 3 Salk. 306; 2 Ves. sen. 253; 2 Saund. 97, b.; Lutw. 1267; 3 Lev. 370; 2 Chitty on Pleading, 5 ed. 576.

(q) See in general 2 Prest. Conv. 212; 1 Saund. 251, n. 2; 2 Bla. C. 338. How to be pleaded, 2 Chitty's Pl. 6 ed. 577.

(r) The statute 27 Hen. 8, c. 16, does not extend to interests less than freehold nor to assignments of terms for years.

(s) See 2 Sand. U. & T. 42.

(t) 11 East's Rep. 429.

(u) *Ante*, 325, note (m); 2 Saund. 96, b., 97.

there are cases in which a tenant under a lease for a term of years may elect to treat the same as a bargain and sale. (x)

From the definition which has been just given of a bargain and sale, it may be inferred that a *pecuniary* consideration is necessary to raise a use under this conveyance, but the amount is not now material, even the nominal consideration expressed in the ordinary bargain and sale for a year on which to ground a release being sufficient.

"Bargain and sale," though the usual operative words, are not absolutely essential, for any other words will be sufficient, and we have seen that a covenant to stand seised, if made for pecuniary consideration, may take effect as a bargain and sale, (y) that is if it be inrolled.

So in the creation of a term, the words *grant and demise* will do, but it is better where the parties are desirous that the instrument should operate under the statute, as where it is to precede a release, to use the proper technical operative words "*bargain and sale*."

14. A conveyance by *lease and release* is now by far the most frequent mode of transferring any *freehold* interest, whether absolutely or by way of mortgage, on account of its capacity to operate in various ways, and on all *possible* contingencies; (z) and that it supplies the place of livery of *seisin*, and consequently avoids the necessity for the grantor and grantee going upon the land to deliver and receive the actual possession, and that this conveyance will equally operate, although, perhaps, neither party has ever been upon or ever seen the estate; and on account of its operation being equivalent, in this respect, to a feoffment, it has been said to amount to a feoffment. (a) But the operation of a feoffment and of a lease and release is, in most other respects, very different. A feoffment may be a tortious conveyance creating a fee, even though made by the owner of a particular estate, and therefore incurring a forfeiture; but a lease and release form but an innocent conveyance, which transfers only such an interest as the party conveying actually has, and no more, and may be for this reason used by any one without forfeiting his estate. (b) The mode of effecting this conveyance (at least when the transferee is not already in possession under an actual lease)

(x) *Ante*, 254, note (k).

(y) *Ante*, 325, note (l); 7 Rep. 40.

(z) See its different operation, 2 Saund. 96, b., 97; Cowp. 600; *ante*, 314. A re-

lease may operate as a new grant, Cowp. 600; 2 Bro. P. C. 48; 9 J. B. Moore, 46.

(a) Cro. Jac. 604.

(b) *Ante*, 287, note (s).

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is to prepare a lease for a year (then usually termed a bargain and sale for a year) of the land, dated the day before the intended release, and by which, when executed, the use of that term is executed, so that such lessee is supposed to be in actual possession, at least sufficiently so as to accept a release in fee or otherwise, dated on the day after, and then upon the latter day both the deeds are executed at the same instant, and the statute of uses is considered to have transferred the possession to the releasee and completely vests the estate and possession in the bargainee, to whom the legal estate has been transferred. (c) A chattel real, as a lease for years, or a remainder for years after a term, may be conveyed and pass together with a reversion in fee by the same general words in an ordinary lease and release. (d)

15. Deeds to lead or declare uses, and 16. deeds of revocation of uses, and 17. Deeds to charge and discharge incumbrances on land.

15. Then are usually enumerated, deeds *to lead or declare the uses* of other distinct conveyances, as well at common law as under the statute of uses; and 16. Deeds of revocation of uses; and 17. Deeds to charge or discharge incumbrances on land, such as *bonds* or obligations, *recognizances* and *defeazances* on each, and to which we shall here merely thus allude. (e)

Some other titles or modes of establishing a right or interest not before enumerated.

In the preceding arrangement we have adhered to the order adopted by Blackstone and other elementary authors on this subject, but there appear to be some titles still to be noticed, such as titles or interests, 18. By Award; 19. By Jointure or Settlement; 20. Voluntary Conveyances; 21. Fraudulent Conveyances; 22. Legal and Equitable Mortgages; and 23. Licenses.

18. Title by award.

18. Although it was formerly thought otherwise, it is now settled, that disputes respecting title to *land* or *tithes*, or other incorporeal hereditaments, may be referred to arbitration, and that one person may, by an award founded upon a proper order or agreement of reference, be directed to execute all the necessary conveyances to the other, and to perform all such acts as may be requisite to confer the perfect right as well as the possession; (f) and an award, that one of the parties is the

(c) 2 Preston on Convey. 211; 2 Cru. Dig. Lease and Release; Cases and Op. 143 to 149, tit. Reversion.

(d) 7 Bing. 760; and see the effect of a conveyance by lease and release of a reversion expectant on a term, and the mode of pleading such a conveyance,

Co. Lit. 270, a., n. 3; 4 Cruise, 199; 2 Chit. Pl. 5 ed. 578.

(e) See fully, 2 Bla. C. 339, 340, and notes.

(f) Rol. Ab. Arbit. E. 2 (2) B. 14, K. 15; Willes, 248; 3 East, 15; 7 East, 81; 3 Taunt. 426.

legal owner, or entitled to an estate, is binding on the other and his heirs; so that the order of reference and award are equivalent to title deeds. (g) But an award against trustees and guardians of an infant tenant for life of the realty, who died before the award was made, was holden not to be binding. (h) And an award between a lessee and his neighbour, awarding an act to be done for the benefit of the latter by the lessee, which would be waste upon the estate of the lessor, is bad. (i)

Many questions arise upon *awards* under the general or a local *inclosure* act in regard to the title to land, but the full consideration of which would be beyond the scope of this undertaking. (k) In general the legal title to an allotment is not acquired until the execution and publication of the commissioners' award, (l) and the preparation of plans and maps for the purpose of carrying an inclosure into effect, is no evidence of an allotment under an act which requires an appeal against an allotment to be made within six months after the cause of complaint had arisen, and it was held that it suffices to appeal within six months from the time of making the conclusive award. (m) But where the plaintiff pleaded a right of common under an award of commissioners appointed by an inclosure act, which authorized them to award such rights in respect of a certain messuage, and gave an appeal in three months after the award by feigned issue and to the quarter session; it was held that the limited time having elapsed, it was not necessary for him to show the original right, in respect of which the commissioners had given him the right in the award. (n)

19. Conveyances and transfers of real estates, as well as of personalty, to trustees or others, by way of *marriage settlement*, and to secure a *jointure* or provision for younger children, should be completed *before* marriage; or at least marriage articles, agreeing for a prospective settlement, should be previously signed, (p) for in either of those cases they will, in general, be valid against creditors (q) as well as purchasers. (r) But if not entered into nor articles signed until after the marriage, they will then be invalid as against the *then*

19. Marriage settlements and jointures, (o)

(g) *Ante*, 328, n. (f); 3 East, 15.

(h) 3 Dowl. & R. 184.

(i) 5 Taunt. 454.

(k) 41 Geo. 3, c. 109, s. 35; 1 & 2 Geo. 4, c. 23; and see cases *infra*, note (l) (m).

(l) 2 Bar. & Ald. 171.

(m) 1 Chitty's R. 366.

(n) *Phillips v. Maile*, 7 Bing. 133.

(o) See in general Chit. Eq. Dig., tit.

Settlement, 1203 to 1230, and tit. Marriage; and Roberts on Fraudulent Conveyances; 2 Bla. Com. 136; *post*, 333.

(p) Chit. Eq. Dig. 1217, 1218; *post*, 333.

(q) As to creditors, Ambl. 121; 17 Ves. 264, 271; 1 Ball & B. 252.

(r) As to purchasers, 1 Atk. 265; 2 P. Wms. 358, 674; *aliter*, as to any limitation in favor of a stranger, 2 P. Wms. 245; 10 Mod. 333; 3 Meriv. 249.

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creditors, if the party were insolvent at the time ; (s) and if he be a trader, then, in case of a subsequent bankruptcy, a settlement after marriage will be inoperative, except, perhaps, as respects the wife's property, although he were solvent at the time the same was executed. (t) A settlement after marriage would also be invalid against a *purchaser* for pecuniary or good consideration, although he had notice thereof at the time of accepting the conveyance to him. (u) Marriage settlements and jointures are in general regulated by the statute 27 Hen. 8, c. 10, and which enacts, that a jointure after marriage may be accepted or refused by the wife. (x) In general the settlement is by lease and release, but it will depend upon the nature of the property and estate therein, the same as every other conveyance. Infants, whether male or female, are, in equity, bound by a proper and reasonable marriage settlement, although executed by them when under age, especially if parents or guardians have concurred. (y)

20. Conveyances in fraud of creditors, contrary to 13 Eliz. c. 5.

20. There are two statutes against *fraudulent conveyances* and *deeds*, and other acts, the 13 Eliz. c. 5, (x) for the protection principally of *creditors*, and the 27 Eliz. c. 4, (z) for the protection of *purchasers*. The first (a) enacts, " That every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or of any lease, rent, common, or other profit or charge out of the same, made *with intent* to defraud *creditors* and others of their just debts, &c. shall be utterly void, but *only* so as against those creditors and others, (a) and expressly declares (sect. 6.) that estates or interests conveyed or created on *good consideration* and *bonâ fide* in favor of persons not having any notice of such fraud, shall be valid."

This statute extends not only to fraudulent conveyances of *land* but of *personal* property; but it has been questioned whether it extends to land of *copyhold* tenure, (b) and to render a conveyance fraudulent within this statute, the party, at the time of making it, must have been indebted to the extent

(s) 12 Vest. 136; 10 Ves. 139; 2 Bro. C. C. 96; 2 Atk. 519, 600.

(t) 12 Ves. 136; 1 Ball & B. 252; 19 Ves. 88, 206.

(u) 18 Ves. 84, *post*.

(x) See statute and notes, Chit. Col. Stat. 271; and see the observations on settlement, *ante*, 57, 58.

(y) *Williams v. Williams*, 3 Ves. J. 545; 1 Bro. C. C. 152, S. C.; 18 Ves.

259; 2 Bro. C. C. 545; 1 Mad. Ch. 355.

(z) See these statutes, with notes, Chit. Col. Stat. 385 to 391.

(a) See 13 Eliz. c. 5, and notes, Chit. Col. Stat. *Fraudulent Conveyances*, 585. The party himself cannot take advantage of the act, but all *creditors* may, 4 East, 1; 5 B. & Cres. 560.

(b) 1 Cox's Rep. 278; Ellis, 155; but see Cowp. 705.

of general insolvency, (c) or at least the deed or act must have been *without* an adequate *consideration*, and with intent to defraud one or more particular creditors or persons, in which case it would be void even at common law. If the party executing were not indebted at all, or not insolvent, so that abundant other property to satisfy any then existing debts be left, then even a *bonâ fide gift* of *personal* property would be valid against *creditors*, or even a subsequent purchaser; (d) but not so as to *land*, with regard to subsequent purchasers thereof, in consequence of the enactment of 27 Eliz. But a party not subject to the bankrupt laws, may convey all or part of his property to a particular creditor in preference to others, (e) and even in part for his own benefit, and the deed will protect the part for the benefit of creditors, but not that for his benefit. (f) But a conveyance or other act, in preference of a particular creditor, must have been made *bonâ fide* with intent really to satisfy a just debt. (g) The fraud must, in general, be decided by a jury, (h) but it may sometimes be decided upon affidavits and motion. (i)

It has been supposed that a voluntary conveyance in favor of creditors is void if they do not execute, (k) and if *no creditor* assented to the deed it would be so, but otherwise if creditors accept the benefit, (l) and if even one of several trustees executes, that would suffice to vest the property. (m) In case of a conveyance of real property, or a chattel real, the circumstance of the conveying party remaining in possession thereof would not be deemed a badge of fraud, as in the case of an assignment of mere personalty, (n) because, as there are usually title deeds applicable to *real* property and interest therein, creditors ought not to be deceived by the bare possession thereof; (o) and the same rule even extends to some

(c) 3 B. & Adolp. 362; 5 Ves. 384; 1 Sim. & Stu. 315.

(d) *Twyne's case*, 3 Co. 82, a.; 1 Mad. Cha. 275; 1 Sim. & Stu. 315; *ante*, 108, note (i).

(e) 5 T. R. 235, 420; 8 T. R. 528; Newl, on Contr. 381, 382; 3 M. & S. 371; 4 East, 1; 5 Moore, 19.

(f) *Caillard v. Estwick*, 2 Anstr. 381; 5 T. R. 420, S. C.

(g) 2 Young & J. 304.

(h) 5 B. & C. 666; 8 Dowl. & R. 442.

(i) 8 B. & Cres. 217. The 3d section of 13 Eliz. c. 5, subjects the parties to a fraudulent conveyance to the forfeiture of the pretended purchase money, and one years' value of the land, and half a year's

imprisonment; and on a late trial and motion for a new trial, it was held that the assignees of one of the parties to a fraudulent conveyance, might, in an action on the statute, recover such penalties from him and the pretended purchaser. Mich. T. 1832; Campbell for plaintiff, Curwood for defendant; Holmes & Co. agents for plaintiff; and see 4 East, 1.

(k) 3 Sim. Rep. 1.

(l) 8 T. R. 521; 6 East, 257.

(m) *Ante*, 303; 9 Bar. & Cres. 300.

(n) *Ante*, 107, note (d); Chit. Col. Stat. 385, note (c).

(o) 5 Taunt. 212; *Baker v. Horn*, 9 East, 59; but see 2 B. & Ald. 551.

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fixtures and annexations to the freehold, even for the purposes of trade, and although in the possession of a trader who has become bankrupt, and notwithstanding the enactment in the 6 Geo. 4, c. 16, sect. 72. (o)

21. Voluntary -
conveyances in
fraud of pur-
chasers, against
27 Eliz. c. 4.

21. The 27 Eliz. c. 4, intituled "An Act against Covinous and Fraudulent Conveyances," enacts, that every conveyance, grant, charge, lease, incumbrance, and limitation of any use, of, to, or out of any *lands, tenements, or other hereditaments*, had or made for the intent and purpose to deceive and defraud such person as shall *purchase* the same for money, or other good consideration, the same shall be deemed and taken only as against that person, his heirs, &c. to be *utterly void*; but the 4th section declares that deeds upon *good* consideration and *bonâ fide* shall not be affected; (p) but voluntary deeds are, by the same terms of the act, good against the party conveying, and indeed it is a general maxim, that no one shall be allowed to allege his own fraud; (q) besides, a gift without consideration, if under seal, is valid against the party himself, and this, and the stat. 13 Eliz. were merely intended to protect *purchasers* and *creditors*. Copyhold estates are, it is supposed, not within this act; (r) and every prior conveyance, without *pecuniary* consideration or adequate value, excepting settlements before marriage, or in fulfilment of a contract *before* marriage, is considered voluntary, fraudulent and void, as against a *bonâ fide* purchaser, (s) and Lord Hardwicke said, "I hardly know an instance where a *voluntary* conveyance has not been held fraudulent against a purchaser." (t) Thus a voluntary settlement of lands made in consideration of natural love and affection for very near relations, is void against a subsequent purchaser, though he *had notice* of the settlement before his purchase. (u) So a voluntary settlement *after* marriage may be set aside in favor of a subsequent legal *mortgagee* though he had notice of the settlement. (x) So a settlement by tenant in fee for maintenance of herself and children for her life, to raise portions for younger children, and the surplus to her heir at law, she then having many sons and daughters, is a voluntary settlement, and void against a purchaser; (y) and the title of a purchaser for

(o) *Ante*, 331, n. (o).

(p) See the sect. Chit. Col. Stat. 388; and see 1 Dow. Rep. N. S. 17; and see in general Cro. Jac. 454; 3 Coke, 82, b.; 9 East, 59; Cowp. 705, 711; 1 New Rep. 332.

(q) 2 Bar. & Ald. 367.

(r) 1 Cox, 278; Cowp. 765.

(s) See several cases, Chit. Col. Stat. 387, notes.

(t) 3 Atk. 377.

(u) 9 East, 59; Cowp. 260.

(x) Cowp. 278; 9 Bing. 76.

(y) 2 Bla. R. 1019.

a valuable consideration cannot be defeated by a prior voluntary settlement, of which he had no notice, though he purchased of one who had obtained a conveyance by fraud, but of which fraud the purchaser was ignorant. (z) But *marriage settlements before marriage*, or in pursuance of a previous agreement, are valid; (a) and the giving up a previous voluntary bond, in consideration of a settlement or conveyance, would prevent it from being considered voluntary. (b) This act only protects persons who can, in the terms of the statute, be deemed *purchasers*. (c) But it extends to *legal mortgages*; (d) and a lessee at rack-rent has been considered as a *purchaser* for valuable consideration, protected by this act; (e) and a purchaser of an *equitable* interest is as much protected as a purchaser of a legal interest. (f) But, at least *at law*, a mere *equitable mortgagee*, by a *deposit* of title deeds, is not a purchaser within the act, and therefore trustees under a voluntary settlement after marriage may, at law, recover such deeds from such mortgagee, leaving him to resort to a Court of Equity; (g) so if a purchase has been made at an *under-value* it would not invalidate a previous voluntary conveyance; (h) so where a purchaser with notice took a collateral security, the previous voluntary advancement to a child was holden good and effectual against such purchase; (i) and to entitle a person to the protection of this statute, he must be a purchaser *bonâ fide*, and for a valuable consideration; (k) but the release of an adverse claim is a sufficient consideration. (l) If the party taking under a voluntary conveyance himself sell the same for a valuable consideration, the prior conveyance cannot afterwards be treated as void, so as to defeat the right of such purchaser. (m)

22. Perfect *Mortgages* on real property or chattels real may be created by either of the deeds we have before noticed; and as far as regards the transfer of the *legal estate*, the same descrip-

22. Legal and equitable mortgages and deposits of deeds, &c. (n)

(z) 1 New Rep. 332.

(a) Id. sect. 4; Cro. Jac. 454; Cowp. 278; *ante*, 329.

(b) 19 Ves. 218; 2 Taunt. 69.

(c) 1 Dow. Rep. New Series, 17.

(d) *Ante*, 332, n. (z); Cowp. 278.

(e) 2 Bla. Rep. 1019.

(f) *Buckle v. Mitchell, Palverton v. Palverton*, 18 Ves. 90, 100; 1 Ves. & B. 183, 184; *Otley v. Manning*, 9 East, 69; 2 Taunt. 69.

(g) 9 Bing. 76.

(h) Cowp. 705; 1 Ves. & B. 184; 16 East, 212.

(i) 1 Vern. 467.

(k) Cowp. 785.

(l) 2 Taunt. 69.

(m) 2 Vern. 44; 1 Meriv. 638; 19 Ves. 218.

(n) See in general *Powel on Mortgages* by Coventry; 2 Cruise, 82; and 6 Id. Index, Mortgage; 2 Saund. Index Mortgage; 2 Bla. C. 157 to 160 and notes.

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tion of deed and the same terms are usually adopted as in an absolute conveyance, excepting that a clause of redemption is inserted, and appropriate powers of distress or receivership of the rents, in case of irregularity in paying interest, and ultimately of sale, and covenants for payment of principal and interest at the appointed time, and for title, and against prior incumbrances, with stipulations relative to insurance, cutting timber, &c. (o) It has been usual to grant only a long *term of years* by way of mortgage, so as to avoid the doubts formerly entertained, whether the estate might not become subject to the dower of the mortgagee's wife, and other incumbrances made by him; though that reason has long been removed by the decisions that the land could not be so incumbered. (p) We have seen that assignees of a lease are liable to perform the covenants therein; (q) therefore it is more prudent to take an *under-lease* at a peppercorn rent instead of an assignment, by which means the incumbrancer may avoid most liabilities, as an under-lessee cannot be sued by the lessor. (r) In case of a complete mortgage of a copyhold estate, there must be a regular surrender, presentment, and admittance of the mortgagee. (s) It is advisable on behalf of the mortgagor so to stipulate as to prevent an early or precipitate sale, and avoid the necessity of incurring the expense of three successive applications to a Court of Equity for further time, in case of any unforeseen difficulty in selling. (t)

We have seen some of the incidents of a mortgage. (u) The mortgagor may, at the election of the mortgagee, be treated as a trespasser or as a tenant at sufferance. (v) The mortgagee may sustain ejectment against him without any previous demand; (x) though if the mortgagee accept rent from a tenant in possession under a demise from the mortgagor subsequent to the mortgage, he cannot afterwards treat him as a trespasser, but must, if the rent were accepted as such, give him a notice to quit. (y) Nor could the mortgagee sustain ejectment against a tenant in possession under a lease antecedent to the mortgage,

(o) 1 Jac. & W. 581; 3 Tho. Co. Lit. Waste.

(p) 2 Bla. C. 158.

(q) *Ante*, 319.

(r) Dougl. 183.

(s) *Ante*, 235.

(t) 4 Russ. R. 124; 1 Mad. 287, from which it appears to have been the practice to allow three successive exten-

sions of time of selling, where any reasonable ground can be shown.

(u) *Ante*, 257, and see the observations on *Galliers v. Moss*, 9 B. & Cres. 267, as to the nature of a mortgagee's interest.

(v) *Ante*, 257, 258; 8 B. & Cres. 767.

(x) *Id.* *ibid.*

(y) 7 Bing. 322.

but may sue him for the rent as assignee of the reversion.(z) If the security be scanty, a Court of Equity will restrain the mortgagor in possession from cutting timber or even underwood.(a) If the mortgagor become bankrupt, the mortgagee cannot prove for the *whole* mortgage-money and interest, but must petition for the sale of his security, and to be permitted to prove only for the deficiency, and receive a dividend thereon.(b) The 7 Geo. 2, c. 20, intituled "An Act for the more easy Redemption and Foreclosure of Mortgages," enables the mortgagor, when an action of ejectment, or even an action of covenant or debt on mortgage-bond is pending for the non-payment of the principal money and interest, to stay proceedings at law in certain cases,(c) and also contains other provisions for redemption.(d)

The delay and expense of a regular perfect mortgage gave rise to the now very common practice of creating what is termed an *Equitable Mortgage* by the deposit of title-deeds, with an accompanying agreement to execute a regular mortgage, or by the mere deposit without even any verbal agreement respecting a further security. It is always preferable to have a written agreement signed by the intended mortgagor, and stating the terms of the deposit, as that it is to secure a previous advance of a named sum and of all subsequent advances, and that he agrees at his request to execute all deeds and assurances for mortgaging and conveying the premises as the best and most extensive security that can be framed, and as may be advised and directed by the counsel or conveyancer of the intended mortgagee, with stipulations in the mean time to insure and commit no waste, &c.(f) As the statute against frauds we have seen declares that no interest in real property shall be created otherwise than by a *signed* memorandum, it might excite surprise how the mere verbal deposit of deeds should entitle the party holding the deeds to enforce in a Court of Equity a regular mortgage. The Chief Baron Alexander observed upon that doctrine, "I concur entirely with those eminent persons who

Equitable Mortgages. (e)

(z) Dougl. 183; 3 East, 449; 8 T. R. 2.

(a) 1 Jac. & W. 581; 3 Tho. Co. Lit. 242.

(b) 1 Russ. & M. 185.

(c) 2 Chit. Rep. 264; 7 T. R. 185; 8 T. R. 326, 410; 1 Wils. 80; 3 Bos. & P. 107.

(d) See Chit. Col. Stat. 731, 732, and notes; and 7 Ves. 489; 9 Ves. 36; 1 Young & J. 344.

(e) See in general 2 Powel on Mortgages, 49 to 61; 1 Mad. Ch. Pr. 537;

4 Mad. R. 249; 1 Bro. C. C. 269; 12 Ves. 197; 3 Young & J. 150; 1 Russ. R. 141; ante, 235, of Copyhold; Chit. Eq. Dig. 303, 304, 656; 2 Tho. Co. Lit. 36, note (s).

(f) But the Stamp Act, 55 Geo. 3, c. 184, schedule, Mortgage, requires an *agreement*, accompanying a deposit of title deeds, to be stamped the same as a regular mortgage deed with an *ad valorem* stamp, and hence the practice of a mere verbal deposit.

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regret the inroad which the doctrine of mortgage by mere deposit has made upon the wise provisions of the statute against frauds: so far as it has been carried by a course of decisions, I think it my duty to follow, but no further." (g) Where executors, who are also trustees, agreed to give one of the residuary legatees, as a security for his share, a legal mortgage of real estates, part of the testator's assets, and for the purpose of having the mortgage prepared, they delivered the title-deeds to his agents, it was held that this gave him an equitable lien on the property as against the executors, though not as against the other residuary legatees. (h) The effect given in a Court of Equity to such a verbal deposit is to compel the execution of a legal and sufficient mortgage, and *vice versa*, for if a lease be deposited as a security, the landlord may compel the party holding it to accept from the lessee a legal assignment, so as to enable the lessor to sue the depositor. (i) The deposit creates no legal interest, and if the depositor take possession of the premises, the assignees of the depositor may support an action of ejectment against him, and compel him to resort to a Court of Equity. (k) We have seen also that the deposit does not, at least in law, constitute the party holding the deed a *purchaser* within the meaning of the stat. 27 Eliz. c. 4, against voluntary conveyances, and therefore trustees under a voluntary settlement or conveyance may support trover for the deed; (l) and an equitable mortgage by deposit of title-deeds by any accountant of the crown in the hands of one who has an opportunity of knowing that the depositor is or may become a debtor of the crown, is not available against an extent. (m) An equitable mortgage by mere deposit of deeds does not cover prior advances; (n) and a parol agreement to deposit a lease, when granted, as a security for a sum advanced, does not constitute an equitable mortgage so as to create any lien at law or in equity on the lease when afterwards granted. (o) The precautionary measures to be observed by equitable and other mortgagees will be stated in the next chapter.

23. Licenses.

23. In general a *License to use land*, especially if the exclusive right be given, operates as a lease or demise, and must be so

(g) 3 Young & Jer. 161; and see *Licenses*, 337.

(h) 1 Russ. R. 141; 1 Cox, 211; 1 Rose, 374.

(i) *Ante*, 319, 320; 3 Bro. C. C. 166; 1 Ves. J. 235.

(k) 5 Esp. R. 105.

(l) 9 Bing. 76.

(m) 1 Price, 216.

(n) 1 Turn. & R. 274.

(o) 4 Mad. R. 249.

pleaded; (*p*) but a contract relating to mines may be so worded as not to operate as an actual demise, but merely as a *license to dig*; and we have seen that then the grantee or lessee could not before he had actually opened the mines, nor could he after he had abandoned the same, recover in ejectment or trespass, though it is said that he might whilst he was in actual possession of working mines already opened. (*q*) In one case it was held that a parol engagement that another party might stack coals on his land, and have the exclusive use of so much land for that purpose for seven years, was valid, as being a mere license of an easement, and not a lease or demise of the land itself; (*r*) but the propriety of that decision is very questionable. (*s*) We have seen that as far as respects any *freehold* interest (*i. e.* for life or longer) in real property corporeal, or ANY incorporeal property, at common law it could only be created by livery of seisin or by deed; (*t*) and we have seen that the statute against frauds requires that *all* leases, estates, interests of freehold, or terms for years, or *any uncertain interest* of, in, to, or out of any messuages, lands, tenements, or hereditaments, must be created by *writing*, and *signed*, or the same, if verbal, can only have the effect of a lease or estate *at will*, and the fourth section enacts that *any contract or sale of any interest* in the same shall also be in writing, and signed; (*u*) so that it is obvious that it was the intention of the legislature to deny any effect or operation to a verbal *agreement* to sell, or a verbal making or *transfer* of *any interest* in real property corporeal or incorporeal, excepting in the single case where it could operate as a lease or estate *at will*, now in some cases construed to mean from year to year, determinable by a notice to quit. (*x*) But it was, soon after passing that act, considered that it did not extend to such *mere easements* as did not constitute any *interest* in the *land itself*, and that the latter might be created by parol, and it was on that principle that the court decided the case of *Wood v. Lake*, (*y*) in which it was held, that a verbal agreement that a party might *stack coals* on the grantor's land for *seven years* was good, for the court there considered the subject-matter of the license to be merely an *easement*, and not a lease or demise of any interest

(*p*) 15 Vin. Ab. License, 92; Sugd. V. & P. 74, 75.

(*q*) 2 Bar. & Ald. 724, 652,

(*r*) *Wood v. Lake*, Sayer's Rep. 3; see *infra*.

(*s*) Sugd. V. & P. 8th ed. 74, 75.

(*t*) *Ante*, 146, 204, 232, note (*q*); and see 4 East, 106; 5 B. & Cres. 221, 875; 8 B. & Cres. 293; 9 B. & Cres. 479;

7 Bing. 687, 691. As to the operation of a *license* by deed to *dig*, &c., see *ante*, 185. A *license* to use a common can only be by deed, 2 Saund. 327, a.; but see 338, note (*d*).

(*u*) 29 Car. 2, c. 3, s. 1; *ante*, 292, 293.

(*x*) See observations, Sugd. V. & P., 8 ed. 73 to 75.

(*y*) Sayer, 3.

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in the land, and that on that ground the agreement was valid. (z) And that principle has been since acted upon in numerous cases, so far, at least, as to decide that the verbal authority is an excuse for what had been done under it, and also so far as to establish that no action can be supported against the party for *not removing* what he had done, when afterwards required so to do; but it is clear that any supposition that such a license, when it would affect the grantor's *interest* in his land, is not revocable as to *future* purposes, could not be sustained, for if it could, then the relaxation of the statute would hold out a strong temptation to perjury, in swearing to a *permanent* license, which it was the object of the legislature to prevent. (a) It has been held, that a parol license to a party to erect a building on his *own* land, whereby an ancient light of the grantor was darkened, was valid, and that, as it had been acted upon, and the building had been erected before countermand of the license, the revocation was afterwards too late, and that no action could be supported either for the original erection, or for the continuance, at least without first tendering the amount of the expenses incurred by the party in so erecting the building, (b) and it has also recently been held that a license to a party to erect a building upon his *own* land, which might be deemed a nuisance to the grantor's house or land after the building had been erected, is so far not recoverable that the grantor could not, after revoking the license, sue the other for continuing the nuisance, because he was under no obligation, under such circumstances, to pull down the building; (c) and, for the same reason, if a person entitled to common of pasture on the waste of the lord give license, though verbally, to another to build a cottage thereon, he could not afterwards sustain an action for the incroachment, although no sufficient common of pasture should be left. (d) In one case it was held, that the grant of a free admission ticket to entitle the bearer to enter a theatre for twenty-one years did not create any interest in land, but merely a license to enjoy the privilege of admission, and that therefore it was not necessary that it should pass by deed, or that the

(z) In that case, a parol agreement was entered into for liberty to stack coals on part of a close for seven years, and that during that term the party should have the *sole use* of that part of the close; and Lee, C. J. and Denison held, that the parol license was valid, expressly on the ground that it was only for an *easement*, and not a lease. The error in that decision was upon the *facts*, for clearly the agreement amounted to a parol *lease*; see

cases, 15 Vin. Ab. 92, and Sugd. V. & P. 8 ed. 74, 75.

(a) See Sugd. V. & P. 8 ed. 74, 75.

(b) *Per* Lord Ellenborough, 8 East, 308; and see 2 M. & S. 461, 562; 2 Marsh. 551; 7 Taunt. 374.

(c) *Leggens v. Inge*, 7 Bing. 682.

(d) 1 Car. & P. 141; and see *Palmer*, 71, and 7 Taunt. 374, to establish that a license, after executed, is not countermandable as to what has been done.

grantor should have been authorized to grant the ticket by the persons in whom the legal interest in the theatre was vested, and it was considered in that case that a beneficial license to be exercised upon land for twenty-one years might be granted without deed, and that such a license, when granted for a valuable consideration, and acted upon, could not be countermanded. (e) But, as forcibly observed, to give absolute effect to a parol license, and hold that it passes a *perpetual* right, or an absolute right even for years, in, upon, or over the grantor's land, so as thereby to part with or prejudice any part of his interest therein, would be in the teeth of the statute against frauds; for if a person could acquire a perfect right by a license, any one has only to get a person to swear to a parol license by the owner of land to build a house upon it, and thereby, without any conveyance by deed, he would acquire, in effect, all the beneficial right of an owner in fee. (f) It should seem, therefore, that, at least as regards a parol license to do any thing upon the land of the *grantor*, he has a right (at least at law) to countermand it, and afterwards to resist any *further* enjoyment by the other party under the license, and might, after notice, at least, remove the building erected on his *own* land under colour thereof. (g) It would, however, be prudent, at least, in all licenses, when so intended, expressly to reserve a right, under prescribed circumstances, to require the removal of the building. (h)

On one occasion, Lord Mansfield said that where a party stood by and saw another building on his land without objecting, he would not suffer him to recover such building in ejectment; (i) but, however a Court of Equity might, under strong circumstances, interfere against such a party by injunction, and decree a conveyance, it is clear that such a doctrine at law is not tenable, and that the strict legal title must prevail, for otherwise the statute against frauds would be rendered inoperative; (k) and all *verbal* licenses, however express, and although founded on valuable consideration, are revocable, and therefore it was held, that an agreement to let a party have a trench for water through the grantor's land, though founded on adequate con-

(e) *Taylor v. Waters*, 7 Taunt. 374; 2 Marsh. 551, S. C.; but *quære* whether that case can be supported.

(f) See observations, Sugd. V. & P., 8 ed. 74, 75.

(g) *Semble*, Id. *ibid.* In *Winter v. Brockwell*, Lord Ellenborough appears to have supposed a right to insist on the removal, after tendering expenses, &c. But

Tindal, C. J. in 7 Bing. 693, 694, seems to have supposed that the party licensing could not have the building pulled down; and see 2 Saund. 113, note (a).

(h) *Per* Tindal, C. J., 7 Bing. 694.

(i) See observations in *Rex v. Butterton*, 6 T. R. 555; 1 Anst. 185; 5 Ves. 690; 11 East, 57.

(k) Sugd. V. & P. 8 ed, 74, 75.

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sideration, but without any conveyance, amounted merely to a parol license, and was revocable at the will of the grantor; (*l*) and we have seen that where a rector, in consideration of 20*l.*, gave license by parol to make a vault and bury a corpse therein, and engaged that the party should have the exclusive use of such vault, it was held that such parol license was not binding; (*m*) and it is in every-day's experience to reply to and defeat a plea of license by alleging and proving a revocation before the defendant trespassed under colour of a prior license. (*n*)

Secondly. Alienation by matter of RECORD in general.

Secondly. Alienation by matter of RECORD is where the agreement of the parties to convey is sanctioned and perfected by a Tribunal or Court of Record; as by, 1st, Private Acts of Parliament; 2dly, The King's Grants; 3dly, Fines; and 4thly, Common Recoveries.

1. Private acts of parliament.
(*o*)

1. These are frequently obtained in cases of estates of very considerable value, to effect objects which either cannot be, or cannot so well be, attained by private deeds and conveyances; as by a tenant for life, to enable him to charge the inheritance for the amount of necessary repairs and improvements, which must enure to the benefit of the remainder-man and reversioner. But parliament, of course, is the judge whether the proposed repairs and improvements are adequately beneficial to the amount to be charged upon the estate. So private acts are sometimes obtained by a tenant for life, in order to enable him to carry into effect an advantageous conveyance of the fee-simple. (*p*) When a private act is obtained by a tenant in tail, it will bar the estate tail, all remainders, and the reversion on it, although the persons in remainder or reversion should not give their consent to the act; (*q*) and this, although the rights of the remainder-man were not excepted in the saving clause; (*r*) but where a tenant for life enters into an agreement to convey the fee-simple, and a private act is passed for establishing such agreement, in which is a saving of the rights of all persons not parties to the act, it will not affect the persons entitled to the remainder expectant on the life-estate. (*s*) In a common estate bill there is not, in general, any intention to bind third persons,

(*l*) 4 East, 107; but see 7 Taunt. 374. 27 to 34; Com. Dig. Parliament, R. 7; 2
(*m*) 5 B. & Cres. 221; 8 B. & Cres. Bla. C. 344.
288; ante, 51. (*p*) 3 Wils. 483.
(*n*) 11 East, 451; Com. Dig. Pleader; (*q*) 2 Cas. & Op. 400; 4 Cruise's Dig.
3 M. 35, R. 5; 3 Campb. 515; 2 Saund. 520.
113; 8 Taunt. 31; 5 B. & Cres. 221. (*r*) Ambl. 697.
(*o*) See in general, 1 Tho. Co. Lit. (*s*) 3 Wils. 483.

but, unless expressly excepted, they may be bound. (t) Private acts are to be construed in the same manner as common law conveyances, and therefore when any doubt arises as to the construction of a private act, the court will consider what was the object and intention of the parties in obtaining the act, and endeavour, if possible, to give effect to that intention. (u) Whenever a statute gives a right, it means a *legal* right, and not to compel the party to enforce it in a Court of Equity; (x) and a private act may be relieved against, if obtained upon fraudulent suggestion. (y)

2. We have, in the preceding pages, seen when these may be presumed. (a) Grants of lands of the crown are placed under restrictions by several statutes. (b) There are particular rules for construing such grants generally in favour of the crown, but to which rule there are some exceptions. (c)

2. The King's grants. (z)

3. & 4. As considerable alterations are expected in the law relating to *fin*es and recoveries, we shall merely refer to the works in which the learning on the subject will be found. (d) A fine and nonclaim cannot be pleaded in bar to a bill to prevent the setting up an outstanding term. (e) In the sixth chapter will be shown the proper practical proceedings to avoid a fine. (f) A fine levied by a tenant for years, or copyholder, or owner of any chattel interest, has not any operation on the freehold, and consequently no entry will be necessary to avoid such a fine. (g)

3. Fines, and 4. Recoveries.

In *creating* or *transferring* estates or interests in real property by either of the modes of alienation before noticed, it is essential to consider the right to require, or the expediency and practice of introducing covenants for title or quiet enjoyment. As the *right* to real property is generally to be proved by *written* documents and title deeds, (with the exception of a title for sixty years by *descent* and long *uninterrupted* possession,) a purchaser

COVENANTS for TITLE and QUIET ENJOYMENT. (h)

(t) 7 Bing. 148.

(u) 2 T. R. 701; 4 Cru. Dig. 526.

(x) 1 Sim. R. 499.

(y) 2 Bla. Com. 346; 2 Hargr. *per argum.* 392, Canc. 8, 1773; *M'Kenzie v. Stuart*, Dom. Proc. 1754; *Biddulph v. Biddulph*, 4 Cru. Dig. 549.

(z) See in general 2 Bla. C. 346, and notes; 2 Tho. Co. Lit. 605, Index, tit. Records.

(a) *Ants.* 284, note (z); 11 East, 284, 495.

(b) See the acts considered, 2 Bla. C. 346, note 4.

(c) See the rule and exceptions, 2 Bla.

C. 366, note 4.

(d) 2 Bla. Com. and notes, 348 to 365; see Cruise on Fines and Recoveries; 1 Preston on Conveyances, 200 to 309; 2 Tho. Co. Lit. 606 to 613.

(e) 1 Sim. R. 349.

(f) *Post.*

(g) 1 Prest. Convey. 301; and see Adams on Eject. 88, 89; *post*, chap. vi.

(h) See *ante*, 295 to 300, as to an agreement of purchase and abstracts; and the perusal of the leading case *Browning v. Wright*, 2 Bos. & Pul. 13, and the notes, 2 Saund. R. 175 to 183, is particularly recommended.

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has a right to examine such documents before he accepts the title, and the maxim is *caveat emptor*, and he ought by due examination and consideration of the title to assure himself that it is legal and sufficient; and although it should, after a conveyance has been completed, turn out that the title of the vendor was defective, the purchaser cannot on that account rescind the contract, or recover back his money, unless he can prove *fraud* on the part of the vendor, or he has had the precaution to take a covenant for the sufficiency of the title; and no purchaser should rely upon such a covenant, for though it binds heirs and executors who *have assets*, yet in the known fluctuation of property, it will be too frequently found, that neither the vendor nor his representative after a lapse of time is of sufficient ability to repay the purchase money; and hence the importance of carefully examining and obtaining the advice of persons of experience in deciding on the sufficiency of a title, especially as any neglect will subject the solicitor of the purchaser to liability to make good the damage. In order to subject the vendor to an action for fraud, it must be clearly established; (i) and in order to recover damages upon a covenant for title or quiet enjoyment, it must be very explicit, and *expressly extend to and cover* the cause of the defect of title complained of. (j)

It is usual in conveyances, when there is a doubt upon the title, either to require a collateral security indemnifying against a particular defect, or to insist upon the insertion of unqualified covenants by the vendor for the title and quiet enjoyment; as that the vendor is seised in fee, has good right to convey, and that the purchaser shall quietly enjoy. In these cases the covenant is general and unqualified, by which the vendor in effect covenants for the title against all the world. In others, when the seeming title on the abstract is sufficient, the covenant is limited and qualified; and usually runs, that "*for and notwithstanding any act or omission done or omitted by the vendor to the contrary, he is seised in fee, &c.*" And it is observable that this qualification against acts of the vendor only, and not of all preceding owners, extends to all the subsequent, and sometimes prior covenants respecting the title, however numerous and verbose; (k) therefore where the covenant relative to the seisin was in the above form, but was followed by a covenant "*and that he had full power to convey, &c.*" the

(i) See *Early v. Garrett*, 9 Bar. & Cres. 928, and cases there cited.

(j) Sug. V. & P. 470 to 475, 576 to 593; 2 Saund. Rep. 175 to 183, and notes; 1 Chit. Pl. 131, 132; 2 Chit. Pl.

545, 546; and as to the construction of covenants for a good title, and what constitutes a breach, see 3 East, R. 491.

(k) 2 Saund. 175 to 182, and other cases, *post*; 2 Bos. & Pul. 13.

Court of Common Pleas held, that the latter general form of covenant was either part of the preceding special covenant, or, if not, that it was qualified by all the other special covenants, as well preceding as subsequent, and consequently extended only to acts of the particular covenantor, and did not extend to acts or omissions of *preceding* owners. (l)

The general and unqualified covenant can only, even in the absence of express preliminary agreement, be required by a purchaser or lessee when the title of the vendor is defective, in which case he must, if required, covenant generally for the title, or against some particular defect of title, or he cannot enforce the bargain; and indeed he cannot, unless the defect were provided for in the conditions or agreement of purchase, compel the purchaser to accept that covenant.

When the vendor claims by *descent* it is usual to restrain the general covenant to acts done by himself or any of his ancestors.

Where the vendor has taken by *devise* or *voluntary conveyance*, (m) and the deviser or grantor took from a vendor who entered into the usual covenants, then the recent vendor may be required to covenant against the acts of himself and of such deviser or grantor, and all who claim under him.

The special qualified covenant is used when the vendor has himself taken by purchase, and has obtained from his vendor the usual covenants for title, to the benefit of which the new purchaser will be entitled as assignee, these being covenants which *run with the land*, even though the word "assigns" be omitted in such covenants. (n)

When *express* general and unqualified covenants for good title are to be introduced they should be carefully framed, so as not only to extend to and cover *acts* and things done or to be done or *suffered* by the covenantor, but also to *omissions*; and care should be observed that they are in such distinct sentences as not to be qualified by any covenant which would confine the stipulation to acts or omissions of a particular party. (o) But as the introduction into the conveyance of a covenant to indemnify against any particular specified defect might prejudice a subsequent sale, it is considered expedient to provide for it by a separate adequate indemnity.

It will be seen that in all these cases the covenants have been

(l) *Browning v. Wright*, 2 Bos. & P. 13; 3 Lev. 46.

(m) As to the voluntary conveyances here alluded to, see *ante*, 352.

(n) 1 H. Bla. 562; 3 T. R. 393, 678.

(o) 3 East, 491; 2 Saund. 175 to 182 in notes; 11 East, 633; 2 Moore, 592; 3 Moore, 703; 1 Brod. & B. 319, S. C.; 4 M. & S. 53; 15 East, 530; M'Clel. Rep. 647.

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express; in some deeds *implied* warranties, or covenants for quiet enjoyment, are *inferred* from *particular* words. The word "*grant*" or "*enfeoff*" create an implied warranty of freehold; (p) though as to lands in Yorkshire the usual covenants for title and further assurance are, by particular acts of parliament, to be considered as expressed by the words "grant, bargain and sell." (q)

In a Lease the words "*grant*" or "*demise*" are held to amount to a *covenant* for quiet enjoyment, unless afterwards restrained by a qualified *express* covenant; (r) and it may be implied from the lessor's taking on himself to *demise*, (s) upon which an action of covenant would lie by the lessee against the lessor in case of eviction. (t) There is this distinction between *express* and *implied* covenants, that the *latter* are general and unqualified, but the former may be qualified in any manner according to the agreement of the parties. When a deed contains such an *express* qualified covenant, it will restrain the effect of the *general* covenant, which would have given a remedy in case of an eviction from any title paramount to that of the covenantor, for which only the qualified covenant would be a warranty. (u) This, therefore, is one reason why, in many cases, it might be advisable to rely upon the general implied covenant, if there were not another countervailing objection, which induces parties to require an express covenant, which they can induce the lessor to give, viz. that the general *implied* covenant is a personal stipulation, continuing only during the continuance of the estate of the covenantor, and determining therewith, whereas by the *express* covenant, the covenantor binds himself, his heirs, executors, administrators and assigns, against either of whom a remedy may be had in any case after the death of the lessor. A case was recently decided which illustrates this position. A tenant for *life* granted a lease for fifteen years, (not warranted by any power,) and which lease did not contain any express covenant for quiet enjoyment, but such a covenant was clearly implied from the word *demise*. The lessor, the tenant for life, died, and after his death the lessee was evicted by the remainder-man, before the expiration of the

(p) *Per* Buller, J., 2 Bos. & P. 26; but see Co. Lit. 384, a. n. 1.; 1 Ves. S. 101; Vaugh. 126; 4 Rep. 80, b.; 4 Cru. D. 58; Hob. 12; 2 Evans's Statutes, 192.

(q) 6 Ann. c. 35; 8 Geo. 2, c. 6.

(r) 5 Rep. 17. See 1 Saund. 322, a., n. (2); 9 Ves. 325; 6 Bing. 656.

(s) 4 Rep. 81.

(t) Cro. Jac. 73; 1 Roll. Ab. 520; 5 B. & C. 609.

(u) 4 Rep. 80, a.; 2 Ld. Raym. 1419; 6 Taunt. 329; 2 Bos. & Pul. 26, where Buller, J. observes, that, contrary to the supposition of many, express covenants are inserted, not for the protection or benefit of the purchaser or lessee, but on the contrary, for the protection of the vendor or lessor, and to qualify the effect of the implied covenant; and see Nokes's case, 4 Coke, 80.

fifteen years; and the lessee brought an action of covenant against the executor of the tenant for life in respect of such eviction, but the Court of Common Pleas determined that such action was not sustainable, because the *implied* covenant *ceased* with the estate of the tenant for life, out of which such lease was granted. (x)

In *Leases* it is usual and proper that the covenant for quiet enjoyment should be general and unqualified, for the lessee usually accepts the lease without being permitted to inspect the title of the lessor, and cannot therefore be supposed to know whether he can safely accept such lease, as regards the lessor's title. (y)

In *Mortgages* the covenants for title and quiet enjoyment are almost invariably unqualified, and it is very proper that they should be so; for a mortgagee is not in the same situation as a purchaser, but lends his money on the faith of the land and the security of the title, and it is therefore but reasonable that the borrower should undertake that the title is absolutely good, and will secure the return of his loan.

In *Settlements*, where the husband received a sum of money or other portion for his own use, from his wife or her relations, it is prudent to require that he should covenant for the title to the property which it is agreed he shall settle without any restriction. But where such settlement by the husband is wholly voluntary, or without return or consideration, (otherwise than that of marriage,) it is not always required that he should enter into such covenants, or perhaps not into any other than a covenant for further assurance; but these things depend upon and are regulated by the confidence which the parties repose in one another, and whether the title has been inquired into, and upon other stipulations of the parties in each particular case.

We have considered the nature and general incidents of real property corporeal or incorporeal when of *Copyhold tenure*. (a)

Thirdly. Alienations by Custom, as in case of Copyholds. (z)

(x) 6 Bing. 656; 4 M. & P. 491, S. C.; see also similar case, Dyer, 257, a.; Bendl. 150.

(y) See 4 Taunt. 329. But *semble*, that the purchaser of a lease may, unless restrained by express covenant, insist on the production of the lessor's title, with some exceptions, Sugd. V. & P. 305 to 311; 2 Bos. & Pul. 23; *Keech v. Hall*, Dougl. 22; 6 Taunt. 60.

(z) See in general 2 Bla. C. 365, and

notes; and see Mr. Sergeant Scrivens's very excellent work on Copyholds, which contains all the law relating to Copyholds; see also Fisher, Watkins, and Cruise, on Copyholds, *per tot.*; 1 Co. Lit. by Thomas, 653 to 676; 2 Saund. Rep. Index, tit. Copyholds, Surrender, and Chit. Eq. Dig. tit. Copyhold; and as to copyhold tenure and incidents, *ante*, 232 to 237, 246.

(a) *Ante*, 232 to 237.

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With respect to these, there are, on account of the nature of the tenure, *peculiar modes of Alienation*, (sometimes varying in particular manors, (b)) regulated by the custom *generally* prevailing in *most* manors, (c) viz. by *Surrender* back of the copyholder's estate to the lord, in order that he may regrant the same to another person or persons; *Presentment* of such surrender by the homage, and *Admittance* by the lord of the party in whose favour the presentment was made; and all which proceedings are entered in the *general Court Rolls* of the manor, which in effect constitute a *general register* of the proceedings therein relating to the estates and interests of the copyhold tenants in the order as they arise; and *Copies* of which proceedings are made out by the steward on parchment and delivered to the tenant, and which constitute the secondary or duplicate evidence of his title, and from whence he is termed a *Copyhold tenant*, or tenant by *Copy of Court Roll*. All these, as well as the custom requiring a license from the lord in creating leases or demises for a longer term than one year, were established for the protection of the lord; the *first*, (the *Surrender*,) because, without the lord's consent, no interest in the customary tenement could be passed for more than a year, so that he might know who was to be his *new* tenant; the *second*, (the *Presentment*,) to secure notoriety of the transaction, which could be best effected by the homage finding the fact of such surrender; and the *third* (the *Admittance*) being required as evidence of the lord's assent to his new tenant, and to secure the payment of the fines and fees payable to the lord and steward upon admittance. The full statement of the principle upon which these were required is concisely and clearly stated in the elementary works on this subject. (d) We have seen that these modes of conveyance apply as well to the transfer of *Incorporeal* hereditaments of copyhold tenure as of corporeal, and that even a right to hold a fair or market, or to tithe, &c. may be granted or transferred by copy of court roll; (e) and that a transfer of copyhold cannot in general be effected by feoffment, lease, or release, or fine or recovery; (f) but that a mere *Equitable* interest in copyhold is not properly the subject of a sur-

(b) *Ante*, 232 to 237; and see some modern instances of peculiar customs, Harrison, Index, tit. Customs and Prescriptions, II. Customs of Manors.

(c) These expressions are used because there is not in strictness any *general* custom for *all* copyholds, though the *like* custom is *generally* prevalent in *most* manors, *Evans*

v. *Glyn*, 6 Taunt. 425; see as to demises for a year without license being a *general* custom, *ante*, 234.

(d) 2 Bla. C. and notes, 365 to 371; and see the works referred to, *supra*, note (1).

(e) *Ante*, 205.

(f) *Ante*, 235.

render, nor can be surrendered, and it should be transferred by *assignment*; (g) and devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest, nor will a surrender operate against them or their heirs. (h) We have seen when and how an *equitable mortgage* may be effected of copyhold. (i)

A *Surrender* may be considered as *substantially* the instrument of transfer or conveyance, and the presentment and admittance merely as *formal* measures to perfect it. It may in general be made by the owner of an estate of inheritance of copyhold to the use of a third person and his heirs generally or in tail, and either in possession, remainder, or reversion, or to the uses of a will made or to be made by the owner. It may be made by the owner appearing in person or (under the 47 Geo. 3, sess. 2, c. 8, (k)) by attorney before the lord or his steward, or by custom before two customary tenants in court, or by custom which is usual out of court, and even out of the manor; (l) and by the delivery of a rod or other symbol in the name of the whole, as directed by the custom, surrendering, or in other words, resigning his estate or interest in a particular customary tenement to the lord, in trust for the intended purposes, as to be again granted out by the lord to such persons and for such uses as are named in the *written surrender*, and according to the custom of the manor. If the use of the entire interest be not declared in the surrender, then the residue of the interest not declared will continue in the surrenderor as of his former estate, (m) and might be resembled to a resulting trust.

The *omission* to surrender to the use of a will, when that surrender is merely a *formal* act, is aided by express enactment, (n) as before it was relieved against in equity in favour of a wife or younger children, or where the estate was devised for payment of debts, (o) though not in favour of a brother, grandchild, or natural children. But that act does not extend to cases where the mode and proceeding by surrender are not

(g) *Ante*, 235, 236; 2 T. R. 484; 2 Saund. 422; and Scriv. Cop. 267.

(h) 11 East, 185.

(i) *Ante*, 235, note (s); 19 Ves. 202; 3 Ves. 582; Chit. Eq. Dig. 30, 34, 656. See observations, Sugd. V. & P. 8 ed. 759, as to when court rolls are not to be deemed notice to a purchaser.

(k) Extended to ancient demesnes by 59 Geo. 3, c. 80.

(l) 1 Salk. 184; 1 Ld. Raym. 76; but

the admittance must be within the manor.

(m) 4 Co. 29, b.; 9 Id. 107, a.; 1 Broul. 18; Cro. Eliz. 442; Gilb. Ten. by Watkins, 254, and n. 116.

(n) 55 Geo. 3, c. 192. See Chit. Col. Stat. 180, and notes.

(o) 1 Atk. 387; 3 Bro. 229; 1 P. W. 60; 2 Ves. 582; 5 Id. 557; 6 Id. 544; 1 Fonbl. Eq. 39; Chit. Eq. Dig. Cop.

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matters of form, but of substance; as where a surrender of copyhold by a married woman to the use of her will was required by the particular custom of the manor, in which case the want of her surrender is not aided; (*p*) and the statute saves to the lord the like fees to be paid on admission as if a regular surrender had been made. It should seem that a *general* surrender to such uses as the owner shall appoint, is the most extensive and the best, when it is at the time uncertain what disposition of his estate the surrenderor will ultimately make, for it has been held that after such a surrender the owner may appoint either by deed or by will; and a surrender for the particular purpose of a will was not necessary even before the above statute. (*q*) The beneficial and equitable title of the surrenderee, when for a valuable consideration, begins from the date of the surrender, and after admittance his legal title relates to that time; (*r*) and immediately after the surrender, the surrenderor is merely a trustee for the surrenderee; (*s*) and after admittance the surrenderee is an assignee within the equity of the stat. Hen. 8, and may sue for the breach of covenants entered into with the surrenderor. (*t*) But the surrenderee has no legal interest nor any right to enter before admittance; (*u*) and to enforce the complete transfer of the legal interest and possession he must proceed by *mandamus* to the lord to admit, or by bill in Chancery. (*x*)

2. Presentment.

A *Presentment* is only necessary when the surrender has been *out* of court. (*y*) It is to be made in that case by the homage, in order to inform the lord or his steward of what has been transacted out of court, and it must substantially correspond with and truly state the terms of the surrender, for if the surrender were conditional, and the presentment as if it had been absolute, both the surrender, presentment, and admittance thereupon would be wholly void. (*z*) It should properly be made at the next court-baron after the surrender, but by the customs of many manors it may be afterwards; and if a surrenderor die before presentment, it may be made after his death; (*a*)

(*p*) 5 B. & Ald. 492; 1 Dowl. & R. 84, S. C. As to surrender of lunatic's copyhold, see 1 Jac. & W. 642; 3 Swans. 98; Chit. Col. Stat. 180, note (*b*), 692. As to how a surrender should be taken from a *feme covert*, see 4 Taunt. 294.

(*q*) 3 M. & S. 158.

(*r*) 1 T. R. 600; 5 Burr. 2674; 16 East, 208; 2 Saund. 442.

(*s*) 1 T. R. 600.

(*t*) 1 Saund. 241, a.

(*u*) 1 T. R. 600; 2 Bla. C. 368, 369.

(*x*) 2 Roll. R. 107; 2 Bla. C. 369; *post*, ch. x.

(*y*) 2 Bla. C. 366, 369.

(*z*) Co. Copyh. 40.

(*a*) Co. Lit. 62.

and the presentment might be obtained by petition in the court-baron, or enforced in Chancery. (a).

Admittances of copyhold are of three descriptions; *first*, upon a voluntary grant from the lord without any previous surrender, or where a customary tenement has escheated or been forfeited, and the lord afterwards, as we have seen he may do, grants the same to a new tenant to hold of the ancient tenure and upon the same services; (c) or where by special custom parcels of the waste are granted *de novo* to hold as copyhold; (d) *secondly*, an admittance upon a *surrender* by the former tenant; and *thirdly*, an admittance upon a descent from the ancestor.

With respect to the *first*, upon the *re-grant* of an escheat or forfeited copyhold, the re-grant must be upon precisely the same tenure and services as those subject to which it was before held without diminution or addition. (e) The lord's grantee in this case has title without further admittance. (f)

With respect to *admittances* upon *Surrender*, whether upon a conveyance or devise, they are of the most essential importance to vest the legal and perfect right in the surrenderee, for although the lord is a mere instrument, yet until admittance by him the estate remains in the surrenderor, so that if he die before admittance of the surrenderee, the legal estate descends to the heir of the surrenderor; (g) for which reason a surrenderee has no estate to forfeit nor does forfeit for a felony committed before admittance, for till then the estate remains in the surrenderor. (h) But if a surrenderee die before admittance, his heir will in equity be entitled to it, and the widow to freebench, though not to the legal estate. (i) And where a devise was made by an unadmitted devisee, it was held that the second devisee could not recover in ejectment, because his admittance had no relation to the last legal surrender, but that the *legal* title remained in the heir of the surrenderor, the first testator. (k) The admittance must be to hold the same estate or quantity of interest as that limited by the terms of the surrender, or it will be void. (l) If the lord refuse to admit such surrenderee, the latter may compel admittance by bill in Chancery, (m) or now more usually by motion in the Court of King's Bench for a *man-*

(a) Co. Copyh. 40.

(b) See in general 2 Bla. C. 370.

(c) *Ante*, 233, n. (l), (m); 2 Bl. C. 370.

(d) *Ante*, 233, n. (i), 347.

(e) Co. Copyh. s. 41; 8 Coke, 63.

(f) 2 Bar. & Ald. 453.

(g) 5 East, 132; 1 Smith's Rep. 363.

(h) 1 Keny. R. 110; 2 Saund. 422, c., n. 2; 1 T. R. 600; 2 Bla. C. 368.

(i) 2 Saund. R. 422, d.

(k) 7 East, 8.

(l) 4 Coke, 27; 1 Coke, 140; *ante*, 347.

(m) Cro. Jac. 368.

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damus. (n) And though the surrenderee could not, (o) the surrenderor might sustain an action against the lord for his refusal to admit. (p) The lord may by proclamation compel such a surrenderee to be admitted, and if a copyhold be granted for a term of years, it was held that the executor of the termor was obliged to be admitted, and that the lord was entitled to a fine upon such admission. (q) Before admittance such surrenderee has no legal estate but merely a possibility; he could not therefore himself make any efficient surrender, (r) nor make a devise so as to pass any legal interest, (s) nor could the surrenderee before admittance sustain any action founded on the right of property, though if in actual possession, he might, merely in respect of such possession, sue a stranger.

But *after* admittance upon such a surrender, the legal right relates back by legal relations to the date of the surrender, unless it were only prospective in its terms, and on which account it has been held that in an action of ejectment, the day of the demise may be laid at any time after the surrender, though before admittance, provided, before the commencement of the action, there had been a sufficient admittance; (t) and a copyholder may maintain an action of trespass for mesne profits from the time of surrender, after he has been admitted and recovered in ejectment. (u) And after admittance, the surrenderee is considered to be an assignee of the reversion within the stat. Hen. 8, so as to enable him to sue in that character for breaches of covenant entered into with the surrenderor or his ancestors. (x) The admittance of the particular tenant is the admittance of the remainder-man, but the latter may be admitted by himself. (y)

Admittances upon *Descent*, as regards any supposed transfer or perfecting the estate or interest, are wholly *immaterial*, for the heir has as complete a title without it as with it, for he can take possession and maintain every description of personal action or ejectment without ever obtaining any admittance; so that, excepting for the satisfaction of the heir, and to enable him to have the copy of his admittance ready to produce on all occasions, and excepting the securing payment of the fine and fees, the admittance of an heir is not of any utility, on which account the courts formerly would not compel the lord to admit,

(n) 2 T. R. 484.

(o) Cro. Jac. 368.

(p) 3 Bulst. 217.

(q) 1 Burr. R. 206; 1 Keny. R. 471,
S. C.

(r) 2 Bla. C. 368.

(s) 7 East, 8.

(t) 6 East, 210; 1 T. R. 600; 4
Burr. 1952; 2 Saund. 422, c., n. 2.

(u) 16 East, 210; 2 Wils. 15.

(x) 1 Saund, 241, a.

(y) Id. 147, a.

considering that form as a mere useless ceremony; (x) but now an heir may by *mandamus* compel the lord to admit him; (a) and the heir need not tender himself for admittance at the lord's court, if he has been previously refused by the steward out of court. (b) In order to *compel* the heir to pay the fine, (which is not usually payable until after admittance, (c)) the lord may, by the custom of most manors, compel the heir to be admitted by three successive proclamations for him to come in and be admitted, and if he shall neglect to do so, the estate may be seized and withheld *quousque* the heir appear to be admitted and pay the fine; (d) and after admittance, which is at least equivalent to an attornment, the party admitted cannot dispute the lord's title to the manor. (e) When the party entitled to admittance by descent or under a will is an infant or *feme covert*, the 9th Geo. 1, c. 29, provides against forfeiture and a remedy for the lord's fine, by enabling the lord to appoint a proper guardian to be admitted, and who has powers enabling him to raise and pay the fine. (f)

By the mutual consent of the lord and his customary tenant, the copyhold estate may be *Enfranchised* and converted into a perfect fee-simple estate, and which may be effected by the lord's *conveying*, mediately or immediately, to the tenant the freehold of the particular or specific premises which were held by copy, or by *releasing* to the tenant his seignorial rights. (g) And if a party by mistake sell an estate as freehold, and a part be discovered to be copyhold, a Court of Equity will give time to the vendor to get the latter enfranchised, so as to enable him to perfect the title to the whole. (h)

Enfranchise-
ment.

The right to transfer an estate or interest in corporeal or incorporeal property of *freehold* tenure by *Will* was first given by 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5, but which only authorized the devise of *two-thirds* of the estate, reserving one-third to the king or the lord, to countervail the advantages derived from wardship, *primer seisin*, &c.; and when those benefits were annulled by the stat. 12 Car. 2, c. 24, it followed that the

FOURTHLY.
ALIENATION BY
DEVISE.The statutes
32 H. 8, c. 1;
34 & 35 H. 8,
c. 5.

(x) 2 T. R. 197; Co. Copyh. a. 41;
2 Bla. C. 371, 372.

(a) 3 Bar. & Cres. 172; 4 Dowl. &
Ry. 492, 8. C.

(b) 2 Mau. & Sel. 87.

(c) 2 T. R. 484; 1 East, 236.

(d) *Ante*, 236; 3 T. R. 162; 5 East,
522.

(e) 5 Bar. & Ald. 626; 1 Dow. & R.
243.

(f) See Chit. Col. Stat. and notes, 178;
3 T. R. 162; 13 Ves. 240, 253.

(g) 1 Watkins' Copyh. 362; 4 East,
271; and see 1 Tho. Co. Lit. 676.

(h) Sugd. V. & P. 8 ed. 275, note (II).

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34 & 35 Hen.
8, c. 5, s. 4.

entire interest in *freehold*, when of *inheritance*, became *devisable*. The power to devise freehold of inheritance and the form of the devise now depend upon the enactments in 34 & 35 H. 8, c. 5, s. 4, and the statute against frauds, 29 Car. 2, c. 3. The former enacts "that all and singular person and persons *having* a sole estate or interest in *fee-simple*, or seised in fee-simple in coparcenery, or in common in fee-simple, of and in any manors, lands, *tenements*, rents, or *other hereditaments*, in possession, reversion, remainder, of rents or services incident to any reversion or remainder, shall have full and free liberty, power, and authority to give, dispose, will, or devise to any person or persons, except bodies politic and corporate, by his last will and testament *in writing*, or otherwise by any act or acts lawfully executed in his life by himself solely, or by himself and others jointly, severally, or particularly, or by all those ways or any of them, as much as in him of right is or shall be, *all* his said manors, lands, tenements, or hereditaments, or any of them, or any rents, commons, or other profits or commodities, out of or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure."

The 29 Car. 2,
c. 3, s. 5, 6.

The 29 Car. 2, c. 3, s. 5, enacts that "all devises and bequests of any lands or tenements devisable either by force of the statute of wills or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in *writing*, and SIGNED *by the party so devising the same*, or by some other person in his presence and by his *express directions*, and shall be *attested and subscribed in the presence of the said devisor by three or four such credible witnesses*,⁽ⁱ⁾ or else they shall be utterly void and of none effect." And then section 6 enacts that "no such devise in writing, nor any clause thereof, shall at any time be *revocable*, otherwise than by some other will or codicil in *writing*, or other writing declaring the same, or by *burning, cancelling, tearing, or obliterating* the same by the testator himself, or in his presence and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until

(i) It will be observed that there is a material difference in the words of the 5th and of the 6th section, as regards the circumstances attending the signature of the testator. The sixth section expressly requires that the testator should sign the revocation in the presence of the THREE witnesses. It may therefore be inferred, notwithstanding the decisions to the contrary presently noticed, that probably the legislature originally intended by the

fifth section, that the testator should actually sign his will in the presence of the three witnesses, and the adhering to that requisite would certainly better prevent imposition. Did not the term attest require that the witnesses should see the testator actually sign? The words of the two clauses, however, certainly differ, whatever may have been the intention of the legislature.

the same be burnt, cancelled, torn, or obliterated by the testator or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, *signed in the presence of three or four witnesses, declaring the same.*" (j)

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The operation of these acts may be conveniently considered with reference, 1st, to the *thing* or property that may be devised under them; 2dly, the *tenure, estate, or interest* therein, and the operation of certain terms; 3dly, the *form* and requisites of a will, and the testator's signature thereof; 4thly, the *attestation* by witnesses; 5thly, construction, operation, and pleading of a will, with the consequences of a devise to an heir, and of revocations, and other points.

Arrangement of
decisions on the
statutes.

1stly. With respect to the property or *thing* that may be devised under these statutes, the terms of the acts are very extensive, expressly including manors, (k) lands, (l) tenements, (m) rents, (n) and other *hereditaments*, (o) the comprehensive import of which terms we have considered at large. The terms include every thing corporeal and incorporeal, the particulars of which have been enumerated. (p) The terms being so comprehensive, it would seem scarcely necessary to refer to decisions. It has been held, that an advowson in gross (q) and tithes (r) may be devised, but that certain franchises cannot. (s) In describing in a will the thing intended to be devised, it is expedient to specify and enumerate the principal messuages, buildings, farms, land, or other property, by the usual and most appropriate description, and then, after the words "with the appurtenances," to add "and all lands, tenements, and hereditaments, commons, ways, watercourses, rights, easements, and advantages whatsoever, now or heretofore usually used, occupied, or enjoyed with the same, whether as part or parcel thereof, or for the better or more conveniently occupying or enjoying the same;" by which means all discussion and litigation respecting the extent of the property intended to be devised, and whether or not a way or other easement were strictly appurtenant, or had not been extinguished as such by unity of seisin or otherwise, would

1. What things
devisable, and
by what words
they pass.

(j) This clause clearly requires that the testator shall sign such revocation in the presence of the three witnesses, and quære, whether that was not the real intent in the prior clause in making a will? See ante, 352, n. (i); 1 Saund. 277, b., in nota.

(k) Ante, 166.

(l) Ante, 179.

(m) Ante, 151.

(n) Ante, 225 to 229.

(o) Ante, 153.

(p) Ante, 145 to 229.

(q) Cro. Eliz. 359; 2 Bla. R. 1242.

(r) 6 Cruise, 22.

(s) Id. ibid.; 3 Coke, 32, b.

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be avoided. (t) The terms "effects," (u) or property (v) in general; only import *personal* property, and will not in general include or pass real estates, unless there be something in the context of the will to extend the terms beyond their natural meaning; nor will the words "securities for money" pass the legal estate of a mortgage in fee without words of inheritance, or other words denoting a clear intention. (x)

2. Extent of estate devised, and whether legal or equitable, &c.

2dly, *Extent of interest*, or the tenure or estate in the property devised. The act speaks only of estates which the testator *hath* in *fee-simple*, in possession, reversion, or remainder; they therefore do not extend to *copyhold* estates or customary freeholds, the devise of which will be presently separately noticed. (y) It is better, in a devise of real property, to use the words "my *estate* and *interest*" in the thing specified, and then to limit or declare what extent of interest the devisee shall take as "to him and his heirs and assigns for ever," or "to him and his assigns during the term of his natural life," &c., by which means all discussion respecting the extent of interest that passes will be avoided. We have considered the extensive meaning and operation of the word "estate," especially in a will, and when a mere devise of the thing, without that word, will pass the fee-simple. (z) By introducing the word "interest," as well as "estate," all possibility of doubt will be avoided; whereas a devise of a "messuage," or of "my estate at B.," without the addition of "all" my estate, or "my estate and interest," or adding words expressly denoting the duration of interest, as, "and his heirs," or "for ever," or subjecting the devisee personally to the payment of debts or legacies, will, in general, only give him an estate for life. (a)

But very general words in a will may pass the *largest* interest in real property. Thus, a gift to A. and B. (son and daughter,) "whom I appoint my executors, of *all that I possess in any way*

(t) *Ante*, as to appurtenances, 153 to 159; and as to the comprehensive import of the terms *messuage*, *ante*, 167 to 169; *curtilage*, *ante*, 175; *land*, 179, 180.

(u) 1 Russ. R. 482; 2 Maule & S. 448.

(v) 6 Bing. 602 to 611; 1 Russ. R. 479; 2 Marsh. R. 397.

(x) 9 Bar. & C. 267.

(y) 7 East, 299, 322; Chit. Col. Stat. 1121, in notes.

(z) *Ante*, 159, 238, 248, 249.

(a) *Id.*, *ibid.* When "my estate at Ashton" passes a fee, see 4 Taunt. 176; 2 Marsh. 15, 443, 117, 359, 897; "all my freehold property" passes the fee, 16 East, 271; and as to the difference

between the word "estate" and "lands," 2 Marsh. 35; 7 East, 259. When an estate in fee or fee-tail passes, although only an estate for life be in terms given, 4 M. & S. 364; 3 M. & S. 522. When the word "estates" passes a fee or a devise over after death to tenant for life, 4 M. & S. 366. Devise to wife of all testator's estate, and, after her death, to the heirs of her body, share and share alike, and in default of issue, &c., she takes only an estate for life, 2 Marsh. 9. Devise of a house after payment of debts only gives a life interest, unless devisee be charged with personal liability to pay the debts, 3 M. & S. 516, 518.

belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be," was held to pass the fee-simple, those words being equivalent to a gift of all his property, and this, although the testator expressly excepted his household furniture. (b) So a devise of "all my *worldly goods*" may pass a fee. (c) So a direction in a will, that all the testator's children shall share equally in all his *property*, gives them the real estate in fee. (d) But, in such a case, a further general direction for the sale, in a given event, of an estate in fee devised by a will, without expressing by whom it was to be sold, does not give a power of sale to the executors by implication; and if the estate be given to the testator's children, who are under age, the sale must be suspended until they have attained twenty-one, and are competent to convey. (e)

A trust estate, (f) and the legal interest of a mortgagee in fee, (g) and equitable interests (h) as well as legal, in general including an equity of redemption, are clearly devisable, and will pass under the general words in a will passing other estates, unless a contrary intention can be collected from the testator's expressions, or from purposes or limitations to which he has subjected the lands so devised, and which would be inconsistent or improper, if they had reference to trust or mortgaged property. (i) But the estates of a trustee or mortgagee do not pass by any intendment beyond the terms of a devise, which purports merely to devise what is strictly beneficially his own property, and therefore "a devise of all my ready money, *and securities for money*," will not pass the legal interest in fee of a testator, who was a mortgagee in fee. (k) In general, *parol evidence* is not admissible to extend the terms of a devise and enlarge the estate beyond what the words would import. (l)

The testator must be seised, either legally or equitably, *at the time of making his will*. We have seen that a will as to personal property is ambulatory from the time of making it until death, so that, provided the intention of the testator so appear, or there be an express bequest of the residue, then after-purchased or acquired personal property will pass; and the

When testator must have the estate at the time of making his will.

(b) 4 Russ. R. 348.

(c) 7 Bing. 664.

(d) 1 Jac. & W. 189, 192, note (b).

(e) 1 Jac. & W. 189.

(f) 2 P. W. 258; and see cases cited 9 B. & Cres. 267.

(g) 1 Ch. R. 18; 9 B. & Cres. 267.

(h) 1 Chit. R. 190. The words *having an estate*, &c. in most statutes are construed to include equitable as well as legal interests; see in general, 1 Atk. 573; 1

P. W. 278, and cases on game qualifications, Cald. 230; 9 Price, 237; 8 T. R. 506; 12 East, 263, and Serjeant Williams' opinion, Chit. Game L. 2 ed. 64, 65.

(i) See Lord Eldon's judgment in *Lord Braybrooke v. Inskip*, 8 Ves. 417; 10 Price, 76; and see observations of Bayley, J. in 9 B. & Cres. 278.

(k) 9 B. & Cres. 267.

(l) 3 M. & S. 171; 3 Taunt. 147.

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same rule would include a chattel real, as a term for years ; (m) but no *freehold* interest in real property will *at law* pass, unless the testator have the estate therein *at the time of making his will* ; not on account of the word “ *having* ” in the statutes, but on the ground that a devise of freehold is in the nature of a *conveyance*, which cannot operate upon real estates subsequently acquired ; (n) and this rule prevails so strongly, that the testator must *continue* to retain until his death, subsequently, the same interest in the land as that which he had at the time of making his will ; (o) and a will cannot become operative by the testator *afterwards* becoming interested in land, though specifically devised, (p) excepting by formal *republication* of the will. (q) But provided the testator have, at the time of making his will, a sufficient devisable estate in land, it is not every act or alteration in the nature of his estate will prevent his will from operating. (r) With respect to the words in the first act, *sole seised*, we have seen that a will by a joint tenant before severance of the joint interest is inoperative. (s) The intention of the legislature in using the word “ *having* ” was to enable not only persons actually seised of a *legal* estate, but also all *beneficial* owners even of equitable interests in possession, remainder, or reversion, to devise the same. In equity, therefore, a purchaser’s beneficial and equitable interest in land contracted for, though not yet conveyed, may be devised, (t) also contingent remainders, and all other contingent estates and interests in land. (u) And a possibility, by virtue of an executory devise or a springing use, is devisable. (x)

It has been supposed, upon the same principle, that a person who has been *disseised* cannot devise his interest until he has regained possession ; but as a devise under such circumstances could not be attended with the consequences intended to be guarded against by the statute against transfers by *sale* of an estate, where the possession is adverse, (y) it should seem that such devisee might effectually pass his interest by devise. (z)

(m) *Ante*, 110.

(n) *Id.* *ibid.* ; 2 Ves. Jun. 427 ; and see Chit. Col. Stat. 130, 131, and 1120, note (d). It is essential to attend to this reason.

(o) *Id.* *ibid.* ; 4 Burr. 1961 ; 8 East, 552.

(p) Co. Lit. 392.

(q) 4 T. R. 60 ; Cowp. 364 ; 6 Cruise, 28.

(r) See cases collected, Chit. Col. Stat. 1120, 1121.

(s) *Ante*, 269 ; and see 1 Bla. R. 476 ; 3 Burr. 1468.

(t) 1 Ch. Cas. 39 ; 9 Mod. 78.

(u) 6 Cruise, 23.

(x) 1 Hen. B. 30 ; 3 T. R. 86.

(y) See 32 Hen. 8, c. 9, Chit. Col. Stat. and notes, 130, note (a) ; 1120, note ; Evans’s Statutes, 451, d. A *seisin* in *law* is in general sufficient, 2 Dowl. & R. 38.

(z) *Id.* *ibid.* ; 2 Ves. Jun. 427 ; but see 1 Taunt. 578 ; 8 East, 552 ; 6 Cruise’s Dig. 30 ; Evans’s Col. Stat. tit Wills, 451. If it were otherwise, an heir might, by *disseisin*, readily prevent the party legally entitled from afterwards defeating the descent.

We have seen that an estate *pur autre vie* is expressly devisable by the last mentioned act. (a)

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And notwithstanding this *rule* at law, that *after-purchased* real property will not pass, it will *frequently* be otherwise in *equity*, when the testator's intention to the contrary must be collected from the terms of the will, and the heir would take advantage of the testator's neglect to republish his will after his purchase, and yet attempt to take any benefit under the terms of the will; and therefore a devise and bequest by a testator of, "all my estate and effects, both real and personal, which I shall *die possessed of*," was held in *Equity* to extend to lands purchased by the testator after the date of his will; and it was held that the heir taking benefits under the will must elect either to give up his claim to such lands or to give up his share of any benefit under the will. (b)

3dly. *With respect to the form of a will.* The statute 34 and 35 Hen. 8, c. 5, s. 4, and the 29 Car. 2, c. 3, s. 5, respectively require it to be in *writing*. But if it were *printed* it would suffice, provided it were duly signed, (d) and probably it would be the same though in pencil. (e)

3. Form of
a will. (c)

The 29 Car. 2, c. 3, s. 5, requires that the will shall be *signed* by the testator, or by some other person *in his presence*, and by his *express* direction; *signature* by *mark* would suffice. (f) It need not be at the foot, for it may be at the beginning or on the side, if written with intent to give effect to the whole instrument, though it is usual and safer to subscribe every distinct sheet of a will. (g) But where a will consisted of several sheets and the testator signed two of them, but from weakness could not sign the rest, the court was of opinion that the will was incomplete, though if he had signed the *last sheet* it might have been otherwise. (h) It has been decided that the signing by the testator in the presence of the witnesses is not requisite, nor is it essential that any of the witnesses should see him sign or even see his signature, (i) though *they* must sign in his presence, or at least in a situation where he *might* see

(a) 29 Car. 2, c. 3, s. 12.

(b) *Churchman v. Ireland*, 1 Russ. & M. 250, confirming 13 Ves. 209, 1 Dow, 249, and qualifying 1 Jac. 534.

(c) See a short form, *post*, 350.

(d) 2 Mau. & Sel. 286.

(e) 5 Bar. & Cres. 234.

(f) 3 Lev. 1; Freem. 538; and see

2 Bos. & Pul. 238.

(g) 3 Lev. 1, 86; 9 Ves. 294.

(h) 7 Bing. 457; Dougl. 241; 4 Ves. 197; 9 Ves. 249; and see 2 Bro. & B. 650; 5 Moore, 484, S. C.

(i) *White v. British Museum*, 6 Bing. 310; 1 Ves. & B. 362; and *Wright v. Wright*, 7 Bing. 457.

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and understand that *they* were signing as witnesses; and it is held to be sufficient if the witnesses can swear that the testator acknowledged his signature to each witness, (k) or even *one* witness; and according to the decisions even such an *express acknowledgment* may not be essential. (k) *Sealing* is not required, and it should seem that it would not dispense with the omission to sign, because signature is a more certain and permanent mode of testifying assent than the verbal proof of the testator having sealed; and it will be observed, that the statute against frauds throughout its provisions requires the sanction of signature and not that of sealing. (l) *No formal delivery*, as "I deliver, or I sign this as my last will and testament," though usual, is requisite, and there is not in the statute one word or expression respecting the *publication* of a will, and therefore it seems quite sufficient if the will has been signed by the testator, and it be also attested by three witnesses in his presence, though at different times; (m) and the testator need not describe to the witnesses the instrument as his will, or name what instrument it is; nor need the witnesses know the terms of it, or even whether it be a deed or a will. (n) And if the attesting witnesses will neither swear to the sealing or publication, Holt, C. J. held it sufficient to prove their attestation. (o) And it was recently held that a will of lands, subscribed by three witnesses in the presence and at the request of the testator, was sufficiently within the statute against frauds, although none of the witnesses saw the testator sign or even saw his signature, and only one of them knew what the paper was. (p) It may be questionable, under the terms of the act, whether any communication from the testator is necessary, and whether a will may not be equally valid without either of the witnesses knowing what the instrument was, for the subsequent proof of the testator's handwriting, and those of the three witnesses, would, without any such communication, sufficiently identify the instrument. (q)

(k) *Ante*, 357, n. (i); and see *post*, that even that is not necessary, and that at least an acknowledgment to *one* would suffice; but see *ante*, 352, note (i).

(l) 2 Ves. S. 450; 1 Wils. 313; 1 Ves. Jun. 11; 17 Ves. 458; 18 Id. 175.

(m) 7 Bing. 457.

(n) 3 Stark. Ev. 1689, and cases there collected.

(o) *Dagwell v. Glasscock*, Skin. 413; 1 Stark. Ev. 336. In case of bonds or notes with a subscribing witness, it suffices to prove the handwriting of the

latter, and all the other requisites, if not negated by the witness, will be presumed.

(p) *White v. British Museum*, 6 Bing. 310; *Wright v. Wright*, 7 Id. 467.

(q) *Peate v. Oagly*, Comyns, 197; and see *Trimmer v. Jackson*, Burn's Eccl. L. But it seems that in general proof is expected of the testator's acknowledgment to at least one witness that the instrument was his will; 6 Bing. 310; 3 P. W. 253; 3 Stark. Ev. Wills, 1686.

4thly. As to the *attestation* and *subscribing* in the presence of the testator by *three* or more *credible* witnesses. Although proof is essential that the will was *attested* by the witnesses in the presence of the testator, it was not necessary that such attestation should be stated on the face of the will, or at the foot. (s) The attestation of an illiterate witness, by making his mark, is a sufficient *subscription*. (t) And although the witnesses must attest and subscribe the will in the presence of the deviser, it is not necessary that they should do so in the presence of each other; (u) and where each of the witnesses, at perfectly distinct times, at his request, signed as witnesses, and neither of them saw the testator sign or saw his signature, and he only told one of such witnesses that the instrument was his will, this attestation was held sufficient. (x) Neither is it necessary that the witnesses should see the deviser sign the will or even see his signature when they attest, provided he acknowledged his signature and that it was his will in their presence, or to one of them; (y) and where the deviser having executed his will in the presence of two witnesses, afterwards produced it to a third and showed him his name, and told him it was his handwriting and desired him to witness it, which he did, it was held that the will was well executed. (y)

Nor is it necessary that the testator should *actually* see the witnesses sign the will; it suffices if it be shown that he was so situated that he *might* have seen them do so. (x) When the

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4. Attested and
subscribed by
three witnesses
in presence of
testator. (r)

(r) 2 Bla. C. 376, 377; *ante*, 252, n. (i).
(s) 4 Taunt. 217; Willes' Rep. 6; Vin. Ab. tit. Devise, N. 9; Bac. Ab. tit. Wills, D. 2; *Price v. Smith*, Willes' R. 1; 4 Taunt. 217; and *per* Ld. Eldon, *Randcliffe v. Parkyns*, 6 Dow, 202.

(t) *Wright v. Wright*, 7 Bing. 457; *Harrison v. Harrison*, 8 Ves. jun. 185; *Addy v. Grice*, Id. 504.

(u) *Wright v. Wright*, 7 Bing. 457; *Smith v. Codron*, cited 2 Ves. 455; *Grayson v. Atkinson*, 2 Ves. 454; *Jones v. Lake*, cited Atk. 177. See *Stonehouse v. Evelyn*, 3 P. Wms. 253; *Westbeech v. Kennedy*, 1 Ves. & B. 362; *Ellis v. Smith*, 1 Ves. jun. 11.

(x) *Wright v. Wright*, 7 Bing. 457.

(y) *Ibid.*; 1 Ves. & B. 362; *supra*, 6 Bing. 318, 320; 7 Id. 457.

(z) *Todd v. E. of Winchelsea*, 1 Mood. & M. 12. The witnesses to a will devising real estates retired and attested the same in an adjoining room, a small part only of which was visible from the bed, in which the testator lay so weak as to be incapable of moving without assistance; it did not appear in what part of the room the witnesses signed the will,

and it was held that the will was duly attested, the jury finding that it was attested in such a place that the testator had an *opportunity* of seeing, and *might* have seen it done. Abbott, C. J., in summing up, said, "The single question is, was or was not the will attested in the presence of the testator? What is meant by *presence* may admit of some doubt; it cannot in all cases mean in sight of the testator, because he may have been blind; in that case other circumstances have been held sufficient. In ordinary cases the rule, as I collect it from the authorities [*Doe dem. Wright v. Manifold*, 1 Mau. & S. 294, and cases there cited] is, was or was not the will attested in such a situation as that he *might* have seen it, if it was attested at the pier table, or at either of the other tables moved into that part of the room which was visible from the bed. It is for you to say whether it is made out to your satisfaction that it was attested in such a place as that the testator had an opportunity of seeing and *might* have seen the witnesses do it."

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testator desired the witnesses to go into another room, seven yards distant, to attest his will, and there was a window broken, through which he *might* see them, the attestation was held to be sufficient. (a) So where the testator was sick or in bed, though with his curtain drawn. (b) So where the testatrix could see the witnesses through the windows of her carriage and of the attorney's office. (c) Where the testator required the witnesses to set their hands as witnesses to a paper folded up, which they did in his presence, it was considered that this was sufficient, although the testator did not say it was his will; (d) and although it seems in general to have been supposed there should be some acknowledgment by the testator of his signature to the instrument as his will, at least sworn to by one of the witnesses. (e) But it is otherwise if the testator was so situated that he could not have seen the witnesses attest the will; as where they go down stairs into another room, out of the testator's presence, and attest the will there. (f) So if the testator was in a state of insensibility at the time. (g)

An *incompetent* witness is not a credible witness; and upon the trial of an issue or question respecting the validity of a will, evidence of the character and credibility of a deceased witness is admissible. (h) The 25 Geo. 2, c. 6, renders void a legacy given to a witness by a will devising real property, in order to render him a competent witness. (i)

The attestation of a will need not state that the witnesses subscribed their names in the presence of the testator. (k)

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|---|--|
| (a) <i>Shires v. Glascock</i> , 2 Salk. 688; Carth. 81. | 562; ante, 558; 6 Bing. 318. |
| (b) Bac. Ab. Wills, D. 1. | (f) <i>Broderick v. Broderick</i> , 1 P. Wms. 239; <i>Doe v. Manifold</i> , 1 Mau. & S. 294; |
| (c) <i>Casson v. Dade</i> , 1 Bro. Ch. R. 99; <i>Davy v. Smith</i> , 3 Salk. 395. | <i>Clark v. Ward</i> , 4 Bro. P. C. 71. |
| (d) <i>Peate v. Oagly</i> , Comyns, 197; and see <i>Trimmer v. Jackson</i> , 4 Burn's Ecc. Law. | (g) <i>Cater v. Price</i> , Dougl. 241. |
| (e) <i>Stonehouse v. Evelyn</i> , 3 P. W. 253; 3 Stark. tit. Wills, 1686; 1 Ves. & B. | (h) 5 Bing. 435; 3 Moore & P. 4, S. C. |
| | (i) See Chit. Col. Stat. 1129, 1130, notes. |
| | (k) Willes, 6; 4 Taunt. 217. |

SUGGESTED GENERAL FORM OF A WILL OF REAL PROPERTY, &c.

This is the last will and testament of me, A.B.,* of &c.

1st. Debts and funeral and testamentary expenses charged on real property.

First. I direct that all my just debts and funeral and testamentary expenses may be paid by my executors hereinafter named with all convenient speed after my decease;† and I do hereby subject, charge, and make liable all and every my real and personal estate and effects, whatsoever and wheresoever, to and with the payment of the same, and of the legacies hereinafter bequeathed accordingly.† But I direct that my personal estate shall in the first place be applied in payment, satisfaction, and discharge of my said debts and funeral and testamentary expenses, and of the legacies given by this my will, in exoneration of my real estate.

2. Devise in fee.

Secondly. And I give and devise all my estate and interest of and in all that my farm and lands called Hill Farm, in the county of Norfolk, with the appurtenances, and all

* The will may be in a *prospective* form, as ante, 111.

† These words alone would constitute

an equitable charge on the estate; *Williams v. Chitty*, 3 Ves. jun. 545; 2 B. & Cres. 489.

5thly. The *general construction* of a will is to be the same whether the testator had a legal or only an equitable estate. (1)

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commons, ways, easements, profits, and advantages now or theretofore used or enjoyed therewith,* unto my daughter Emily, her heirs and assigns for ever.

Thirdly. And I give and devise all my estate and interest in that my estate called "The Brooks," in the county of Suffolk, with all &c. (as above), unto my eldest son William and the heirs (if intended to be in tail male insert the word "*male*," and if in tail female then the word "*female*,") of his body lawfully begotten.

3. Devise in tail general male and female.

Fourthly. If it is intended that the heirs in tail of a man by a particular wife should inherit, then say "unto my eldest son William and his heirs on the body of his present wife Mary lawfully begotten."

4. Devise in tail special.

Fifthly. I give and devise all my estate and interest in my estate at Uxbridge, in the county of Middlesex, called "The Plantation," unto A. B. and C. D. and their heirs, but nevertheless to the uses following, (that is to say,) to the use of my son Thomas and his assigns for and during the term of 99 years, to commence and be computed from the day of my decease, if he shall so long live, without impeachment of or for any manner of waste except wilful or malicious waste; and from and after the determination of the said term by forfeiture or otherwise during the life of my said son Thomas, then to the use of the said A. B. and C. D. and their heirs during the natural life of him my said son, in trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require; but nevertheless to permit and suffer my said son and his assigns to receive and take the rents and profits of the said estate and every part thereof during his life; and from and after his decease,† to the use of the first son of the body of my said son Thomas, lawfully to be begotten, and the heirs male of the body of such son; and for default of issue male of such first son, to the use of the second, third, fourth, fifth, sixth, seventh, and all and every other the son and sons of the body of my said son, lawfully to be begotten, severally, successively, and in remainder one after another, as they shall be in seniority of age and priority of birth, and the heirs male of the body and bodies of all and every such son and sons, the elder of such sons and the heirs male of his and their body and bodies being always preferred to and to take before the younger of such sons and the heirs male of his and their body and bodies; and in default of issue male of any or either of such son and sons, to the use of all and every the daughter and daughters of the body of my said son lawfully begotten or to be begotten, equally to be divided between or amongst them, if more than one, share and share alike, and to take as tenants in common and not as joint tenants, and the heirs of the body and bodies of all and every such daughter and daughters; and in default of lawful issue of any one or more of such daughter or daughters, there being more than one, then as to the part or share of such daughter or daughters who shall have no such issue, to the use of the other or remaining daughters, equally to be divided between them, if more than one, share and share alike, and to take as tenants in common and not as joint tenants, and the heirs of their respective bodies; and in case there shall be but one other remaining daughter, then as to the part or share of the daughter or daughters so failing of lawful issue, to the use of such only remaining daughter and the heirs of her body; and in case there shall be but one daughter of the body of my said son, then to the use of such one or only daughter and the heirs of her body; and in default of such issue of my said son, then to the use of my own right heirs for ever.

5. Short devise in strict settlement.

Instead of this last limitation to the testator's right heirs, the estate may be limited to his second and other sons successively, and their children and issue in the same way, with an ultimate remainder, in case of failure of issue of any of his sons, to the testator's daughters, in the like manner as the above limitations in point of form.

Sixthly. And I give and devise my house in Lincoln's Inn Fields, in London, unto my nephew G. H. and his assigns for and during the term of his natural life,‡ and from and after the decease of my said nephew G. H., then

6. Devise of life estate in presenti.

(1) 1 Jac. & W. 573.

* Ante, 253.

† Where the son of the testator has children already born, the limitations may, subject to the rule against perpetuities (see ante, 243), be still further restricted, viz. to the son for life, remainder to his eldest son by name for life, then to trustees to preserve &c. remainder to the first and

other sons in tail of the grandson, the same as it is here limited to those of the son of the testator, with remainder to the second and other sons of the testator's son, and their issue in tail in the same manner.

‡ As to the words essential to create a life estate, see ante, 251, 354; and Id. note (e).

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In *pleading* a devise of land, operating under the statute of devises, it must, as well in a declaration as in a bill, be shown

7. Devise of life estate in remainder.

Seventhly. I give and devise the same unto my other nephew *J. K.* in case he shall be then living, and his assigns for and during the term of his natural life, and from and after the decease of the survivor of my said two nephews, then

8. Devise in remainder to females as tenants in common.

Eighthly. I give and devise my said house unto my nieces *E. P.*, *H. P.*, and *J. P.* daughters of my sister *E. P.* or such of them as shall be living at the time of my decease (or "the decease of the survivor of my said nephews *G. H.* and *J. K.*") their heirs and assigns for ever, as tenants in common and not as joint tenants.

9. Bequest of legacies.*

Ninthly. I give and bequeath unto my eldest son my gold watch, chain, and seals.

Tenthly. And I give and bequeath unto my second son my diamond ring and brooch.

Eleventhly. And I give and bequeath unto my friend *P. B.* the legacy or sum of 100*l.*

Twelfthly. And to my friend *Mrs. C. B.*, wife of the said *P. B.*, the like legacy or sum of 100*l.*†

Thirteenthly. I give and bequeath to each of my executors hereinafter named the sum of 50*l.*, as some remuneration for the trouble they will have, to be paid to or retained by them out of my residuary estate.‡

Fourteenthly. I give and bequeath unto *L. M.*, *N. O.*, &c. the sum of 20*l.* each for mourning.

Fifteenthly. I give and bequeath unto each of my servants living with me at the time of my decease the sum of 10*l.* over and above the wages due to them up to the time of their discharge, together with a suit of mourning each; (and so on according to the intentions of the testator) and he may then proceed,

Sixteenthly. And I do hereby direct that all the aforesaid pecuniary legacies may be paid, if convenient to my executors, within the space of six months after my decease, and that such of the said legacies as are given or shall belong to married women, shall be paid to them personally for their separate use, free from the control of any husband, and their receipts shall be a discharge for the same.†

17. Devise and bequest of Residue.

Seventeenthly. And as to all the rest, residue, and remainder of my real and personal estate and effects whatsoever and wheresoever, not hereinbefore specifically disposed of, over which I shall have a disposing power at the time of my decease, I give, devise, and bequeath the same unto the said *A. B.*, *C. D.*, and *E. F.*, their heirs, executors, administrators, and assigns, according to the nature or tenure thereof, upon trust that they do and shall convert the same into money in such manner as they may think proper, and after payment and deduction thereof of my just debts and funeral and testamentary expenses and the legacies aforesaid, do and shall pay and divide the produce arising from such conversion unto, between, and amongst all and every my sons and daughters who may be living at the time of my decease, and the children of any of my sons and daughters who shall be then dead, in equal shares and proportions as tenants in common; the children of any son or daughter then deceased taking between them the share only which their deceased parents would be entitled to, if then living.

Eighteenthly. And I do hereby declare that the receipts of my said trustees shall be a good discharge to any purchaser who may buy any of the trust property sold by them in execution of the trusts of this my will.

Appointment of executors and trustees, signature by testator, and attestations of witnesses.

Then follow the appointment of the executors,§ and powers for their indemnity and the appointment of new trustees. It is advisable to have three or more trustees, to avoid the necessity of frequent substitution of trustees. The signature of the testator and the attestation and signature of the witnesses may be in the same form as adopted in a case of personality, and which we have already considered.¶

* If it be intended to secure the benefit of a bequest from creditors, express terms to that effect must be introduced; see ante, 66.

† If for her separate use, see ante, 61, n. (a), and infra, sixteenth division.

‡ This bequest alone is effectual to preclude the executor from being entitled to the residue.

§ See form, ante, 111.

¶ See form of attestation, ante, 111.

that it was in writing, as that form was prescribed by the very act which gave and qualified the power to devise; (m) but as only a subsequent act, the statute against frauds, introduced the necessity for witnesses, though usual, it is not necessary to aver that the will was attested and subscribed by three witnesses in the presence of the testator. (n)

With respect to a devise to a person who is the *heir of the testator*, the case of *Doe v. Pratt and Timins* (o) has now established the law to be, that a devise to the heir does not make him take by purchase, *although the fee devised to him be made defeazible by executory limitation*; a point upon which the authorities were previously contradictory. (p) In other words, the devise to the heir is void, and the will is to be read as if *merely* containing a future contingent devise to the party in whose favour the executory limitation is made, leaving the fee to *descend* in the mean time. But if an heir prefer to take by descent, "then a Court of Equity will compel him so to elect, and if he prefer to take as heir, it will not allow him also to have any other property or benefit under the will in derogation of its terms." (q)

A devise of specific lands is not liable to ademption or to pay personal legacies, whether specific or general, although there be deficiency, unless the testator direct otherwise. (r) A devisee may *disclaim* the benefit, and thereby prevent any estate vesting in him; as where land has been devised charged with payment of debts or legacies; and it is not necessary to make a formal disclaimer in a court of record, and it will suffice to do so by deed, but it may be doubtful whether it could be by parol; (s) and where a devisee refused to take it, saying that he was entitled to it as heir, and would not accept any benefit by the will, it was held that this not being by deed, was not such a disclaimer as to prevent her from afterwards bringing an ejectment, and relying on her title as devisee. (t)

Revocations of a will are express or implied. (u) To constitute an express revocation of a clear devise, the intention to revoke must be as clear as the devise, (x) and an express revo-

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5. Construction
and operations
of a will, &c.
and other
points.

Revocation.

(m) 1 Saund. 276, d., n. 2.
(n) 1 Bridgm. Eq. Dig. 2d. ed. 611,
pl. 630; Vern. & Sc. 497; 2 Chit. Pl. 591.
(o) 1 Bar. & Ald. 530.
(p) See *Chaplin v. Larour*, 5 Maule &
Selwyn, 14.
(q) 2 Ves. & B. 190; Chit. Eq. Dig.
tit. Heir, 491.

(r) Bligh's Rep. New S. 84; 1 Dow.
R. New S. 365.
(s) 5 B. & Ald. 34; 6 B. & Ald. 112.
(t) 6 B. & Ald. 112.
(u) See in general as to revocations, 1
Saund. 277 to 279, in notes.
(x) *Doe v. Hicks*, 8 Bing. 475.

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cation must be either in writing, signed by the devisor in the presence of three or more witnessess, or by burning, cancelling, tearing, or obliterating the will by the testator, or by his direction. (y) The latter must be done *animo cancellandi*, and the intention is a question for a jury. (z) Implied revocation is by marriage and the birth of a child subsequent to the will, even a posthumous child would suffice. (a) But it has been doubted whether the subsequent birth of a child, where the will was made after marriage, can alone suffice. (b)

Devises under
Powers. (c)

Devises under Powers. A feme covert, where lands have been conveyed to trustees, may have the power of *appointing* the disposition of the lands held in trust for her after death, and which appointment, in the absence of express directions, must be executed like the will of a feme sole, (d) and the appointment by a married woman is effectual against her heir, although it depend only upon the agreement of her husband before marriage, without any conveyance of the estate to trustees. (e)

And where there is a power to charge lands for the payment of debts, or for a provision for a wife or younger children, a Court of Equity will decree a will, though not executed according to the statute, to be a sufficient execution of such power; (f) and the defective executions of wills, in exercise of powers, have been remedied by modern enactment. (g)

Devise of Copy-
hold. (h)

We have seen that as copyholders and customary tenants, (whose interests pass by surrender,) are not seised *in fee simple*, nor hold their lands in socage tenure, it follows that they cannot make a will, or devise *under the statute* of Hen. 8; nor does that statute, or that of frauds, apply to or affect them; and that consequently the requisites of those statutes, as to the form of a will, or the number of witnesses, are wholly inapplicable; (i) though if the terms of the surrender to the use of a will require that it should be signed and witnessed in a specified manner, then, at least before the statute aiding the want of a surrender, such form must have been observed. (j) But at *common law*, or rather by *custom* generally prevailing in most

(y) *Ante*, 352, 353.
(z) 3 Bar. & Ald. 489; 2 Bla. R. 1043.
(a) 5 T. R. 49, 51, n.; 4 M. & S. 10;
5 Ves. J. 656.
(b) *Id.* ib.; and see 2 Bla. Com. 376,
note 5.
(c) See Sugd. on Powers, *per tot.*
(d) 2 Ves. 610; 1 Bro. 99.
(e) 3 Ves. sen. 191; 6 Bro. P. C. 156;

2 Eden, 239; 1 Bro. P. C. 486; Ambl.
653; 2 Roper's Husb. and Wife, 180.
(f) Scho. & Lef. 60; 1 Duke, 165.
(g) 54 G. 3, c. 168; Chit. Col. Stat.
856, and notes; and see Sugd. on Powers,
2 ed.
(h) *Ante*, 345 to 35
(i) 7 East, 299, 322; 1 Russ. R. 482.
(j) *Id.* *ibid.*; 2 P. W. 258; 2 Atk. 37.

manors, copyholders of inheritance may surrender the same to the uses declared in their wills; and it has been held that a custom to the contrary was void; (*k*) and since the 55 Geo. 3, c. 192, dispenses with a surrender to the use of a will, (excepting in the instance before noticed, where the surrender by a married woman was of the substance of the conveyance,) a copyhold will pass under a general devise of real estates, although there were no surrender to the use of the will, and although there were only two witnesses; (*l*) and equitable as well as legal interests pass by general words, and the terms of a will of copyhold are construed the same as those in a will of freehold; (*m*) and though under the words of the statute of wills, after-purchased freehold will not pass under a prior will, unless it be afterwards republished, it is otherwise as to copyhold, for if a man make a disposition by will of all his copyhold estates *generally*, and afterwards purchase other copyhold estates, and surrender them to the uses declared by his will, or even to the uses declared by his will of and concerning *the same*, the after-purchased estates will pass under the general devise, although the will was not republished. (*n*) But it seems that a surrenderee of copyhold cannot, *before admittance*, devise, at least so as to pass the *legal* interest to the devisee (*o*).

VII. Many of the *distinctions* between *legal* and *equitable* estates and interests, as well in personal as in real property, have been shown in the preceding pages; but there are some others essential to be kept in view; and though this chapter relates principally to *Real* property, it is expedient at the same time to consider equitable interests in *Personalty*; and *first*, *Personalty*; *secondly*, *Realty*.

VII. The distinctions between *LEGAL* and *EQUITABLE* rights, interests, and estates. (*p*)

1. It will be observed, that the title to personalty is usually *legal*, and consequently more simple than the title to realty; but the interest in personalty *may* be *equitable*; and in that case many of the principles affecting equitable interests in real property equally apply. Thus if a bond or other contract under seal be made to *A.* for the use of *B.*, the latter has no

1. As to *Personalty*.

(*k*) 3 Bro. C. C. 286; 15 Ves. J. 396.

(*l*) *Doe v. Ludlam*, 7 Bing. 275; 1 Russ. R. 482; *ante*, 347, 348.

(*m*) *Id.* *Ibid.*; 2 Atk. 57.

(*n*) Cowp. 130; Loft, 604; 8 Ves. 256;

Sug. V. & P. 8 ed. 173; 10 B. & Cres. 85.

(*o*) 1 Madd. 632; 7 East, 8; *King v. Turner*, 2 Sim. R. 545.

(*p*) See the divisions of the subject, *ante*, 145, 147, 307, 320, 321, 324.

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legal but only an equitable interest, and he could neither sue at law nor release the contract. (p) So if a deed be *inter partes*, that is, professedly made between two or more persons, then no person who is not stated therein to be a party can sue at law upon a stipulation therein, although expressly for his benefit; but the action must be in the name of the covenantor. (q) And if a bill of exchange be in terms payable to A. for the use of B. the latter cannot sue thereon. (r) In the case of a deed-poll, not *inter partes*, if the covenant therein be generally to pay B., or it be expressly with him to pay him money, then he might sue in his own name, although he did not execute the deed, and were in all other respects a stranger to it. (s) And in the case of contracts *not under seal*, there are instances in which it has been held that upon a promise in fact made to A. to pay money or deliver goods to C., the latter might sue in his own name for the breach; (t) though it is said that in declaring, the contract to pay or deliver should be alleged to have been made to the plaintiff, and that the promise, though in fact made to A., would be evidence in support of that allegation. (u) However, it should seem that whenever by the terms of a contract the party to whom the engagement is made is to be a trustee for another, the legal interest and right to sue is vested only in him, and he alone can sue. (x) But these rules, it should seem, do not preclude assignees of a bankrupt from suing at law his trustees, who have received dividends of stock which was vested in their names for his use. (y) Where there has been a bequest of a specific legacy, the legal interest remains in the executor until he has assented; and the legatee could not sue at law for or in relation to such bequest; (z) though after such assent the legal interest would vest, and the legatee might sue even the executor. (a)

So with respect to goods or any *personal tangible chattels*, if the legal interest therein be vested in A. as a trustee for B.,

(p) 2 Inst. 673; 1 Lev. 235; 3 Id. 139; 3 Bos. & P. 149, n. (a); 1 East, 501; 7 East, 148; 1 M. & S. 575; 1 Saund. 153; 2 Sand. U. & T. 222; 6 Vin. Ab. Covenant, 374; see the rule and principle, ante, 6, 7.

(q) 2 Inst. 673; 4 Rel. Ab. Fails, F. 1; 3 M. & S. 308, 322; 5 Moore, 23; 2 Bos. & P. 333; 5 B. & Cres. 355; 2 Prest. on Conv. 184; Platt on Conv. 7, 8.

(r) Carth. 57; 2 Vent. 307; 1 Esp. R. 231; 6 T. R. 193; 1 M. & S. 723; 1 Bos. & P. 101, note (c).

(s) 4 Lev. 74, Com. Dig. Covenant,

A. 1.

(t) Dutton v. Poole, 1 Vent. 318, 332; 2 Lev. 210; 5 Moore, 31; Marchington v. Vernon, 1 Bos. & P. 101, n.; and see observations in Carnegie v. Waugh, 2 Dowl. & R. 277; 1 Chit. Pl. 5 ed. 5, 6, note (b); but see Crow v. Rogers, 1 Stra. 592.

(u) Per Eyre, C. J. 1 Bos. & P. 102.

(x) Carth. 5; 2 Vent. 307.

(y) Allen (assignee) v. Impell, 8 Taunt. 963; 2 Moore, 240, S. C.; but see the case at Nt. Pri., Holt, C. N. P. 641, cont.

(z) 7 B. & Cres. 542; ante, 112.

(a) 3 East, 140.

and it be essential to adopt a form of action in which the right of property comes in question, as in *trover*, the proceeding must be in the name of *A.*, and not of *B.*; and the latter could not sue such trustee, or even a stranger, (b) though he might when in actual possession at the time of the injury sue a stranger for such injury, as possession is a sufficient title against a mere stranger. (c)

Where goods have been mortgaged or pawned, and are in the possession of the mortgagee, he has the legal interest, and in strictness the beneficial interest could not be legally seized or sold under an execution against the mortgagor; (d) and though it is said that on payment of the money due or subject to the charge the equitable interest might be seized or sold, it does not appear that there has been any solemn decision to that effect. (e)

2. With respect to *real* property and *chattels real*, the difference between legal and equitable interests are exceedingly important, and may be considered, *first*, with reference to the general consequences independently of legal proceedings; and *secondly*, with respect to actions and other proceedings. Under the *first* we have noticed one instance, that of the widow of an owner, who had only an *equitable* right, not acquiring a settlement as guardian in socage, because that character is only acquired in cases where the *legal* as well as the beneficial interest vests in the infant heir. (g) At *Law* only *legal* rights can be considered. (h) Again: a heriot is only payable upon the death of a *legal* owner, and not on the death of *cestui que trust*, (i) and many questions upon the distinction between legal and equitable interests frequently arise under the *Poor Laws*. (j) But *collaterally* and *independently* of actions and legal proceedings, the legislature and the courts for most purposes notice and consider the person *beneficially* interested, whether as *cestui que trust* or as mortgagor, as substantially

2. As to real property and chattels real. (f)

First. Independently of legal proceedings. (f)

(b) Holt's Cas. N. P. 641; 8 Taunt. 263; 2 Moore, 240, where see qualifications of the rule; 8 T. R. 322; 3 Campb. 417; 2 Bing. 2; 1 Sand. U. & T. 222.

(c) See principle, 2 Saund. 47, d.; 1 East, 244.

(d) Tidd, 9 ed. 1003; Bro. Ab. tit. Pledges, 28.

(e) Id. ibid.; in Tidd, 9 ed., referring to Bro. Ab. tit. Pledges, pl. 28, and 8 East, 476, 479, and 15 East, 607, the right to sell, subject to the lien, is supposed to exist, and in 8 East, Mr. Richardson so argued; but *quære*, if any express decision to that effect took place; certainly

a mere equity of redemption in a term for years cannot be seized or sold under a *fi. fa.* even on the sheriff's paying off the mortgage, 8 East, 467; 9 New R. 461, and Tidd, 1003.

(f) As to when a use is not executed, ante, 322 to 325; and as to conveyances of equitable interests, 307, 320, 321, 324.

(g) Ante, 8; Rex v. Toddington, 1 Bar. & Ald. 560, and Burn's J. Poor.

(h) The King v. Wilson, 16 B. & Cres. 67.

(i) 1 Vern. 441.

(j) See Burn's J. Poor, 26 ed. 589 to 656.

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the owner, and afford him, whilst he retains a *sufficient beneficial* interest in the property, *substantially* the same rights as if he were the legal owner. Thus we have seen that the words in the statute of wills, "persons *having* an *estate* or interest in fee simple," are construed to include equitable as well as legal estates. (k) So the prohibition from killing game, against persons "not *having* lands and tenements of the value of 100*l*." were construed to include mere *equitable* or beneficial interests in land, where the legal estate was vested in a trustee or mortgagee; (l) and many other instances might be referred to. (m) So although the *trustee* or legal owner of a manor might appoint a gamekeeper to *preserve* the game, that being consistent with the nature and duties of a trustee, yet it should seem (at least in equity) that he could not appoint a gamekeeper to *kill* game for his own benefit. (n)

Some statutes even expressly reserve or declare the right of a mere beneficial owner, as the 7 Wm. 3, c. 25, s. 7, which allowed the *cestui que trust* to vote at elections for knights of the shire; and the Reform act (o) enacts that no person shall be allowed to have any vote for a county member for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate, but that the mortgagor shall and may vote for the same estates, notwithstanding such mortgage interest.

With respect to *trust estates* in general, and uses not executed or vested under the statute of uses, the trust or equitable estate is considered, for most beneficial purposes, as equivalent to the legal estate, (p) and the *cestui que trust* has in most respects equal powers over the trust estate, as a party in whom the *legal* estate and the *beneficial* interest continue, though he may not be able to enforce the full benefit of those powers, except in a Court of Equity. Thus a trust estate and an equity of redemption may be *aliened* by the *cestui que trust* or mortgagor, and any usual *legal* conveyance or assurance executed by the former has, in equity, substantially, and as far as respects all beneficial purposes, the same effect and operation upon the trust as it would have had at law upon the legal

(k) 34 & 35 Hen. 8, c. 5, s. 4; *ante*, 355, 356; 2 P. W. 258; 1 Chan. R. 18, 190; 2 Ves. & B. 385; Dougl. 718.

(l) Cald. 230; Chit. G. L. 63, 64; *ante*, 355, n. (k).

(m) *Ante*, 355.

(n) 7 Ves. 488; Cald. R. 230.

(o) 2 Wm. 4, c. 45, s. 23.

(p) 1 Ves. 357; Sand. U. & Trusts; Sugden's ed. Gilb. U. & T. per tot.

estate, supposing it had been vested in him. (q) But when the *equitable* interest is of such a nature that if it had been a *legal* estate it could not have been conveyed without the aid of a fine or recovery, then the owner of such *equitable* interest must use the same kind of assurances by matter of record, in the transfer of his beneficial interest, as if it had been a legal estate; thus the equitable rights of tenant in tail and of married women must be conveyed by fine or recovery. (r) And a common recovery suffered by a *cestui que trust* in tail in possession will bar all equitable remainders depending upon such estate tail, although there was no legal tenant to the *præcipe*. (s)

The equitable interest of a *cestui que trust* or mortgagor may be *devised* precisely the same as a legal estate. (t) If not devised, the same *descends* precisely as a legal estate, and this whether the tenure be customary, as borough-English, or gavel-kind, or otherwise, (u) and there may be a *possessio fratris* of a trust. (v) So a trust estate may be *entailed*, and which, as just stated, can only be barred by fine or recovery, which will have the same effect upon an equitable as upon a legal estate. (x) So a trust estate may be limited to a person for life, and in such case a fine or other assurance by the *cestui que trust* for life will not operate as a forfeiture of his estate. (y) So trust estates are subject to *curtesy*, (z) unless where the husband is excluded by an express agreement or trust for the separate use of his wife. (a) But a trust estate is not subject to dower, which is the reason why, upon a purchase by a husband during coverture, care is usually observed, by the intervention of a trustee, to prevent any legal estate vesting in him of which the wife would be dowable. (b) We shall state the effect of *executions* against trust estates when considering how they affect proceedings at law, (c) and if an equitable title has not been acted upon the same as the legal should, we shall find that it is barred by analogy to the statutes of limitations. (d)

(q) *North v. Champerton*, 2 Chan. Cas. 63, 78; *Botteler v. Allingham*, 1 Bro. C. C. 72.

(r) 1 Sand. U. & T. 273.

(s) *North v. Way*, 1 Vern. 13; *Burnaby v. Griffiths*, 3 Ves. 276; *Wykhan v. Wykhan*, 18 Ves. 418; see further, 1 Prest. Conv. 23.

(t) *Greenhill v. Greenhill*, 2 Vern. 680; ante, 355.

(u) *Banks v. Sutton*, 2 P. Wms. 713, 736; 2 Ves. 304; *Caldecot's R.* 230.

(v) 2 P. Wms. 713, 736.

(x) *Kirkman v. Smith*, Ambl. 518; 2 P. Wms. 133.

(y) 3 Atk. 728; 2 P. Wms. 146.

(z) 1 P. Wms. 108; 3 P. Wms. 234; 1 Atk. 603.

(a) 3 Atk. 695, 716; 1 Ves. 298.

(b) *Dixon v. Saville*, 1 Bro. C. C. 326.

(c) *Post*, 371, 372.

(d) *Medlicot v. O'Donel*, 1 Bro. C. C. 167; *Hovendon v. Lord Annesley*, 2 Sch. & Lef. 630; *Bonny v. Ridgard*, 4 Bro. C. C. 138, 125; *Beckford v. Wade*, 17 Ves. 87, 97; *post*, ch. ix.

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Secondly. With
respect to ac-
tions and legal
proceedings.

As respects *actions* and *suits* at law for the recovery of real property or chattels real, or for injuries to the same, and in which any question respecting the *right* is to be tried, the proceeding must be in the name of the *legal* owner, and not of a party who has only an *equitable* interest; (e) though the latter, when in *actual possession*, may sue a *stranger* for an immediate injury to his possession, because in the latter proceeding the mere proof of possession suffices, and without investigation of the real ownership and even without any actual right, is considered sufficient to enable a party to sue a mere *trespasser*. (f) In actions of ejectment (which are founded on the *legal right* of property) the count must always be on the supposed demise of the *trustee*, in whom the *legal* interest and immediate *right* of possession is vested, and not upon the demise of the *cestui que trust*, or of a party having the *equitable* interest, unless he also have a *legal* right of possession; (g) though a *person* in actual possession, even under a void lease, at the time a trespass has been committed, might support an action for such trespass. (h) And it is settled that a *cestui que trust* cannot in any case sue his *trustee* at law, even for the most malicious waste to the property in which he is beneficially interested, but must proceed in a Court of Equity to prevent or obtain compensation for the injury, (i) and a mere equitable mortgagee by *deposit* of deeds would stand in the same situation; whilst *e converso* the trustee might at law support ejectment even against his own *cestui que trust*. (k) The same rule applies to *legal reversions*; thus if there be a tenant for years in possession, and there be a mortgagee or a trustee for a term, in whom the *legal* interest in reversion is vested, the latter, and not the mortgagee or *cestui que trust*, would be the proper party to sue the hundred for the felonious demolition of buildings, (l) though sometimes, by concealing the mortgage or deeds passing the legal interest, the party having only the equitable interest might succeed in such action. (m)

A mere *equitable* interest or *equity* of redemption in a *term for years*, cannot be taken in execution under a *fieri facias* against the party beneficially entitled. (n) And, therefore,

(e) 7 T. R. 47, 50; 8 T. R. 118; 10 B. & C. 87; see the *principle*, *ante*, 6 to 8.

(f) 1 East, 244; Willes, 221; 3 Burr. 1563; 1 Taunt. 83, 190; 8 East, 394; 5 B. & Ald. 600.

(g) 7 T. R. 47, 50. The instances, *ante*, 317, in which the *surrender* of a legal term vested in a trustee may be presumed, constitute exceptions.

(h) *Supra*, n. (f).

(i) 8 T. R. 118.

(k) *Doe v. Reid*, 8 T. R. 118.

(l) *Pritchit v. Waldron*, 5 Term R. 14.

(m) 9 B. & Cres. 134.

(n) 8 East, 467; 2 New R. 461; 3 Bro. C. C. 48; 1 Ves. J. 431; Tidd, 9^{ed.} 1003. As to a *freehold* lease, see *Comberbatch*, 291.

when the defendant has only an equity of redemption in a leasehold estate, an execution will not affect it, as the legal estate is in the trustee or mortgagee; (o) and the judgment creditor's only remedy in that case is by filing a bill in equity to redeem the estate by paying off the mortgage incumbrance; (o) and before so redeeming, it is said, he must first issue a *fiery facias*, (p) though it is not necessary to show it to have been returned. (q) It has been decided that a trust of a term for years is not within the statute 29 Car. 2, c. 3, s. 18, (presently stated,) because that act only extends to trusts of land in *fee*; (r) and courts of law so far take notice of equitable interests and qualify those that are legal, as to hold that when it is clear that a term is merely for trust purposes, as if it be a term for 2,000 years, they will construe it not to be a mere lease but a trust term to attend the inheritance, and not to be subject to be taken in execution, or sold under an execution against a trustee who has no beneficial interest under the same. (t)

As respects the effect of an *elegit* or *extent* against *freehold equitable* interests in land, Mr. Tidd thus distinctly states the law. (u) "At common law, if a man was seised of the legal estate in lands to the use of or in trust for another, against whom a judgment had been obtained, or who had entered into a statute or recognizance, these lands were not liable to execution upon the judgment, statute or recognizance of *cestui que trust*." (x) But the 29 Car. 2, c. 3, s. 10, altered the law in this respect, and enacts that, "it shall be lawful for every sheriff or other officer, to whom any writ or precept is directed at the suit of any person or persons, of, for, and upon any judgment, statute or recognizance, to do, make, and deliver execution, unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, as any other person or persons are in any manner *seised* or *possessed in trust* for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution is so sued had been *seised* of such lands, &c. of such estate as they are seised of in trust for him *at the time*

(o) 3 Atk. 200, 739; For. 162; 8 East, 476; Moore, 281; 1 Brod. & B. 506.

(p) 3 Atk. 200; 1 Vern. 399; 1 P. W. 445; 6 Ves. 72; 1 Mad. Ch. Pr. 205, 522.

(q) Lord Rederd. Pl. 3d. ed. 102; 1 Mad. Ch. Pr. 205.

(r) 2 Vern. 248; and see 2 Saund. 5 ed.

11, n. 17; 8 East, 476, 486; Tidd, 9th ed. 1036.

(s) Cowp. 595.

(t) Quere, Id. ibid.

(u) Tidd, 9th ed. 1035, 1036.

(x) Co. Lit. 374, b.; 2 Saund. 5th ed. 11, n. 17.

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of the said execution sued, which lands, &c. by force and virtue of such execution, shall accordingly be held and enjoyed freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued; and if any *cestui que trust* shall die, leaving a trust in fee simple to descend to his heirs, then and in every such case such trust shall be deemed and taken and is thereby declared to be *assets* by descent; and the heir shall be liable to, and chargeable with, the obligation of his ancestor for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended." The words in the act, "*at the time of the said execution sued*," are held to refer to the seisin of the trustee, and therefore if he has conveyed the lands by the direction of *cestui que trust* before execution, though seised in trust at the time of the judgment, the lands cannot be taken in execution.^(y) And a trust created by a defendant in favour of himself and another person is not a trust within the meaning of the above statute, which is confined to cases where the trustees are seised or possessed in trust for a defendant *alone* and not jointly with another person.^(z) An equity of redemption cannot be taken in execution on the above statute,^(a) though it is deemed assets;^(b) and therefore when the estate is mortgaged, the plaintiff's remedy is by filing a bill in equity to redeem, which he is entitled to do, on payment of principal, interest and costs.^(c) But an *elegit* must be first sued against the defendant and delivered to the sheriff,^(d) though it does not seem necessary to have it returned.^(e) And it is holden, that if a man be *cestui que trust* of a *term*, it is not assets within the statute, which extends only to a trust of lands in *fee*.^(f) An equity of redemption, however, may be taken under an *extent*.^(g)

Under an *extent*, the *crown* may take not only the legal estate of the debtor, but also trust estates,^(h) or an equity of

(y) Com. Rep. 226; Com. Dig. tit. Execution, C. (14); and see 4 Bing. 335.

(z) 4 Bar. & Ald. 684; and see 4 Bing. 96, 335.

(a) 3 Atk. 200, 739; 1 Ves. J. 431; 3 Bro. C. C. 478, S. C.; 8 East, 467; 2 New Rep. 461.

(b) 2 Freem. 115; 2 Atk. 290; and see Toller's Ex. 1st ed. 415, 416.

(c) Powel, Mortgages, 1st ed. 99; and see For. 162; 1 Mad. Ch. 522, 523.

(d) 3 Atk. 200; and see 1 Vern. 399; 1 P. Wms. 445; 6 Ves. 72; 1 Mad. Ch. 205, 522, 523.

(e) Lord Redesdale, Pl. 3d ed. 102; 1 Madd. Ch. 205, n. (r).

(f) Fleetwood's case, 8 Coke, 71; 2 Vern. 248; and see 2 Saund. 5th ed. 11, n. (17); 8 East, 474, 486.

(g) For. 162, 163; 1 Price, 207.

(h) West on Extents, 129; Tidd. 1050; but see Carth. 5.

redemption; (i) and if the extent be against several, the lands of all or any of them are liable to be seized. (k) But we have seen that no interests in lands of *copyhold* tenure are liable to be seized either under an *elegit* or an extent; (l) although every description of beneficial interest, whether legal or equitable, as well in freehold as copyhold property, is liable to be sold under a commission against a bankrupt, or by an assignee of a discharged insolvent. (m)

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In the early parts of this chapter, when enumerating the different descriptions of real property corporeal, and the different interests therein, we have noticed the civil and most of the criminal injuries which usually affect each, and the modern remedies and punishments, (o) and when considering the *times of enjoyment* (as whether the estate be in possession, remainder, or reversion, (p)) and the *number of owners*, (as parceners, joint tenants, and tenants in common, (q)) we stated how those circumstances varied the civil remedies and criminal punishments; and other remedies and punishments have been noticed in preceding pages, but still it is expedient, in concluding this chapter, to take a *practical* view of all the civil remedies and criminal punishments that can be applicable to any interest, legal or equitable, in real property or chattels real, with the exception of *Real actions*, which we will reserve for future consideration, when we state the practice of the Court of Common Pleas in particular, where those remedies must be pursued.

II. & III. IN-
JURIES, OFFEN-
CES, REMEDIES,
and PUNISH-
MENTS relating
TO REAL PRO-
PERTY. (n)

From the distinct natures of corporeal and incorporeal property, and in respect of the latter not being tangible, there is a very marked distinction between the injuries and remedies affecting them, and therefore we will *first* consider the injuries, civil and criminal, affecting real property *corporeal*, and the appropriate remedies and punishments; and, *secondly*, the injuries, remedies, and punishments relating to real property *incorporeal*. In considering these, our object will be to give a *practical outline*. The particulars of each remedy will be better examined in a subsequent part of the work.

Division of injuries and offences into those to corporeal and those to incorporeal property.

(i) For. 162; 1 Price's R. 207.
(k) West, Extents, 136.
(l) Ante, 235; 1 Rol. Ab. 888; 2 Bar. & Cres. 242, 243; 3 Dowl. & R. 603; Parker, 195; Tidd, 9th ed. 1050.

(m) Ante, 235.
(n) See division, ante, 145.
(o) Ante, 151 to 203.
(p) Ante, 266 to 268.
(q) Ante, 268 to 270.

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PROPERTY.

The *civil* injuries to real property *corporeal* are such as affect the possession or *right of possession*, or a right in *remainder* or *reversion*. The former are, 1st. *Ousters*, which include not only actual evictions or turnings out of possession, but also every wrongful withholding of possession; 2dly. *Injuries to the possession* by *trespasses* or *incumbrances* upon the land, and which may be as well by *acts* done as by *omissions*, as by neglecting to remove tithe, &c.; or by *nuisances* near to the same, as the obstruction of ancient lights, not removing nuisances, and not repairing fences. The latter include all the above injuries, when they are of such a nature as to affect the *future right of enjoyment*, whether in remainder or reversion, and also include waste and breaches of covenant affecting the future enjoyment of the property.

The *civil* injuries affecting real property *incorporeal* are principally by *disturbances*, as injuries to rights of common of pasture, or common of fishery, or ways, or watercourses, or rights to tithes, or advowson, or franchise, &c., or by *subtraction*, as withholding rents or services, &c. For most of these injuries there are three descriptions of remedies, viz. the *preventive*, the *compensatory*, or those for some degree of *punishment*, where the injury has been wilful and malicious.

FIRST. OUSTERS, and remedies for the same. (r)

Ouster defined. (r)

First. OUSTERS are either by actually *turning out*, or by *keeping excluded*, the party entitled to possession of any *real property corporeal*. An ouster can properly be only from *real property corporeal*, and it cannot be committed of anything moveable, (s) nor is a mere temporary trespass considered an ouster. (t) However, turning or keeping off cattle, or any other

(r) Ouster is the technical term still used in the declaration and action of ejectment, to describe an eviction or turning out of a *farm* or chattel interest, as a term for years in real property. *Disclaimer*, by a tenant's refusing to pay, or otherwise absolutely denying his landlord's title, is also equivalent to an ouster, 2 Schol. & Lefroy, 624, 625, ante, 287. *Disseisin* is the technical description of an eviction by a stranger from the *freehold*, and an ouster of the rightful tenant of the *freehold* from the possession, and an usurpation of the *freehold tenure*, 12 East, 141 *Doe v. Hull*, 2 Dowl. & R. 38, 604; *Jerritt v. Weare*, 3 Price's R. 575; but a lease by a stranger, and entry by the lessee, is not a disseisin *in fact*, without an entry by *force*, or an avowed intention to *disseise*, *Jerritt v. Weare*, 3 Price's R. 575; *Doe v. Hull*, 2 Dowl. & R. 38; and *Discontinuance* describes the eviction of a tenant in tail,

Doe dem. Jones v. Jones, 1 Bar. & Cres. 238; 2 Dowl. & R. 372, S.C.; *Burton v. Hussey*, 1 Hen. Bla. 269; *Doe v. Hordq*, Cowp. 702. *Descent Cast*, is where the death of the party, who made the *disseisin* and descent of the estate of his heir, takes away the right of entry of the true owner and compels him to resort to a *real action*. It is scarcely possible now to suggest a case in which the doctrine of *descent cast* can be so applied as to prevent a claimant from maintaining an action of ejectment, 2 Dowl. & R. 41; Adams's Ej. 2 ed. 41, note (s); 2 Bla. Com. 176, note 10; and see further 3 Tho. Co. Lit. 1.

(s) *Doe v. Cowley*, 1 Car. & P. 123; ante, 148 note (r). Ejectment for the tithe of a *parish* is an exception by 32 Hen. 8, c. 7, ante, 218.

(t) *Ante*, 374, n. (s); 7 Term Rep. 387; 1 Bos. & P. 573.

continuing act of exclusion from the enjoyment, constitutes an ouster, even by one tenant in common of his co-tenant; (u) and although, in general, as each tenant in common has a right to enjoy the whole and every part of the joint property, the possession of one is deemed the possession of the other, so as not to constitute an ouster, or enable one to recover in ejectment against the other, and he must therefore, in an action of ejectment, prove some act equivalent to an *actual* eviction; (x) yet if one has for many years (as 35 years) exclusively received the *whole* rents, or had *exclusive possession* without accounting to his companion, a jury may *présume* an actual ouster. (y)

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There appear to be no less than *twelve remedies* for wrongful ousters or withholding possession of real property. Although the usual remedy for an ouster is an action of *ejectment*, yet it is clearly established that the party injured may not only *prevent* the completion of the act by *resisting* the attempt to evict, and this even by forcible means, (z) (provided a dangerous weapon be not used, (a)) but after he has been turned out he may legally at any time retake and keep possession of land, or even of a messuage, provided he can do so by stratagem or even by force, (not amounting to a forcible entry, nor occasioning a breach of the peace, (b)) and therefore many actions of ejectment are unnecessarily resorted to when without personal conflict possession might have been regained. (c) But the safer course may in many cases be to proceed by action of ejectment, a judgment in which would tend to establish the title and probably prevent future interruption. In the meantime, supposing that reasonable ground for apprehending waste or other material injury will be committed before any execution in ejectment can be obtained, then a Court of Equity will in some cases *immediately* interfere, and prevent such injury by injunction. (d) In cases of *forcible entries* and *ousters* and

1. Remedy by resistance.

2. Remedy by re-entry.

3. Remedy speedy by injunction in Court of Equity.

(u) Co. Lit. 199, b, 200. a, where see several instances of ouster.

(x) Id. ibid.; 7 Mod. 39; *ante*, 271. But if the *consent* rule be *general* instead of special (avoiding any admission of an ouster as it should be) then the production of the consent rule will avoid the necessity of proof of actual eviction, *Doe v. Cuff*, 1 Camp. 173, *ante* 271.

(y) *Doe v. Prosser*, 1 Cowp. 217; 13 East, 212; but proof that one tenant levied a fine and received the whole rent for nearly *five years* is not (against the justice of the case) sufficient to find an ouster at the time the fine was levied, *Peaceable v. Read*, 1 East's Rep. 568.

(z) 1 East's P. C. 271, 277, 287; 7 Bing. 805; Skin. 387.

(a) Id. ibid.; 1 Hale's P. C. 445; Cook's Case, Cro. Car. 537; and see *post*, ch. vii.

(b) Because obtaining possession by such violent means would be indictable, 7 T. R. 432; 8 T. R. 357.

(c) *Turner v. Meymott*, 1 Bing. 158; 7 Moore, 574, S. C.; *Wildbore v. Rainforth*, 8 B. & Cres. 4; 3 Bing. 11, *post*, ch. vii.

(d) See the proceedings in the case *Ex parte Clegg*, MS., *post*, ch. viii. In that case, where a party wrongfully withholding possession had committed waste

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4. Remedy by justices giving possession in case of forcible entry.

5. Remedy summarily by justices giving possession where half-year's rent in arrear, and no distress, and premises deserted or uncultivated.

6. Remedy, double value for holding over after landlord's notice.

forcible detainers, justices of the peace also have the *power* of immediately restoring possession, (e) but they are reluctant to act, and rarely can be persuaded to do so, though they might in a clear case be compelled to proceed by *mandamus* from the Court of King's Bench. (f)

As between *landlord* and *tenant*, when the latter owes *half-a-year's rent*, and holds under any demise or agreement, whether written or verbal, (although there be not any power of re-entry reserved,) has deserted the premises and left the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrear of rent, two justices of the peace are, at the request of the landlord, to go to the premises and affix a notice on the premises of the day they will return, allowing at least fourteen days, and if upon such return the tenant do not pay the arrear, or there shall not be sufficient distress, then the justices are to put the landlord in possession, and the tenancy is thenceforth to cease. (g)

In favour of *landlords*, if a *tenant* for life or *years*, or person holding under him, shall *wilfully* hold over after the expiration of a notice in *writing*, given by the landlord, and after *demand* of possession, the 4 Geo. 2, c. 28, as a compensation for such ouster or withholding possession, subjects the tenant to pay *double the yearly value for so long a time* as the same are detained. (h) A weekly tenant is not within the act; (i) and as the term "*wilfully*" has been adopted, it has been considered that a person holding over after the death of a tenant for life, upon a *bonâ fide* supposition that a lease granted by him continued valid, when in the result it was void, was not liable to the penalty of double value. (k) The *landlord's* notice must have been in *writing*, (l) and it must have been a valid notice, or at least accepted as valid by the tenant. (m) A *demand* of posses-

by injuring a private rail-way and digging mines, and threatened further injury, an injunction was obtained *ex parte* in a very few days after the inception of the injury. The application and extension of the relief afforded in that case would, in *practice*, be of the greatest advantage to *landlords* and owners of property.

(e) *Post*, 377, 378; see fully *post*, ch. x.

(f) *Post*, ch. x.

(g) 11 Geo. 2, c. 19, s. 16; 57 Geo. 3, c. 52; and see 1 B. & Ald. 369; 3 B.

& Cres. 649, 5 Dowl. & R. 558, S. C.; Burn's J. tit. Distress, XVII.; and Chit. Col. Stat. tit. Landlord and Tenant, 673, 677, 678.

(h) 4 Geo. 2, c. 28, s. 1; Chit. Col. Stat. and notes, 666.

(i) *Lloyd v. Roscoe*, 2 Camp. 453; but see Co. Lit. 54, b.; *ante*, 256.

(k) *Wright v. Smith*, 5 Esp. Rep. 203; and see *Soulsby v. Irving*, 9 East, 313.

(l) *Trimmins v. Rawlinson*, 3 Burr. 1607.

(m) *Johnson v. Huddleston*, 4 Bar. & Cres. 922; 7 Dowl. & R. 411.

sion is essential, but it has been held that it may be made even before the right of possession accrued, and even that the service of the written notice to quit will of itself constitute a sufficient demand, (n) and if made even six weeks *after* the expiration of the tenancy it suffices, unless there has been a binding assent of the landlord to the continuing in possession. (o) The statute gives an action of *debt*, and as double *value* is recoverable, the amount of which is uncertain till fixed by a jury, the landlord cannot *distrain*. (p)

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A subsequent act provides that if a *tenant* give a *notice to quit* and do not quit accordingly, he shall thenceforth pay *double rent*, to be levied, sued for, and recovered at the same times and in the same manner as the single rent, and such double rent shall *continue* to be paid during all the time that such tenant shall *continue in possession*. (q) But the holding over does not strictly *continue* the former or constitute a *new* tenancy, and therefore it has been held that if a tenant, after having given notice to quit, hold over for a year, paying double rent, he may quit at the end of such year without fresh notice, and is liable to pay double rent only whilst he withholds the possession. (r) The statute only applies when the tenant has the power of determining his tenancy by a notice, and has given a *valid* notice, or at least when the landlord has assented to accept an insufficient notice. (s) But the penalty being double *rent* it may be distrained for the same as single rent. (t)

7. Remedy, double rent for holding over after tenant's notice.

The statutes against *forcible entries and detainers*, just alluded to, besides giving the power to justices immediately to restore possession and inflicting criminal punishments upon the offenders, also give a civil remedy to the party evicted; when a *freeholder*, by *action* of trespass for *treble* damages and treble costs; (u) and the proceedings upon an *indictment* upon the statute for a forcible entry operates as a civil remedy, for a part of the judgment

8. Remedy, restitution, on indictment for forcible entry, &c.

(n) *Cutting v. Derby*, 2 Bla. Rep. 1073; *Wilkinson v. Colley*, 5 Burr. 2694; *Lake v. Smith*, 1 New Rep. 174. *Sed quære*, whether the legislature did not intend to require a demand after the expiration of the tenancy.

(o) *Cobb v. Storkes*, 8 East, 358.

(p) *Trimmins v. Rawlinson*, 3 Burr. R. 1605.

(q) 11 Geo. 2, c. 19, s. 18; Chit. Col. Stat. & notes, 674.

(r) *Booth v. Macfarlane*, 1 Bar. &

Adolp. 904.

(s) *Johnson v. Huddleston*, 4 B. & Cres. 922; 7 Dowl. & R. 411, S. C.

(t) *Trimmins v. Rawlinson*, 3 Burr. 1603.

(u) 8 Hen. 6, c. 9; Co. Ent. 46, n. (a); 2 Chit. Pl. 5th ed. 864, 865. Only to a *freeholder* who has been forcibly expelled, 8 Bar. & Cres. 409; as to treble costs, 2 Inst. 289; 10 Co. 115, 'b.; 1 Vent. 22; but see as to treble costs, Hard. 152; ante, 27, 28.

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is an award of and writ of restitution, unless the offender has been in possession more than three years, (x) for which reason a party interested in the possession of the estate is not a competent witness in support of the prosecution. (y) The statute 21 Jac. 1, c. 15, extends the writ of restitution to tenants for years and copyholders, and tenants by *elegit* ousted by the lessor or the lord or others. (z)

9. Remedy,
justices giving
summary pos-
session where
paupers retain
possession.

When a *pauper* or others have been permitted to occupy, or has intruded himself into a house, tenement, or dwelling, or land appropriated for the poor belonging to a parish, shall refuse or neglect to quit the same to the churchwardens and overseers of the poor within one month after notice and demand in writing, two justices of the peace may summon the party, and after the expiration of seven days they may by warrant cause possession to be delivered to the parish officers; (a) but this proceeding is cumulative, and where a party wrongfully withholds possession, the latter may be taken without force, or the proceeding may be by action of ejectment. (b)

10. Remedies
in equity.

When the *legal* estate is vested in a trustee and he declines to interfere and allow his name to be used, in the supposed demise in a declaration of ejectment, then (although he could not in case an action should be brought on his demise defeat the action by release, (c)) it is advisable to state explicitly in writing the necessity for the proceeding in an action of ejectment, and to tender an adequate indemnity, (d) and in case the trustee should wrongfully persist in his refusal and impede the proceedings, the *cestui que trust* might proceed in his name or file a bill in a Court of Equity, and probably the trustee might under circumstances be subjected to costs in a clear breach of trust; (e) or it may become necessary to file a bill and move for an injunction against a tenant holding over, (f) or to restrain a defendant in ejectment from setting up an outstanding term; (g)

(x) 8 Hen. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15. See statutes and cases, Burn's J. Forcible Entry and Detainer; and post, ch. x.

(y) *Rex v. Williams*, 9 Bar. & Cres. 549; Talf. Dick. Sess. 239, S. C.; *Rex v. Bevan*, Ry. & M. N. P. C. 242.

(z) See Burn's J. Forcible Entry, I. A lord of a manor may be indicted for a forcible entry on his copyholder, see Gilb. Ten. 328; 3 Burr. R. 1733; 1 Tho. Co. Lit. 657, n. C.

(a) 59 Geo. 3, c. 12, s. 17, 24, 25; see

Chit. Col. Stat. 679, 680, and notes; *Woodcock v. Gibson*, 4 B. & Cres. 524; 6 Dowl. & R. 521, S. C.; as to the summons, &c. see 1 Bing. 537; 8 T. R. 109.

(b) *Wildbore v. Rainforth*, 8 B. & Cres. 4; *Turner v. Maymott*, 1 Bing. 158; 7 Moore, 574, S. C.; ante, 375.

(c) 4 Maule & Sel. 300.

(d) See the mode of tender, post, ch. vi.

(e) 3 Maule & Sel. 516; 6 Bing. 174.

(f) Chit. Eq. Dig. 1057; 15 Ves. 180; 5 Price, 468.

(g) Chit. Eq. Dig. 1055.

or a bill to quiet the owner in possession, after repeated trials at law, may become a prudent proceeding to prevent future litigation. (h)

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The ordinary proceeding for recovery of the *possession* of premises, where the *right* of possession has accrued within twenty years, (after which it is necessary in general to proceed in a *Real* action,) is by ejectment, which is a *mixed* action, as well for recovery of possession as for *damages*, and though until recently the latter were merely nominal, and the defendant could not be compelled to give security in the nature of bail, yet the recent acts, (1 Geo. 4, c. 87, and 1 Wm. 4, c. 70, s. 36 to 38, and 1 Wm. 4, sess. 1. c. 7,) in cases between landlord and tenant, restore the action to the ancient principle, and entitle the lessor of the plaintiff not only to recover possession, but also actual *damages*, in the nature of mesne or intermediate profits, whilst the party has wrongfully withheld possession, and so as to prevent the necessity for a subsequent *distinct* action of *trespass* to recover such mesne profits. But these statutes are confined to proceedings by *landlords* against *tenants* holding over, and do not extend to other claimants.

11. Remedy by action of ejectment in general.

The whole practice in ejectment will be considered in the second volume, (i) and we shall merely here observe that an action of ejectment can only be sustained when the property to be recovered is *real* property, and actually part thereof, and not for a thing moveable, or for or against a person in respect of a stall set up in a street, and not substantially and permanently let into the ground, (k) nor for a mere *transient trespass*, where there is no *continued* ouster or exclusion from house or land; an action of trespass *quare clausum fregit* being then the proper remedy for such mere trespass. (l) So ejectment is not sustainable for *Dower* before it has been assigned, as the widow has not before that division any distinct legal interest in any part of the land. (m) Nor can ejectment be sustained for *Incorporeal* property, which not being tangible is incapable of being injured by an ouster, and the proper remedy is case for the injury. But ejectment for *Tithes* is an exception introduced by statute; (n) and ejectment, we have seen, lies for a right of

(h) *Post*, ch. viii.

(i) And see Adams on Ejectment, 3 ed., one of the very best modern works, replete with learning and equally perspicuous and practically useful.

(k) *Doe v. Cowley*, 1 Car. & P. 123,

and *ante*, 148, note (r), 374, 375.

(l) *Id. ibid.*; 7 T. R. 327; 1 Bos. & Pal. 573, *ante*, 374, 375.

(m) 2 Car. & P. 430.

(n) 32 Hen. 8, c. 7, s. 7; Cro. Car. 301; *ante*, 218.

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common appendant or appurtenant, when claimed together with real property. (o) With respect to the *Title*, it should seem that the modern practice narrows the maxim, that the lessor of the plaintiff must recover upon the strength of his own title, and not on the weakness of that of his adversary, for (at least *prima facie*) mere proof of *priority of possession* will suffice against a party who acquired possession from or under the lessor of the plaintiff by consent or force or fraud. (p)

12. Remedy
for Dower.

A widow has not, until a distinct third has been assigned to her by consent, or under process of law, any legal interest in any part of the land, and (subject to her right to retain possession of the principal mansion for forty days after her husband's death,) she would have no defence to an action of ejectment on the demise of the heir. She should therefore require the heir to assign her a just proportion of the estate descended, and if he should afterwards refuse, a Court of Equity would probably compel him to pay costs. If the husband died seised, then, upon a writ of dower, she would at law be entitled to *damages* and costs; but if he did not die seised, then she could not at law recover either, and therefore in that case it is better, after demand, to proceed in a Court of Equity. (q)

SECONDLY.
TRESPASSES
and remedies.
What a trespass.

SECONDLY, are injuries by *trespasses upon* land or in the house of a party in *actual possession* and without eviction. The act complained of must have been *upon* or at least in *contact* with the land or building, or it cannot be deemed a trespass, but merely a nuisance, remediable in an action on the case, (r) and must have been an act *committed* by, or caused to have been committed by the defendant; and therefore although the owner of cattle, whose habit of wandering must be known, or presumed to have been *known* to him, is liable to be sued for trespasses committed by them, although without his actual concurrence, it would be otherwise as respects other animals, as a dog; (s) but a very small contact, such as earth being piled up near to and rolling *against* a wall, though upon the land of the wrong-doer. (t) It must be some *act done*, so that it might be technically described as committed with *force*, and therefore a *mere nonfeasance*, such as the neglect to remove

(o) 1 Stra. 54; *ante*, 211, note (c).
(p) *Ante*, 274, 275.
(q) 2 Saund. R. 43, in notes; Mit. Eq. Treat. 111; Bac. Ab. Dower; Chit. Eq. Dig. 324 to 328; and 3 Chit. Pl. 5 ed. 1311 to 1330.

(r) 2 Burr. 1114; 11 Mod. 74, 130; 1 Stark. R. 59.

(s) 1 Car. & P. 119; Burr. Rep. 2092; 2 Lev. 172; 1 Chit. Pl. 5 ed. 94, 95.

(t) 9 B. & Cres. 591.

tithe duly severed is not a trespass; (u) and it should seem questionable whether the *mere continuance* of an injury, for the inception of which the plaintiff has already recovered damages, can be treated as a trespass, as the neglect to remove an incumbrance on land after a verdict for placing the same thereon. (x) The injury must also be to the *possession*, and a person who has not had actual possession, but merely the right, cannot, before he has taken possession, sue, though afterwards he might for an antecedent injury, after his right first accrued. (y) But we have seen that mere possession, and that even under a void lease, is sufficient against a wrong-doer or person who cannot prove the right of possession in himself, or in some person by whose authority he committed the act complained of. (z)

1. The *remedies* for trespasses are by *prevention*, *compensation*, or *punishment*. The *prevention*, by turning off the trespasser or his cattle, not using unnecessary force or dangerous weapon, (a) but not by placing dangerous instruments on the land, as spring guns, (b) or dog spears, (c) or a ferocious dog or other animal in an open yard, at least without adequate notice. (d) So the continuance of a trespass by cattle may be prevented, and the payment of damages for the injury then doing may be secured by *distraining* the cattle whilst in the act of doing the damage, and upon the same close, but not after they have escaped. (e) So in case of wasteful continued trespasses, it may be expedient to file a bill, and by injunction prevent a repetition. (f)

1. Remedies by preventions, &c.

2. Remedy by distress.

3. Remedy by proceeding in equity.

4. And compensation to the extent of 5*l.* for small wilful or malicious trespasses, occasioning actual damage, and not mere trespasses by walking over land, may be obtained by summary proceeding before a justice. (g)

4. Remedy by summary proceeding before a justice.

5. To prevent trespasses in pursuit of game, summary proceedings are provided either to apprehend and detain for even

5. Remedies for trespasses as to game.

(u) 1 Bos. & Pul. 476; 1 Ld. Raym. 188,

(x) 1 Stark. R. 22.

(y) See cases 1 Chit. Pl. 5 ed. 204.

(z) 1 East, 244; 11 East, 65.

(a) 2 Salk. 641; 7 Bing. 316; *post*, chap. vii.

(b) 7 & 8 Geo. 4, c. 18, s. 1; 4 Bing. 633; *post*, chap. vii.

(c) 1 J. B. Moore, 202; 4 Bing. 642, 643; *post*, chap. vii.

(d) *Sorel v. Blackburn*, 4 Car. & P. 297; *M'Kone v. Wood*, 5 Car. & P. 1; 3 B. & Ald. 312, 313; see fully chap. vii.

(e) 4 Bing. 642, 643; *post*, chap. vii.

(f) *Ex parte Clegg*, *post*, chap. viii.; 17 Ves. 110; 1 Swans. 208; 5 Mad. 45; Chit. Eq. Dig. 1058.

(g) 7 & 8 Geo. 4, c. 30, s. 24; *Buller v. Turley*, 2 Car. & P. 585; *Devey v. White*, 1 Mood. & M. 56; *Rex v. Harper*, 1 Dowl. & R. 223; *post*, Criminal Injuries.

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twelve hours, a trespasser who refuses truly to tell his name and place of abode, and to take him before a justice; and such justice may convict in penalties for trespassing, taking game, attempting to poison it, and other injuries. (*h*)

6. Remedy by
action of tres-
pass.

6. But the common law action of trespass is the usual remedy for trespasses and other *immediate* injuries on land or buildings, but restrained by statutes, enacting that the plaintiff, whenever he recovers a verdict for less than 40s. shall have no more costs than the damages, unless the judge certify that the trespass was wilful, or that the freehold came in question; and hence the expediency of not proceeding for any trespass, unless it were committed after notice not to commit it, or unless the damages were so considerable as to render it certain that the verdict will be for 40s. or upwards. (*i*)

7. Remedies
for nonfeasance,
&c.

7. We have seen that mere *omissions* are not trespasses, nor remediable by action of trespass. Such as the *neglect to remove* tithe, (*j*) or to remove an incumbrance after recovery of damages for the original trespass; and in these cases the remedies are by carefully removing the incumbrance to a proper place off the land, or after requesting the wrong-doer to remove the nuisance, by proceeding in an action against him for his neglecting to do so; and it would not be legal to turn cattle upon the land, or otherwise to damage the tithe, (*k*) and care must be observed in the removal of the property incumbering the soil. (*l*) The incumbrance might however be distrained damage feasant. (*l*)

THIRDLY. In-
juries by not
REPAIRING
FENCES.

THIRDLY. DEFECT OF FENCES. We have considered in whom the property in a hedge, ditch or fence is usually vested, and the legal obligation to repair the same. (*m*) The neglect to repair is an injury which may be compensated, 1st. by the occupier of the adjacent close distraining damage feasant cattle that escaped, through the insufficiency of the fence, into the land of such occupier; (*n*) or 2dly, his suing the wrong-doer for the trespass committed by his cattle; (*o*) 3dly, if the cattle of the adjacent occupier escape, and he thereby sustain

(*h*) 1 & 2 W. 4. c. 32, post, Crim. Inj.
(*i*) 22 & 23 Car. 2, c. 9; 4 & 5 W. & M. c. 23, s. 10; 8 & 9 W. 3, c. 11, s. 4; Tidd, 9 ed. 963 to 968; ante, 23, 27, and post, chap. v. as to notices not to trespass.
(*j*) Ld. Raym. 187, 1399; 1 Stra. 634.

(*k*) 8 T. R. 72.
(*l*) Post, chap. v.
(*m*) Ante, 193 to 197; Vin. Ab. Fences, and 2 Chit. Pl. 5 ed. 780, notes.
(*n*) 1 Salk. 335.
(*o*) Id. ibid.; Bull. N. P. 74.

loss or trouble in recovering them, then he may support an action on the case for the consequence of the neglect to repair; (p) 4thly, the party who ought to have repaired could not sue for trespass committed in consequence of the defect in his fences. (q) 5thly. Perhaps between freeholders, the ancient proceeding to compel reparation by writ *curia claudenda* might be advantageously revived. (r) In an action on the case for not repairing, it suffices to allege generally that the defendant "*debit reparare*," without showing the origin or consideration for the supposed liability, and this seems sufficient, although it should appear that the obligation originated by express agreement. (s)

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FOURTHLY. Injuries by NUISANCES and other injurious acts, the cause of which is *near* to the house or land of the party complaining, but not *upon* the same, are the consequence of some wrongful act or omission of a party, who either ought not to have occasioned or permitted the same, or who ought to remove the same. Such as injuries to the light or air, occasioned by improper obstruction of ancient windows; or arising from not cleansing cesspools, watercourse, &c.; or by frightening wild fowl from a decoy by noises near the same; or by causing water to flow, or preventing it from flowing, to a party's estate.

FOURTHLY.
NUISANCES not upon, but near the complainant's house or land, and remedies.

1. For these injuries also the remedies are *prevention*, *compensation*, or *punishment*. *Prevention*, by entering the land of the wrong-doer, and carefully abating or removing the nuisance; (t) but previous to which, at least where the injury is a mere continuance or omission, there should in general be a request to the wrong-doer himself to remove the matter complained of; (u) or the nuisance by building or otherwise may be prevented by *Injunction*. (x)

1. Remedies, prevention and removal.

2. The remedy by action to recover damages for most nuisances and injuries committed *off* the land of the party com-

2. Remedies by action.

(p) 2 Y. & Jer. 391; 1 B. & Ald. 59.

(q) *Ante*, 194.

(r) *Ante*, 195, note (m).

(s) 3 T. R. 766; 1 Price's R. 27; 6 B. & Cres. 333, 338; 2 Saund. 114, a., b., c.

(t) *Raikes v. Townsend*, 2 Smith's R. 9; 2 Salk. 459; *Earl Lonsdale v. Nelson*, 2 B. & Cres. 302; 3 Dowl. & R. 556; *post*,

chap. vii. as to the *abatement* of nuisances.

(u) *Earl Lonsdale v. Nelson*, 2 B. & Cres. 302; 3 Dowl. & R. 556; *post*, chap. vii.

(x) 2 Russ. R. 121; 2 Swans. 333; 16 Ves. 338; against powder mills, 19 Ves. 617; 18 Ves. 211; Chit. Eq. Dig. 1053, 1055; *post*, chap. viii.

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plaining is generally *case*, and in which the plaintiff is entitled to full costs however small the damages, unless the judge should certify to take them away, as he may do in all actions. (y) And if the nuisance be *continued*, successive actions may be brought, even by a reversioner, until at length the wrong-doer has been induced to remove the nuisance complained of. (a) But before the commencement of an action against a mere continuer of a nuisance, who did not himself erect it, he should be requested to remove it, and such request should be averred and proved. (b) When the nuisance was first occasioned within six years, the action may be against the party who erected it, (c) though the safest course is to request a removal, and afterwards to sue the occupier, whose duty resulting from his occupation is to remove every illegal nuisance on his land occasioning injury to the property of any adjacent owner. (d) We have considered the right to *ancient* lights in general. (e) If ancient windows be raised and enlarged, the owner of the adjoining land cannot legally obstruct the passage of the light or air to any part of the space occupied by the ancient window. (f) And it is not necessary to prove a total privation of light or air to sustain an action, for if the party cannot enjoy the light in so free and ample a manner as he did before, he may sustain the action, though there must be proof of some *sensible diminution* of light or air. (g) The building a wall which merely obstructs a prospect is not actionable, (h) nor is the opening a window and destroying the privacy of the adjoining property actionable, but such new window may be immediately obstructed, so as to prevent a right to its being acquired by twenty years' use. (i)

(y) 2 Burr. R. 1114; 1 Chit. Pl. 5 ed. 159, 160; 2 Bla. C. 403, n. 6; 3 Bla. C. 216; *ante*, 380, n. (r).

(a) *Ante*, 267; 2 B. & Adolp. 97.

(b) Willes's Rep. 583; Cro. Jac. 555; 5 Co. 100, 101; Jenk. 260. But it has been held, that proof of a notice to remove having been left at the premises, is evidence against a subsequent occupier, to render him liable to be sued for the continuance, 1 Ry. & M. C. N. P. 189.

(c) Com. Dig. Action for Nuisance, 13; 1 Bos. & Pul. 404. It may be against lessor, if nuisance was erected by him, 2 Salk. 460; 12 Mod. 636; or even an agent who erected, 6 Moore, 47.

(d) 4 T. R. 318; 2 Hen. Bla. 350.

(e) *Ante*, 206, to 208, 282 to 286.

(f) 3 Campb. 80; *ante*, 157, 208.

(g) 4 Esp. R. 69; 2 Car. & P. 465; *Chilton v. Sir T. Plumer*, Sittings at Westminster, in the King's Bench, A.D. 1822.

(h) 9 Coke, 58, l.; 1 Mod. 55; 2 Selw. N. P. 4 ed. 1046.

(i) 3 Campb. 82. In obstructing such new window, care must be observed not to trespass upon or against the land or building of the person who made the window, but it should be effected by placing a board upon a pole opposite the window, and in the ground of the party annoyed by such window.

3. The judgment *quod prostravit*, upon an indictment for a continuing nuisance, might, in that respect, operate as a private preventive remedy.

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Some of the preceding injuries may so *continue in their consequences* as to be prejudicial to an interest in real property in *remainder* or *reversion*, and entitle the parties having such interests to sue for such consequences. (k) Thus we have seen that if a *trespass* or direct injury to the *possession* occasion such *continuing damages* as to affect and prejudice also the *reversionary* interest, the occupier may sue in trespass for the injury to his possession, and the reversioner may also sue in case for the injury to his right. (k) So, if a nuisance committed *near* to buildings or land occasion as well a present injury to the possession as also an injury to the remainder or reversion, the occupier may sue in case, and the remainder-man or reversioner may also sue in case; so it should seem that a reversioner might sue for stopping up a way. (l) And it is immaterial of what tenure the land may be, and any future vested interest that has been injured is in general sufficient; thus a remainder-man of copyhold premises may sue; (m) and a remainder-man may sue a tenant for life for any wrongful act that has prejudiced his interest. (n) But in all these cases the form of the remedy at the suit of a reversioner or a remainder-man differs from that of the occupier, for it must be expressly in *case*, stating the injury, not to the possession, but to the reversionary interest, and it must show and aver an injury *capable* of extending and continuing so as to affect the future right of possession, and that it *actually did injure* the reversionary interest; (o) though the declaration need not show the precise extent or nature of the interest in remainder or reversion, and a general allegation that at the time of committing the grievance complained of, the premises upon or to which the injury was committed was in the possession of a certain person, to wit, *E. F.*, as tenant thereof to the plaintiff, the *reversion* (or "*remainder*,"") thereof then (p) belonging to the plaintiff, is sufficient, and preferable to a more precise allegation; (q) but in evidence, the lease

3. Remedy by prostration on indictment.

Fifthly. Injuries to rights in remainder and reversion, and of landlords and successors, &c.

(k) *Ante*, 266 to 268; 4 Burr. 2141; 3 Car. & P. 817.

(l) 8 Wentw. 550; *quere*, Com. Dig. Action on Case; Nuisance, B.; 3 Lev. 360.

(m) *Jefferson v. Jefferson*, 3 Lev. 130; *Jessur v. Gifford*, 4 Burr. 2141; *Fisher on Copyhold*, 114; 2 Saund. R. 252, a. note 7.

(n) *Scumble*, 2 Saund. 252, a., but those were cases of waste.

(o) 1 M. & S. 234, 239; *ante*, 267, note (a); 1 B. & Adolph. 391.

(p) It is not necessary, though usual, to aver that the plaintiff's interest still continues, 3 Taunt. 137.

(q) Com. Dig. Pleader, C. 39. Sometimes a seisin in fee of the reversion is unnecessarily stated, 3 Wils. 461; 8 Wentw. 550.

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WASTE and other injuries to a remainderman or reversioner.

or agreement which creates and limits the possessory interest should be proved. (r)

But the principal injuries affecting remainders and reversions are those committed *upon* or *to* the buildings or land during a tenancy for *life* or *years*, and which may be *Waste* or *Breach of Covenant* or *stipulation* expressed or implied. *Waste* is the principal injury, and may be either *active* and *wilful*, usually termed *voluntary* waste, or it may be *permissive*: the *former*, by pulling down houses, destroying heir-looms, opening new mines or pits, changing the course of husbandry, felling timber trees, or by any material alteration in the state of the premises, even by an enlargement, melioration, or improvement in value of the premises; (s) and the *latter* by *permitting* or suffering premises to become or continue dilapidated for want of requisite repairs. The extent of liability for mere *permissive* waste appears to be questionable, and therefore in creating tenancies for life or years, it is at least advisable to specify the duty by express stipulation or *covenant*.

Tenants for life.
(t)

Tenants for *life*, unless expressly dispunishable for waste, are liable to any *actual* or *wilful* waste, as cutting trees otherwise than for repairs, (u) or altering buildings or land, or destroying hedge-rows; and even if dispunishable of waste, we have seen that a Court of Equity will by injunction prevent equitable or malicious waste, as cutting ornamental timber, or pulling down a mansion, excepting for rebuilding, when necessary. (x) The statute of Marlebridge, 52 Hen. 3, c. 23, and the statute of Gloucester, 6 Ed. 1, c. 5, are the only statutes relating to waste. The first enacts, sect. 2, "also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of any thing belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do, and thereof be convict, they shall yield full damage, and shall be *punished by amerciament grievously*." The statute of Gloucester, 6 Ed. 1, c. 5, enacts, "that a man shall have a writ of waste in the Chancery against him that holdeth by law of England (*i. e.* tenant by curtesy) or otherwise, *for term of life*, or *for term of years*, or a woman in dower; and he which shall be attainted of *waste* shall leese the thing that *he hath*

(r) 4 Bar. & Cres, 465; *Seamble*, a mortgagor may be treated as tenant to mortgagee, 5 B. & Ald. 604.

(s) *Greene v. Cole*, -1 Lev. 309; 2 Saund. 259; and see other cases, *Id. n.* 11; *Cole v. Forth*, 1 Mod. 94. See cases,

3 Tho. Co. Lit. 233; *Keepers of Harrow School v. Alderton*, 2 Bos. & Pul. 86; *Simmons v. Norton*, 7 Bing. R. 640.

(t) See in general, *ante*, 259, 260.

(u) *Ante*, 260.

(x) *Id. ibid.*

wasted, and moreover shall recompence *thrice* so much as the waste shall be taxed at." It is submitted that both these acts only apply to *wilful* or *voluntary* waste, and do not extend to mere *permissive* waste. Mr. Serjeant Williams, in his valuable edition of Saunders, (y) *mistates* this enactment, as if it *expressly* gave an action of waste or in case against any lessee for life or years, guilty of *permissive* waste, as if he *permit* an house to be out of repair, unless it was ruinous at the time of the lease; (z) (although that act speaks only of forfeiture of the thing that he *wasted* with treble damages; (a)) and he refers to elementary works, as proving that the statute extends to *permissive* as well as voluntary waste, and he insists that the statute extends to tenants from year to year, or *even half a year*; (b) but the subsequent editors, in their learned and accurate notes, have questioned the latter opinion, at least as regards tenants from year to year, and also as regards lessees for years under a lease not containing any covenant to repair. (c) And it seems questionable, whether the statute of Gloucester extends to any case of mere *permissive* waste, and, indeed, whether a tenant for life is liable to any penalty, forfeiture, or action for *merely neglecting to repair*, unless he be under express directions or agreement to do so. (d) And it will be observed that Blackstone, when he states the incidents of a tenancy for life, does not intimate any liability to repair or prevent *permissive* waste. (e)

It should seem however that such reparations as are absolutely *essential* to prevent the *total destruction* of the property must be made by a tenant for life, as the reparation of a sea wall, or embankment of a river. (f) But this only refers to ordinary supports of such walls and embankments, and does not render such a tenant responsible for extraordinary tempests or floods, (f) nor for dilapidations occasioned by lightning, enemies, &c., (g) nor to reparations of buildings originally dilapidated at the time when their interest commenced. (h)

(y) 1 Saund. Rep. 323, b., n. 7; 2 Saund. 259, note 11.

(z) Id. ibid, cites Co. Lit. 54, b.

(a) *Sed quære*. Did the legislature intend to impose so heavy a penalty for *merely permitting* the progress of decay, or was not the intention only to prevent *wilful* waste? and see *Herne v. Benbow*, 4 Taunt. 764; *infra*, 389, n. (w).

(b) 1 Saund. 323, b. note 7, refers to 2 Inst. 145; Co. Lit. 53, a.; 2 Rol. Ab. 816; 2 Saund 259, n. 11.

(c) 1 Saund 323, b. note (k); and 2 Saund. 252, a. note (b), and cases there cited.

(d) *Herne v. Benbow*, 4 Taunt. 764, *post*, 389, n. (w), which, though a case of a tenant for years is applicable; and see *Jones v. Hill*, 7 Taunt. 392; 1 J. B. Moore, 100, S. C.

(e) 2 Bla. C. 122; 3 Bla. C. 224; Co. Lit. 53; but in 2 Bla. Com, 283, it is certainly supposed that the statute extends to *permissive* waste.

(f) 3 Tho. Co. Lit. 236.

(g) 2 Saund. 238, note 5.

(h) Moore, 54; Winch. Ent. 1159; 2 Saund. 238, note 5; 259, note 11; Co. Lit. 53, a.; *Glover v. Pope*, Owen, 92.

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In case of lands of *Copyhold tenure*, if there be no custom to the contrary, waste, whether permissive or voluntary, is a forfeiture to the lord; (i) and the lord may enter for waste committed by a copyholder for life, though there be an intermediate estate in remainder between the estate for life and the lord's reversion. (k) But in such a case of forfeiture, especially by *permissive waste*, or waste by a tenant of the copyholder, a Court of Equity will relieve, and compel the lord to re-admit, on receiving satisfaction for the injury he has received. (l)

In the absence of express covenant, and where *wilful waste* has been committed by an occupier, an action on the *case* may be sustained against him by a party who has the *immediate* reversion or remainder for life or years, as well as in fee or in tail, and the plaintiff is entitled to costs; (m) though a *writ of waste* could only be supported by him who has the *immediate* reversion or remainder in *fee-simple* or in *fee-tail*, so that his *inheritance* was injured; and a mere remainder-man for *life* could not support that writ. (n) Nor would costs be recoverable if the single damages exceeded twenty nobles; (o) nor can any action at *law* be supported against an executor of a tenant for life for waste committed by his testator, it being a tort which dies with the person, (p) unless for the money received by a sale of the timber. (q) But a Court of Equity will, where a tenant for life has committed waste by cutting timber, afford compensation against his assets, after paying debts, and in preference to legacies. (r)

In declaring by an immediate remainder-man against a tenant for life for wilful waste, it is better not to state with particularity the precise nature of the plaintiff's interest in remainder or reversion, for fear of variance; (s) but it is necessary to state correctly the nature and kind of waste that has been committed. (t)

Tenant for a term of years, or under a lease.

Tenants for a term of years, like all other persons who have only a *temporary* interest, are liable for *wilful waste*, whether committed by themselves or a stranger. (u) With respect to

(i) Co. Lit. 63, a.; 1 Tho. Co. Lit. 673, 674, note 32, where the cases *contrâ* are stated.

(k) *Doe v. Clements*, 2 Maul. & Sel. 68.

(l) 4 Ves. 704, 705; 1 Ch. Cas. 95; Pre. Ch. 568; Toth. Cha. 257; Mo. 49; Co. Lit. 63, a., note 2; 1 Tho. Co. Lit. 674, note 33.

(m) 2 Saund. 252, note 7.

(n) *Id.* *ibid.*; 3 Tho. Co. Lit. 246, note Q.

(o) 8 & 9 Wm. 3, c. 11, s. 3.

(p) *Id.* *ibid.*; 2 Inst. 302; 2 Rol. Ab.

828, pl. 7; 3 Tho. Co. Lit. 246, note 2; 251, note B. 1.

(q) 3 Tho. Co. Lit. 251, B. 1; 244, note O.

(r) Tho. Co. Lit. 246, note 2, 251, note B. 1.

(s) 2 Saund. 252, b., note 7; *Hardwick v. Thompson*, A.D. 1799, there cited; Yelv. 141.

(t) 2 Saund. 252, c., note 7.

(u) 1 Taunt. 196, 201; 2 Saund. 259, b., note (f).

tenants for terms of years under *lease* or express demise, it has been holden, contrary to the former prevailing opinion, (v) that no action for *permissive waste* in buildings is sustainable against a tenant by lease who has not *covenanted* to repair. (w) So it has been decided that a tenant for years who has covenanted to repair and leave the premises in as good a condition as they were in when finished by one *J. M.*, is not liable to be sued generally for permissive waste. (x) That decision is correct, if the statute of Gloucester, which speaks of forfeitures for *waste done* by tenants for term of life or *years*, does not extend to *permissive waste*, or waste occasioned by accidental burning; but otherwise it is obviously incorrect. (y) In the case of land of *copyhold* tenure, we have seen that, if there be no custom to the contrary, waste, either *permissive* or voluntary, of a copyholder is a forfeiture of his copyhold, and this, although the waste be committed or permitted by a mere under-tenant; (z) and therefore a copyholder must take special care to keep his customary tenement in good repair.

Where there has been an express covenant or agreement to repair, the action should be upon the same, though it has been held that the landlord has the option of suing in case. (a) If a tenant neglect to repair according to contract, and the lessor himself be a lessee, and under pain of forfeiture, he may enter, without the sub-lessee's consent, and perform the repairs; (b) or if he be sued by the superior landlord on his covenant to repair, and his immediate tenant refuse to repair, or defend the action, the damages and costs recovered against him by the ground landlord and the costs of defence may form the measure of damages to be recovered in his subsequent action against his own tenant; (c) and though it is usual and advisable in such a case to give notice of the threatened action of the superior landlord, it is not absolutely necessary to give the same.

Every tenant from year to year is bound not to commit *voluntary waste*, such as ploughing up strawberry beds still in bearing, and this, although he paid for them at a valuation when

Tenants from year to year, or for less than a year.

(v) See Mr. Serjeant Williams's note, 1 Saund. 323, b., note 7; 2 Saund. 259, note 11.

(w) *Horne v. Benbow*, 4 Taunt. 764; 5 Coke, 13, b.; 2 Saund. R. 252, a., note 1. by Patteson and Williams, but there stated as *doubtful*; 1 Tho. Co. Lit. 644, note 19.

(x) *Jones v. Hill*, 7 Taunt. 392; 1 J. B. Moore, 100, S. C.

(y) See 1 Tho. Co. Lit. 644, note 19,

and cases there cited, where the statute of Gloucester is considered as extending to permissive waste.

(z) *Ante*, 388; 1 Tho. Co. Lit. 673, 674, note 32.

(a) 2 Bla. R. 1111; 2 Saund. 252, a. b., note 7.

(b) 2 Br. & Cres. 273; 3 Dowl. & R. 522, S. C.

(c) 3 Br. & Cres. 533; 5 Dowl. & R. 542, S. C.; and see 5 Bar. & Cres. 603.

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he entered. (d) As to *permissive* waste, Mr. Serjeant Williams has stated that a tenant from year to year, or even for half a year, is, under the statute of Gloucester, liable for *permissive* waste, and consequently bound to repair; (e) but it would be unreasonable to require a person who has so short, precarious, and uncertain an interest, determinable at any time by a notice to quit, to incur the expense of repairs, for he merely hires, and impliedly engages to pay for the *temporary* use of the premises, and to use the premises in a proper manner; and as to reparations, it is more reasonable that the landlord, who has the permanent or larger interest, should make them, unless the dilapidation be occasioned by breakage or other want of care on the part of the occupier. And the modern decisions accord with this view of the tenant's liability; and he is not even bound to make or do what are termed tenant's repairs, or to keep the premises wind and water tight; and although in the absence of express stipulation he cannot compel the landlord to repair, (f) yet it has been held that when the premises have become uninhabitable, and the landlord refuses to repair, the tenant may quit without a regular notice to quit, and may resist the payment of any future rent; and the supposition that a tenant from year to year is liable to repair, has been refuted by the more recent learned editors of Saunders, (g) and by decisions which establish that a mere tenant from year to year, still less for half a year, is not bound to repair in the absence of a covenant or agreement to do so. (h) But which is *implied* when such a tenant holds over after a lease containing an express covenant to keep in repair, (i) and extends to all stipulations in such lease that can possibly be applicable to a tenancy from year to year. (k) And where a party takes possession under an agreement for a lease, he may be treated as impliedly agreeing to become tenant from year to year on the terms of the

(d) *Wetherell v. Howells*, 1 Campb. 227.

(e) 1 Saund. 323, b., note (7).

(f) *Id.* *ibid.*

(g) *Id.* *ibid.* note (k); 2 *Id.* 252, a., note (b).

(h) 5 Co. 13, b., Hale's MS.; *Gibson v. Wells*, 1 New Rep. 290; *Herne v. Benbow*, 4 Taunt. 764; 1 Marsh. 567; 6 Taunt. 300, S. C.; *Jones v. Hill*, 1 J. B. Moore, 100; 7 Taunt. 392; *Horsefall v. Mather*, Holt's C. N. P. 7; 1 Saund. 323, a., n. (i); 2 Saund. 252, a., n. (b), *acc.* But see Co. Lit. 57, a., 7; 1 Saund. 323, b., n. (7). (by Mr. Serjt. Williams) it was supposed that a tenant from year

to year is bound to keep premises in *tenantable* repair, though not bound to make *substantial* and lasting or general repairs, such as putting a new roof on an old house, putting in a new main-beam, &c.; and see *id.* 2 Esp. Rep. 598; 2 Bla. Rep. 84; 2 Bar. & Cres. 278; 3 Dowl. & Ry. 522.

(i) 2 Bar. & Cres. 273; 3 Dowl. & R. 522, S. C.

(k) *Id.* *ibid.*; 6 Esp. Rep. 106; 11 East. 71; 3 Taunt. 410; 4 Campb. 275; 3 Bing. 363; 3 Bar. & Cres. 483; 5 Dowl. & R. 213, S. C.

agreement; (*l*) and he may also be sued for the breach of an implied contract to use the premises in a *tenantlike* manner, although the agreement for a lease stipulated that it should contain a covenant to repair. (*m*) Such a tenant from year to year impliedly engages to use the premises in a *tenantlike* manner, or in the case of lands, in a *husbandlike* manner, (*n*) and in general also according to the *custom* of the country where the lands are situate; (*o*) but an express lease or written agreement, as far as it speaks on the subject, would exclude the effect of any custom or usage, (*p*) and therefore where the declaration stated that the defendant was tenant to the plaintiff, and in consideration thereof that he promised to *use* the lands in a husbandlike manner, and the proof was of an agreement to *farm* lands in a husbandlike manner, to be *kept constantly in grass*, this was holden a fatal variance. (*q*)

It has been long settled that a mere tenant strictly at will is not bound to repair or prevent permissive waste. (*r*)

The *remedies* for waste, as in most other cases, are *preventive*, or for *compensation*, or for *punishment*. To *prevent* waste the landlord may in general, without express reservation, enter the premises to which he is entitled in remainder or reversion, to see whether waste has been committed, without being a trespasser; (*s*) or he may enter under a clause of forfeiture for waste; (*t*) or he may in some cases enter to repair, so as to prevent a forfeiture of his own leasehold estate; or he may file a bill in equity, and move for an injunction to prevent wilful waste; (*u*) or he may have in some cases a writ *de reparatione faciundo*; or he may sustain covenant or *assumpsit* for a breach of covenant made to himself or running with the land, (*x*) according to the contract; or an action on the case for wilful waste. (*y*) If wilful waste has been committed by a tenant for life or years to a considerable extent, then a writ of waste may be proceeded in for the recovery of the property wasted, and

Remedies for waste in general.

(*l*) *Ante*, 390, n. (*k*); 1 R. & M. C. N. P. 355; 3 Bar. & Cres. 478; 1 M. & P. 183.

(*m*) 2 Bar. & Cres. 273.

(*n*) 5 T. R. 373; 4 East, 154; 1 Marsh. R. 567; 6 Taunt. 300, S. C.; Holt's C. N. P. 7; but see 2 Bar. & Cres. 273; 3 Dowl. & R. 522, S. C.

(*o*) 4 East, 154; 5 T. R. 376; Holt's C. N. P. 7; 1 Marsh. 569; 5 Bar. & Cres. 909.

(*p*) 1 Meriv. 15; 16 East, 71; 5 Bar. & Cres. 909; *ante*, 119.

(*q*) 5 Bar. & Cres. 909.

(*r*) Lit. s. 71; Co. Lit. 57, a.; 5 Co. 13, b.; Cro. Eliz. 777, 784; 3 Lev. 359; 1 Saund. 323, b.

(*s*) 8 Co. 146; 3 Bla. C. 212, 213; Com. Dig. Pleader.

(*t*) 1 Saund. 286.

(*u*) 4 Mad. 393; 5 Mad. 45; Chit. Eq. Dig. Practice, Injunctions, 1058; 3 Bla. C. 227, note (5).

(*x*) 32 Hen. 8, c. 31; 2 B. & Ald. 105; 4 B. & Cres. 157; 1 B. & Cres. 410; 9 B. & Cres. 505; 1 Cromp. & J. 105.

(*y*) *Ante*, 386, 389, 390; 1 Campb. 360.

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treble damages; but if the damage were very trifling, and merely nominal, that remedy might wholly fail. (z) In such an action the defendant must in general *plead* his matter of defence specially, and not merely the general issue *nul wast*; thus if the writ charge that he ploughed up ancient meadow land, and cut down timber, he must plead specially that the ploughing was resorted to according to the custom of the country and for the purpose of ameliorating the meadow, and that the timber was cut and used for necessary repairs. (a) If the waste, either wilful or permissive, have been committed contrary to a *lease* containing a clause of forfeiture and re-entry, then possession may be taken peaceably; (b) or an action of ejectment may be sustained, provided the covenant broken ran with the land, but not otherwise. (c) And it should seem that under the general terms of the statute against malicious injuries a remainder-man or reversioner might proceed summarily before a justice for any wilful or malicious injury affecting his interest, and not occasioning more than 5*l.* damages. (d)

An action *on the case* in the nature of waste lies at the suit of a landlord against his tenant, for acts done by the latter while holding over after the expiration of a notice to quit, (e) and the landlord of a tenant from year to year, although there be no reservation of the timber on the premises, may support an action of trespass *vi et armis* against a third person for carrying it away after it has been cut down. (f) And where a lessor during the term cut down some oak pollards growing upon the demised premises, which were unfit for timber, it was held that as the tenant for life or years would have been entitled to them if they had been blown down and was entitled to the *usufruct* of them during the term, the lessor could not by wrongfully severing them acquire any right to them, and consequently that he, or his vendee, could not maintain trespass against the tenant for taking them. (g) When trees are excepted in the lease trespass is sustainable and not case, (h) and if not excepted the interest of the lessor continues in the body of the trees, so that he may support trespass for carrying them away. (i) But if a lessor during the term *cut down* trees grow-

(z) *Keepers of Harrow School v. Alderton*, 2 Bos. & Pul. 86.

(a) *Simmons v. Norton*, 7 Bing. 640.

(b) *Ante*, 375.

(c) 32 Hen. 8, c. 31; 3 M. & S. 382; 2 B. & Ald. 105; 4 Bar. & Cres. 157; 1 Id. 410; 9 Id. 505; 1 Crompt. & J. 105.

(d) 7 & 8 Geo. 4, c. 30, s. 24.

(e) 1 Campb. 360.

(f) 2 Chit. Rep. 636.

(g) 5 Bar. & Cres. 897; 8 Dow. & Ry. 651, S. C.; but see *ante*, 261.

(h) 8 East, 196; *ante*, 261.

(i) 1 Saund. 322, n. 5; 7 T. R. 13; 2 Campb. 491; *ante*, 261.

ing upon the demised premises, which were fit only *for fire wood*, and the lessee take them away, trespass will not lie against the lessee at the suit of either the lessor or his vendee; (*k*) though if the trees had been fit for the purposes of reparation or sale it would have been otherwise. (*l*)

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We have stated the instances in which a parcener, joint-tenant or tenant in common, may sue his co-tenant at law for waste, as for cutting trees or underwood of sufficient growth; (*m*) but in general a bill in equity for an injunction to prevent wanton and malicious waste, is the preferable proceeding between these parties. (*n*)

Injuries by Waste, or as between Parceners, Joint-tenants, and Tenants in Common.

By the custom of the realm, or rather by the general law, a succeeding incumbent may sue his predecessor, who has resigned, for *Dilapidations*; (*o*) but not for omitting ornamental repairs; (*p*) and even the executors or administrators of a deceased rector or vicar may by this law be sued; (*q*) although we have seen that in general no executor can be sued for a tort committed or permitted by his testator and not constituting the breach of a contract. And a successor may have separate actions against the executor of the late rector for dilapidations to different parts of the rectory; and though it has been usual in a declaration in such action to allege that assets of the deceased have come to the defendant's hands, that allegation is perhaps unnecessary, as the want of assets is matter of defence, and need not be thus anticipated by the plaintiff. (*r*)

Remedies for Ecclesiastical Dilapidations.

We have considered the several kinds of *Incorporeal property* and the rights thereto, (*s*) and we have seen that they are principally ancient lights, pews, commons, ways, watercourses, advowsons, tithes, offices, dignities, franchises of various kinds, as rights to hold courts, forests, chases, purlieus, parks, free-warrens, fisheries, corodies, and rents; (*s*) and we have at the same time noticed the injuries and offences, and remedies and punishments relating to the same. We may here observe that as regards any *civil* injury to *the right* to these, the *remedy* is

Injuries to INCORPOREAL Property.

(*k*) 8 Dow. & Ry. 651; 5 Bar. & Cr. 897, S. C.

(*l*) *Ante*, 261.

(*m*) 8 T. R. 145; 8 Bar. & Cres. 257; *ante*, 271, 272.

(*n*) *Ante*, 271, 272.

(*o*) Lutw. 146; 21 H. 8, c. 13; Burn's Eccl. L. Plurality.

(*p*) 10 B. & Cres. 299.

(*q*) Willes' Rep. 421; 3 Woodes. 205; 2 T. R. 636; Wats. Cl. Law, chap. 39; 3 Burn's Eccl. L. 146, 153; 3 Lev. 268; 1 Lutw. 106; 2 Chit. Pl. 785.

(*r*) Lit. Ent. 21, 67; but see Gibb. 733; 3 Keb. 619.

(*s*) *Ante*, 203 to 229.

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Remedies for
injuries to an-
cient lights. (x)

in general *Case*, not *Trespass*, though there are exceptions. (t) The *Injuries* are in general termed *Disturbances*, as of the right to ancient lights, pews, commons, ways, watercourses, advowsons, freewarrens, fisheries; (u) or *Subtractions*, as of rents-service and tolls by refusing to pay the same. (v) The injuries to *ancient lights* by obstruction and the remedies have already been considered. (x)

2. Remedies for
injuries to
Pews.

2. With respect to *Pews*, as the party entitled to the use thereof has not in legal contemplation the exclusive possession, but merely a right to sit therein to hear divine service, he cannot support trespass for a mere exclusion, though he might for personal violence; (y) and the proper remedy is an action on the case, (y) and a faculty granting a pew to a man, but not annexing it to some messuage, will not enable him to maintain an action at law for disturbance, and his only remedy in that case is in the Ecclesiastical Court. (z) It has been held however that thirty years' uninterrupted possession and use of a pew would *prima facie* enable a party to sue a stranger at law, (a) though it was considered that such presumptive title might be rebutted by proof that the pew had no existence thirty years ago; (a) and it has been held that as the declaration for disturbance of seats in a pew must state the pew as appurtenant to a messuage in the parish, and that otherwise a bare possession of the pew for sixty years or more is not a sufficient title to maintain an action on the case for disturbing the plaintiff in the possession thereof, but he must prove a prescriptive right or a faculty. (b) But those decisions were before the rule was established, that mere priority of possession shall be sufficient against a stranger who cannot show a better title, (c) and before the recent statute 2 & 3 Wm. 4, c. 70. (d)

3. Remedies
for injuries to
Common. (e)

3. The injuries to a right of *Common* of pasture are various; as by inclosing the waste over which the right of common exists, building thereon, planting trees, overstocking with rabbits, by either of which sufficiency of common is not left, or

(t) *Ante*, 203 to 229.

(u) See in general, 3 Bla. C. 236.

(v) See in general, 2 Bla. C. 230.

(x) *Ante*, 207, 208.

(y) 1 T. R. 430; 5 B. & Ald. 361; 8 B. & Crea. 294; 3 Bing. 137, 138; *ante*, 208.

(z) *Mainwaring v. Giles*, 5 B. & Ald. 356; 2 Saund. 175, c., n. 2.

(a) *Rogers v. Brand*, 1 T. R. 431; *Griffith v. Matthew*, 5 T. R. 296; 2 Saund. 175, n. 2.

(b) *Stokes v. Booth*, 1 T. R. 428.

(c) *Ante*, 274, 275.

(d) *Ante*, 285, 286.

(e) As to the right, see *ante*, 210 to

by any person taking off the common manure dropped thereon, and thereby impoverishing the pasture, or by a stranger's turning on cattle, or by the lord or a commoner surcharging and turning on more than a proper quantity of cattle, or improper cattle, or by driving off the commoner's cattle, or by turning on diseased cattle.

The *remedies* for a commoner are either for *prevention* or for *compensation*, and some for *punishment*; as respects the *preventive* remedies, it should seem that if it be apprehended that the owner of the waste is about to inclose or build and not leave sufficiency of common, a Court of Equity would restrain the injury by injunction, at least until the sufficiency of common has been tried. (*f*) If a waste or common be surrounded by a fence placed *upon* the common, so that a person having right of common cannot turn on his cattle, he may justify prostrating such fence and opening a way for his cattle before he actually attempts to turn on, and he may even prostrate a large piece of the fence upon the common and much more than would be necessary for the convenient ingress and egress of commonable cattle, because in this case the *whole* fence being *upon* the common and injuring the pasture, a commoner might abate the *whole*; (*g*) and the exercise of such right to abate may be much more convenient than that the commoners should be compelled to bring an action for every obstruction, because when the fences are thrown down, the assertion of right may be decided in one action; (*h*) besides, the right of a single commoner might perhaps be questionable, whereas if several commoners concur in the abatement, they may all defend on the title of each, and if the right of one be established, though the others fail, a general defence would succeed. But if the fence were not *upon* the common but *on other* land, the commoner must then only open a *sufficient way* through the same. (*i*) And in all these cases the commoners act at the peril of the lord's having a right to approve, leaving sufficiency of common, and any excess or unnecessary damages would subject the commoner to an action; (*i*) and we have seen that a commoner cannot sue for an inclosure made with his consent, although most licenses are revokable. (*j*) If the lord insist on his right to place and con-

(*f*) *Quere*, 2 Vern. 301, 356; Chit. Eq. Dig. 219, 220.

(*g*) *Arlett v. Ellis*, 7 Bar. & Cres. 346, 367; 9 Id. 684; 2 Mood. C. N. P. 65; 6 T. R. 487; Com. Dig. Common, H.; 3 Chit. Pl. 5 ed. 1110; so a gate, wall, &c.

may be abated, 1 Saund. 353, b., n. 2.

(*h*) *Per* Littledale J. in 7 Bar. & Cres. 378.

(*i*) 1 Saund. 353, b., n. 2.

(*j*) 1 Car. & P. 141; *ante*, 338, note (*d*).

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tinue the fences, he may by bill restrain the commoners from prostrating the same, and obtain an issue for trial of the right; (*k*) and the right of the owner of the soil, whether the lord of the manor or waste, to approve and inclose, leaving sufficiency of common, is recognised and qualified by the statute of Merton and of Westminster. (*l*) A commoner cannot justify the prostration of *trees*, (*m*) nor the letting off water from a new pond made by the lord, (*n*) nor the killing rabbits surcharging the common. (*o*) Before the abatement it would be prudent (although not absolutely necessary) first to request the owner of the waste to remove the fence. (*p*) A commoner may also legally *drive* off the cattle of a stranger who has no right of common, or he may distrain the same, (*q*) though not the cattle of another *commoner*, (*r*) unless where the right of common is limited to a fixed number, in which case the excess might be distrained; (*s*) but commoners are advised not to proceed by distress, but rather to proceed by action on the case; (*t*) and he might file a bill in equity to prevent what might become a permanent injury to his right of common.

A commoner may always support an action *on the case* against the lord or any other person for inclosing or building, so as to occasion an insufficiency of pasturage, or for any disturbance of his right; (*u*) as by planting trees upon the waste whereby the pasturage has sensibly diminished, or for surcharging with rabbits, (*x*) or against any person for carrying off manure dropped on the common, however small the damage. (*y*) If the lord of a manor wantonly and unnecessarily exercise his manorial rights to the injury of persons entitled to common of pasture, he is liable to such action on the case. (*z*) If the commoner's cattle be chased off or hunted upon the common, then he has the election to sue in trespass or in case, and sometimes the former, in order to raise the question on the

(*k*) 2 Vern. 301, 356; Chit. Eq. Dig. tit. Common.

(*l*) 20 Hen. 3, c. 4; 13 Ed. 1, st. 1, c. 44; and see 3 & 4 Ed. 6, c. 3; 29 Geo. 2, c. 36, part repealed by 7 & 8 Geo. 4, c. 27, and cases thereon, Chit. Col. Stat. 155.

(*m*) 6 T. R. 487; 7 Bar. & Cres. 362.

(*n*) 1 Saund. 353, a., n. 2.

(*o*) Id. *ibid.*; *ante*, 187.

(*p*) See observation in *Earl Lonsdale v. Nelson*, 2 Bar. & Cres. 302; 2 Dow. & R. 556; a previous request does not seem to be necessary when the present owner of property has himself wrongfully erected the obstruction; but only in cases of omission.

(*q*) 1 Rol. Ab. 320, 405, pl. 5; Yelv. 104.

(*r*) 3 Wils. 287; 4 Burr. 2426.

(*s*) *Hall v. Harding*, 4 Burr. 2451; 1 Saund. 346, d., in notes.

(*t*) 1 Saund. 346, e., in note.

(*u*) Com. Dig. Action, Case, Disturbance, A 1. But no action lies if the common has been inclosed more than twenty years; 2 Taunt. 156, 160; 2 Bar. & Cres. 918; 7 Id. 346; unless he has given leave to build or inclose, *ante*, 338, n. (*d*).

(*x*) *Ante*, 187.

(*y*) 2 East, 154; 1 McClell. R. 373; Cro. Jac. 195.

(*z*) 4 Dow. & Ry. 318.

pleadings, will be preferable. (a) The injury by depasturing forests, commons, and open fields with sheep or lambs infected with scab or mange is specially provided against, (b) and other acts regulate the cultivation and improvement of common arable fields, wastes, and commons; (c) and the general inclosure act contains provisions very extensive in their operation. (d)

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4. Injuries to *ways* are either by obstructions independently of contract, or founded on express contract, or the same may be by neglect to repair the way. The obstruction to a private or public way may in general be *prevented* by removing the impediment, but which must, at least in the case of a private way, be effected in a careful manner, so as not to unnecessarily injure the materials; (f) though in the abatement of a nuisance to a *public* way no such precaution is supposed to be necessary. (g)

4. Remedies for injuries to WAY. (e)

Case is the proper form of action for an obstruction of a *private* way, whether the defendant had or not expressly covenanted for the enjoyment, though an action on the contract would be sustainable, (h) though in the latter case it might be incorrect to aver that the right of way was by reason of possession when it was independent of such possession, (i) and even a reversioner may sue in case for an apparent permanent obstruction to a private way. (k) *Case* is also the proper remedy for a material obstruction of a *public* way, if the plaintiff has sustained particular and material damage. (l) In general the party entitled to the use of a private way is bound to *repair* it as far as respects his own enjoyment, and he cannot then traverse the adjoining land; (m) but in some cases the owner of the land over which a private way passes is bound to repair the same, (n) and in that case the suffering the way to be much out of repair constitutes another injury, for which *case* may be supported. The proceedings for injuries to *public* ways will be considered amongst *public injuries*. (o).

(a) 1 Chit. Pl. 5 ed. 162.

(b) 38 Geo. 3, c. 65.

(c) 13 Geo. 3, c. 81; *Whiteman v. King*, 2 H. Bla. 4.

(d) 41 Geo. 3, c. 109; 1 & 2 Geo. 4, c. 23; and notes to Chit. Col. Stat. 163 to 176.

(e) As to the rights to private ways, *ante*, 214; and see 1 Tho. Co. Lit. 642, 644.

(f) See pleas justifying removals of obstructions, 3 Chit. Pl. 5 ed. 1116 to 1129.

(g) 2 Salk. 458.

(h) 3 Wils. 348; 2 Bla. R. 848, S. C. See the observations of Holroyd, J. 6

Bar. & Cres. 273.

(i) 4 East, 107; 6 Id. 438; 15 Id. 108; 3 Taunt. 24; 5 Bar. & Cres. 221.

(k) 4 Burr. 2141; 2 Chit. Pl. 5 ed. 810, a.

(l) *Ante*, 11, n. (h); see Willes, 71; 3 Mau. & S. 472; 4 Id. 101; 16 East, 196; 2 Bing. 263; 1 Tho. Co. Lit. 642.

(m) *Taylor v. Whitehead*, Doug. 745; 4 Mau. & S. 387.

(n) *Rider v. Smith*, 3 T. R. 766; 1 Saund. 322, a., n. 3; 1 Tho. Co. Lit. 235, note D. 1.

(o) 2 Saund, 113, n. 1; 172, a., n. 1; Ld. Raym. 1096; 3 T. R. 766.

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5. Remedies for injuries to WATERCOURSES. (p)

5. Injuries to mere WATERCOURSES are usually *nuisances* by obstructing the course of the water or by an undue addition to or subtraction from the force of the water, or by poisoning or injuring the same. (q) The remedies are either *preventive* or for *compensation* or *punishment*. To *prevent* a wrongful continuance of an obstruction made by a person on his own land, the party thereby injured may legally enter and abate the nuisance, (q) and a Court of Equity would interfere by injunction to prevent any serious injury to a watercourse. (r)

If the party interested in a watercourse were also owner of the soil or banks thereof, then the remedies would be ejectment or trespass, according to the nature of the right and the time of enjoyment and injury; (s) but if he had only the use of the water, or the injury were not immediate, then the remedy should be an action on the case. (s) Trespass however lies for entering a *several* fishery and taking fish therefrom. (t)

6. Remedies for injuries by disturbance of patronage in an ADVOWSON.

6. Injuries to the right of *Advowson* (which we have seen is the right to present a clerk to the Bishop of the diocese in order that he may be instituted to a church) is the disturbance of and refusal to give effect to that right. (u) The proper remedy for this injury is an action of *quare impedit*, in which, if the patron succeed, he recovers two years' value of the church, if the turn of presentation has been lost by the resistance. (x) We shall consider this remedy more fully hereafter.

7. Remedies for injuries to the right to TITHES.

7. We have stated many of the remedies relating to *Tithe* when considering the *right*. (y) The remedies are either for injuries to the tithe-owner or to the occupier of the land.

If the right of the *Tithe-Owner* to the tithe of a parish be disputed he may try his right in ejectment; (z) or by suit in equity, upon which an issue may be directed to try the right, if still disputed. If there be a *Modus*, then also a suit in equity or in the Exchequer will be proper; but if only a *particular parishioner* dispute the right and neglect to set out predial tithe in kind, (excepting of agistment,) then he may be sued in *debt* upon the statute, for not duly setting out tithe in kind, and for treble the value, (a) but in which *no costs*

(p) See the rights considered *ante*, 189 to 193, 197, 198, 200, 215, 224.

(q) 2 Smith's R. 9.

(r) *Ante*, 191, 192.

(s) *Ante*, 189, 190.

(t) *Ante*, 224.

(u) *Ante*, 215 to 218.

(x) *Ante*, 217.

(y) *Ante*, 218 to 221.

(z) *Ante*, 218; 32 H. 8, c. 7, s. 7; Cro. Car. 301; Ld. Raym. 789; 2 Saund. 304, n. 12; when not, 2 Roll. 309; 3 Bla. 88.

(a) 2 & 3 Ed. 6, c. 13, s. 1; 8 East, 178; 3 Anstr. 763; Moore, 915; 2 Chit. Pl. 5 ed. 496, and note.

will be recoverable if the single value *exceed* 6*l.* 13*s.* 4*d.* (b) If the tithe were duly set out, but the occupier turn in his cattle and they damage the tithe, he may be sued in *trespass* for such injury, (c) and he has a right to remove the tithe by the ordinary way, (d) and if obstructed he may sue for that injury or remove the obstruction. (e) If there were by *agreement* a *composition* to take money instead of tithe in kind, then the same will be recoverable in an action of *assumpsit* or debt, as in the ordinary case of contract; (f) or for tithe not exceeding 10*l.* we have seen there is a summary remedy before two justices. (g)

On the other hand, *the occupier* is, according to the custom of the parish, to give due notice to the tithe owner to attend and see the tithe, or, in the absence of particular custom, he is to set out the tithe himself, and give notice to the tithe-owner of having done so, and of his intention to carry his crop, and request the tithe-owner to come and see the tithe as set out; (h) and if the latter do not duly attend, the occupier is to set out the tithe himself, and leave the entire crop in the field for a reasonable time, so as to enable the tithe-owner to compare the tithe with the residue before he removes any part of the crop in the field. (i) If the tithe-owner do not remove the tithe within a reasonable time, (k) the occupier may *distrain* the same damage feasant, (l) or he may support an action on the *case*, but not *trespass*, for the neglect and consequential damage to growing grass, &c.; (l) but he cannot legally turn cattle into the close where the tithe remains, and if he should do so, and they damage the tithe, he will be subject to an action of *trespass* to compensate the damage. (m)

The remedies for injuries to *other incorporeal real* property, such as Franchises, Rights to hold Courts, Markets, Fairs, Free-warren, &c. &c., are in general an action on the *case*, but

Remedies for injuries to OTHER INCORPOREAL property.

(b) *Ante*, 218; and therefore it is frequently better to proceed in a Court of Equity, as the Exchequer, *ante*, 218; 2 Inst. 651; or when in *Spiritual Court*, 3 Bla. C. 88, 89.

(c) 8 T. R. 72.

(d) 2 New R. 466; 3 Bro. 9, 17; 1 Bro. 187.

(e) *Id.* *ibid.*; Cro. J. 224; Yelv. 157; Com. Dig. Pleader, F. 18, 19.

(f) In *assumpsit*, 4 Madd. 177; 2 Chit. R. 405; 1 Lev. 141; Sid. 222; 2 Chit. Pl. 5 ed. 578; or *debt*, with a count for not setting out the tithe in kind, Bul. N. P. 88.

(g) *Ante*, 221.

(h) As to the notice, see 1 Rol. Ab. 68; 1 Stra. 245; 3 Burr. 1892; 11 East, 358; as to the custom of tithing, *Id.* *ibid.*; 3 B. & Cres. 213; 3 Esp. R. 31.

(i) 2 Taunt. 55.

(k) What time is or not reasonable, 11 East, 358; 3 B. & Cres. 213; 3 Bulstr. 336; 1 Lord Raym. 189; 1 Stra. 245; Latch. 8.

(l) 8 T. R. 72.

(m) 8 T. R. 72; 10 East, 5; 1 Lord Raym. 187; 1 Stra. 245; 3 Burr. 1891; 1 Roll. 109.

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as these do not very frequently occur in practice, we shall merely refer to the books where they are principally noticed. (n)

III. Of CRIMINAL INJURIES AND OFFENCES TO Real Property, and their Preventions and Punishments.

III. When considering each kind of Real Property, we have stated most of the modern enactments for *preventing* and *punishing* injuries and offences affecting them when of a *criminal* nature; as in respect of what *Buildings* the offence of *Burglary*, (o) or in the nature of *Larceny*, (p) or *Malicious Injuries*, (q) as *Arson*, (r) &c. may be committed, or for which the *Hundred* may be liable to make compensation, (s) and what offences in inclosed yards, gardens, orchards, nursery grounds, hothouses, greenhouses, and conservatories, or in ground adjoining or belonging to a dwelling-house, are particularly and how punishable. (t) We have also noticed *Forcible Entries and Detainers*, (u) and what criminal Injuries to Mines are punishable; (x) also what injuries committed in *Hare and Rabbit Warrens* and *Preserves*, or in respect of *Game*, are declared penal. (y) Also what criminal injuries to *Water, Watercourses, Fisheries, Fish-ponds, and Dams, and Oyster-beds*, (z) *Navigable Rivers, Creeks, Canals, Quays, Docks, and Wharfs*, (a) *Sea-Banks and Walls, Ports and Harbours, Lighthouses, Beacons, and Sea Marks*, (b) are punishable, and how. We have also shown the criminal injuries to *Hedges and Fences*, (c) to *Bridges*, (d) *Highways*, (e) *Toll-gates, and Weighing Engines, Rail Roads, &c.* (f) Other criminal injuries which affect the private interests of individuals have also been noticed. It will be observed, that the recent enactments repeal (g) and afterwards consolidate and re-enact, in an amended form, *most* of the former punishments of offences against real property, and introduce new provisions, so that most of the offences which either partake of the crime of *Larceny*, or of *Malicious Injuries*, as respects real property, will be found in the statutes 7 and 8 Geo. 4, c. 29 and 30, and the pecuniary compensation recoverable from the *Hundred* in the statute 7 and 8 Geo. 4, c. 31. But there are still several *parts* of the ancient *Common Law*, and

(n) 2 Saund. R. Index, Fair, Market, Franchise; 3 Tho. Co. Lit., Index, Franchise, Hereditaments; 2 Chit. Pl. 5 ed. 818, c.

(o) Ante, 169 to 177.

(p) Ante, 171.

(q) Ante, 172, 164.

(r) Ante, 172.

(s) Ante, 172, 173, post, ch. vi.

(t) Ante, 176 to 179.

(u) Ante, 181.

(x) Ante, 186.

(y) Ante, 186.

(z) Ante, 189 to 193.

(a) Ante, 189.

(b) Ante, 189.

(c) Ante, 196.

(d) Ante, 199.

(e) Ante, 200.

(f) Ante, 202, 203.

(g) 7 & 8 Geo. 4, c. 27.

several ancient as well as modern enactments to repress offences to real property still in force, and not affected by these recent acts, such as the common law indictment for forcible entries, and the statutes against such offences, also the statutes against night poaching, against game, and a few other provisions.

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1. At common law a *forcible entry* is still an offence which may be prevented by force, though a dangerous instrument must not be used, (*h*) or is indictable, merely charging that the offenders with force and with a strong hand broke and entered the messuage, &c.; (*i*) but a mere entry by several persons on *land*, and without using dangerous weapons, nor committing any attack on the person or other actual breach of the peace, is not indictable, being considered as a mere trespass remediable by action of trespass. (*k*) And though a conviction has taken place for indecorously firing a gun loaden with shot and breaking church windows, no person being therein at the time or put in terror, the propriety of such conviction may be questionable. (*l*) The statutes against forcible entries also enable justices to proceed summarily against offenders and restore possession by a proceeding which is pointed out in the last chapter of this volume, and which, from the speedy redress they afford, deserve to be acted upon, though now in a great measure obsolete. Another statute against forcible entries affords not only punishment, but compensation and restitution of possession, upon conviction under an indictment; but that remedy is only given to the freeholder, and not to a mere occupier, and as the prosecutor would be interested in the result, he would not be a competent witness. (*m*)

1. Forcible Entries.

2. With respect to *night poaching*, the 9 Geo. 4, c. 69, s. 1, enacts that if any person by *night*, (that is, between an hour after sunset and an hour before sunrise,) unlawfully take or destroy any game, (*n*) or any rabbit, in any lands, whether open or inclosed, or shall by night unlawfully enter or be upon the land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game; (*n*) such offender shall, upon conviction thereof before two justices of the peace, be committed for the *first* offence to the common gaol or house of correction for any period not exceeding *three*

2. Night poaching.

(*h*) *Ante*, 373.

(*i*) 8 T. R. 78, 299; 1 Saund. 296.

(*k*) 3 Burr. 1698, 1731.

(*l*) 2 Chitty's Crim. L. 23.

(*m*) *Rex v. Williams*, 9 Bar. & Cres.

549; *Rex v. Bevan*, R. & M. C. N. P. 242.

(*n*) Defined in 13th section to be hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

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calendar months, there to be kept to hard labour, and at the expiration of such period shall find securities by recognizance, or in Scotland by bond of caution, of himself in 10*l.* and two securities in 5*l.* each, or one surety in 10*l.*, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found. The punishment of a *second* offence is six months imprisonment, and to be kept to hard labour, and to find sureties; and for a *third* offence the offender is liable to transportation. The 2d section, where any person shall be *found* upon any land committing any such offence, authorizes the owner or occupier of such land, and other specified persons, to seize and apprehend such offender upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person thereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a *misdemeanor*, and shall be liable, at the discretion of the court, to be transported for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years. The 4th section limits the summary proceeding to six, and indictment to twelve, calendar months; and the 5th, 6th, and 7th sections give the form of conviction and proceedings on appeal, and take away any removal by *certiorari*. Upon this enactment it will be observed, that the omission of the words "forest, chase, park," &c. in this act, which were in the prior act, is immaterial, as they would unquestionably be included under the comprehensive words, "open or inclosed grounds." (o) The word "*found*" in this act means "having been seen or discovered;" (p) and if gamekeepers attempt to apprehend persons armed with offensive weapons, who are poaching in the night, and one of the gamekeepers be shot by one of the poachers, this will be murder in all, unless it be shown that either of the poachers separated himself from the rest, so as to establish that he did not join in the act; (q) and where gamekeepers had seized two persons

(o) *Rex v. Parkhurst*, Russ. & R. C. C. 503.

(q) *Rex v. Edwards*, 3 Car. & P.; *Rex v. Whitehouse*, Russ. & R. C. C. 99.

(p) *At.-Gen. v. Delane*, 1 Pri. R. 383.

who were poaching in the night, and they, having surrendered, called to a third, who came up, and he killed one of the keepers, this was held to be murder in all, though the two struck no blow, and though the keepers had not announced in what capacity they had apprehended them. (r)

The same act, s. 9, enacts "that if any persons, to the number of three or more together, shall by *night(s)* unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying *game(t)* or rabbits, any such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a *misdemeanor*, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years."

In an indictment upon the 9th section of this act, as well as under the repealed act, 57 Geo. 3, c. 90, it must be expressly averred, not only that the offender did by night unlawfully enter divers closes, but also that they were there *by night*, armed with guns and offensive weapons, for the purpose of taking and destroying game; and where the allegation was merely that the defendants *entered* by night, and that they were *then and there* armed, &c., without *repeating* "*by night*," the indictment was holden insufficient. (u)

3. The *Game Act*, 1 & 2 W. 4, c. 32, (repealing all the previous acts relating to game,) contains several enactments, principally of a *penal* rather than a criminal nature, and most of which we have indeed already noticed, (v) but which it may be useful here to consider together. The object of the statute 9 Geo. 4, c. 69, was to prevent and punish *night poaching*, whereas the game act was *principally* to *prevent* and *punish* (but not to *compensate*) *day poaching*; and the 34th section defines *day-time*, as respects this act, to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the last hour after sun-set; so that the two acts leave not an instant of time uncovered. The second section defines "game" to include, for all purposes of that act, hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards; as to

3. Game Act,
1 & 2 W. 4, c. 32.
Punishments
under it.

(r) *Rex v. Whitehouse*, Russ. & R.C.C. 99.

(s) See *ante*, 401.

(t) *Id. ibid.*

(u) *Davies and others v. The King*,
10 Bar. & C. 89.

(v) *Ante*, 186 to 188.

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woodcocks, snipes, quails, landrails, and conies, they are afterwards in some clauses particularly mentioned. The third section prohibits the killing or taking game, or using any dog, net, or other engine or *instrument*, for the purpose of killing or taking game on a Sunday or Christmas-day, and subjects the offender to not exceeding 5*l.* penalty and costs on conviction before two justices; and the killing any partridge between the 1st of February and 1st of September, or any pheasant between the 1st of February and 1st of October, or any black game, (except in Somersetshire, or Devon, or in the New Forest,) between the 10th December and 20th August; or in the three excepted places between the 10th December and 1st of September, subjects the offender to forfeit not exceeding 1*l.* for each head of game, on the like conviction. And if any person, with intent to destroy or injure any game, shall put or cause to be put any *poison* or *poisonous ingredient* on any ground, whether open or inclosed, where game usually resort, or in any highway, he is to forfeit not exceeding 10*l.* and costs, on like conviction. The 4th section declares illegal, and subjects to pecuniary penalties, dealers having game in their possession ten days after the appointed time, and other persons having in possession forty days after the appointed time, unless in breeding places. The 7th to the 17th section inclusive vest the right to kill game in the owners of land and in lessees, or parties acting under express reservations in leases, or by their permission. The 18th to the 24th section relate to *licenses* to sell and *certificates* to kill game. The 24th section enacts that if any person, not having the right or license to kill game upon any land, shall *wilfully* take from the nest or destroy in the nest upon such land the *eggs* of any bird of game, or of any swan, wild duck, teal, or widgeon, or shall knowingly have in his house, shop, possession, or controul, any such eggs so taken, he shall forfeit, on conviction before two justices, for every such egg not exceeding five shillings, with costs. The 25th to the 30th section contain regulations and penalties against selling or buying game of persons not duly licensed.

The 30th section subjects any person who shall commit any *trespass* by entering or being in the *day-time* upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, on conviction before one justice, to a penalty not exceeding 2*l.* with costs; and if five persons or more *together* commit such trespass, each forfeits not exceeding 5*l.* and costs; and the section then provides that such offender, by

way of defence, may prove any matter that would have been an answer to a common law action for trespass; but that the license of the occupier shall not be any defence, unless he had the reserved right of killing the game. And the 31st section contains a strong power, authorizing the person having the right to kill game, or the occupier, &c. to apprehend and detain, not exceeding twelve hours, and take before a justice, such a trespasser *found on any* land, unless he forthwith quit the land, (w) and also tell his real name and place of abode; or if he give such a general description of the latter as shall be illusory for the purpose of discovery. The 32d section enacts, that if five or more such trespassers *together* shall *be found* on any land in search of game, &c. in the day-time, and any of such persons shall be armed with a gun, and shall by violence, intimidation, or menace, prevent or endeavour to prevent any person, authorized as aforesaid, from approaching such persons so found, for the purpose of requiring them or any of them to quit the land whereon they shall be so found, or to tell their or his christian name, surname, or place of abode respectively as aforesaid, every person so offending by such violence, intimidation, or menace, and every person aiding or abetting such offender, shall, on conviction before two justices, forfeit not exceeding 5*l.* with costs, in addition to the previous forfeiture under the 31st section. Trespassers in pursuit of game in his Majesty's forests, parks, chases, or warrens, are subjected to 2*l.* penalty and costs.

The 35th section then provides that the enactments shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being *in fresh pursuit* of any deer, hare, or fox *already started* upon *any other land*, nor to any person *bonâ fide* claiming and exercising any right or reputed right of free-warren or free-chase, nor to any gamekeeper lawfully appointed and within his limits. It should seem therefore that this act would extend so as to prevent persons with hounds or greyhounds, without leave, from beating or searching for fresh deer, hare, or fox, not already started.

The 36th section enacts that when any person shall *be found by day or by night* (x) *upon any land* in search or pursuit of game, and shall then and there have in his possession any *game which shall appear to have been recently killed*, any person

(w) As to the meaning of the term "*found, &c.*" see *Attorney-General v. Delane*, 1 Price R. 383, *post*, ch. vii. fully.

(x) See the meaning of the word "*found*,"

ante, 402. This is the only clause in the act which relates to offences in the night-time.

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entitled to kill game on such land, or the occupier thereof, &c. may demand the same, and if not immediately delivered up, may seize and take the same for the use of the person entitled to the game upon such land. (y) The 37th section gives the penalties, (the application of which is not otherwise directed,) not as heretofore, for the benefit of the poor of the parish, but to be paid to the overseers to the use of the general county rate, and every inhabitant of the county is a competent witness. The 38th section gives the justices a discretionary power to direct the time of payment of any penalty; and that in default of payment the imprisonment shall not exceed two calendar months, when the penalty does not amount to 5*l.*, and three calendar months in other cases; the imprisonment to cease on payment of the amount and costs. The 39th and following sections give a particular form of conviction, and authorize an appeal to the next general or quarter sessions, but take away removal by *certiorari* or otherwise. But the 46th section enacts that its provisions shall not prevent any person from proceeding by way of *civil action to recover damages in respect of any trespass upon his land*, whether committed in pursuit of game or otherwise, save and except that where any proceedings shall have been instituted under the provisions of that act against any person for or in respect of any trespass, no action at law shall be maintainable for the same trespass by any person at whose instance *or with whose concurrence or assent such proceedings shall have been instituted*, but that such proceedings shall in such case be a bar to any such action, and may be given in evidence under the *general issue*. (z) The act concludes with the usual provision for the protection of persons *bonâ fide* intending to act under its provisions as respects the venue, limitation of actions, notice of action, pleading the general issue, and tendering amends, or paying adequate compensation into court.

4. Offence of
setting SPRING-
GUNS, and as to
dog-spears.

4. The practice of setting *Spring-Guns* and *Dog-Spears* and other dangerous engines, in order to prevent or deter persons from committing or suffering their dogs to commit depredations or injuries to property, will be considered in a subsequent chap-

(y) See the antecedent enactment, 5 Ann, c. 14, s. 4; and *Bird v. Dale*, 7 Taunt. 560.

(z) Without this express enactment the former recovery or proceeding must have been pleaded specially; and it may still

be advisable in some cases to plead specially in order to narrow the evidence or compel the plaintiff to new assign, 3 Burr. 1353; 3 Car. & P. 489; 1 Chit. R. 513, note (f), 545, 613, 672.

ter.(a). It may suffice here to notice that the setting spring-guns, excepting at night within a dwelling-house, is now expressly declared to be illegal, and would subject the offender to an indictment for a misdemeanor, although no actual injury has ensued; (b) and the right even to set dog-spears is very questionable; (c) and another expedient to prevent trespass will be found in the part of the work referred to.

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5. The 7 & 8 Geo. 4, c. 30, s. 24, after providing *particularly* for malicious injuries to Real Property when of *considerable* importance, contains the following comprehensive enactments for the *punishment* of *any wilful or malicious* damage, injury, or spoil, where the *damages do not exceed five pounds*, or where the prosecutor is content to treat the damages as limited to that sum; and unless when the prosecutor is himself examined as a witness, he may, by this prescribed summary proceeding before a magistrate, recover *pecuniary compensation* to that extent. The enactment is, "That if any persons shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, whether of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person being convicted thereof before a justice of the peace shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds, which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or in the case of property of a public nature or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a justice of the peace under this act is hereinafter directed to be applied; and if such sum of money, together with costs (if so ordered), shall not be paid either immediately after the conviction or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two calendar months, unless such sum and costs

5. Wilful or malicious injuries to property not exceeding five pounds under 7 & 8 Geo. 4, c. 30, s. 24.

(a) *Post*, ch. vii.

(b) 7 & 8 Geo. 4, c. 18; see form of indictment, Burn's J. 26 ed. tit. Spring Guns. An action lies for any injury,

Bird v. Holbrook, 4 Bing. 642; *post*, ch. vii.

(c) *Deane v. Clayton*, 1 J. B. Moore, 242.

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be sooner paid: Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, (d) nor to any trespass, not being wilful or malicious, committed in hunting, fishing, or in the pursuit of game; but that every such trespass shall be punishable in the same manner as *before* the passing of this act." (f)

The 25th section enacts, "That every punishment and forfeiture thereby imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise."

The 28th section, for the more *effectual apprehension* of all offenders against this act, enacts, "That any person *found committing* (g) any offence, whether punishable upon indictment or upon summary conviction, may be *immediately apprehended*, without a warrant, by any peace-officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice."

The 29th section requires summary proceedings to be commenced within three calendar months, and enacts that the evidence of the party aggrieved and also that of any inhabitant of the county shall be admitted; and the 30th section directs how the party charged is to be *summoned*; and if he do not appear, the justice may either proceed *ex parte* or issue his warrant, or a warrant may be issued in the first-instance. The 31st section subjects abettors of offences punishable summarily to the like penalties.

The 32d section enacts that the money forfeited for any injury shall be paid to the party aggrieved, excepting when he has been examined as a witness, and then, or in case he be unknown, to be paid the same as any penalty; and every sum to be imposed as a penalty is to be paid to the overseers of the poor or other officer as directed by the justice, and to the use

(d) This was to provide for *bond fide* claims of right, see *Kennersley v. Orpe*, Dougl. 517; but it must be some *fair and plausible* colour of title. *Hunt v. Andrews*, 3 Bar. & Ald. 341; *Calcraft v. Gibbs*, 5 T. R. 19; *Grant v. Hutton*,

1 Bar. & Ald. 134; 1 Burn's J. tit. Convictions, 26 ed. 832, 833.

(f) See now the Game Act, 1 & 2 W. 4, c. 32.

(g) *Ante*, 402, n.(p); and see *post*, ch. vii. fully as to apprehension without warrant.

of the general county rate. And the 33d section provides, that if the damage or penalty be not paid, the offender is to be imprisoned, with or without hard labour, for a term not exceeding two calendar months, where the sum and costs to be paid do not exceed 5*l.*; or four months, if above that sum; and not more than 10*l.*, or not exceeding six months, in any other case, determinable on payment.

The 34th section enables a justice, after a first conviction, to discharge the offender upon his making such satisfaction to the party aggrieved for damages and costs, or either, as shall be ascertained by the justice. The 35th section enables the king to pardon the party imprisoned; and the 36th section enacts "That in case any person convicted of any offence punishable upon summary conviction shall have paid the sum adjudged to be paid, together with costs, or shall have received a remission thereof from the crown, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment adjudged in the first instance, or shall have been discharged from his conviction in the manner aforesaid, in every such case he shall be released from all further or other proceedings for the same cause."

The act then gives a form of conviction and allows an appeal to the sessions, but takes away removal by *certiorari* or otherwise, and contains the usual provisions for the protection of persons *bonâ fide* intending to act under the act. (*h*)

The provisions of *this* act, and of that relating to *day poaching*, render it unnecessary to proceed by action for small trespasses on land when actual damage has been committed not exceeding *five pounds*, or when there is not any *substantial right* to be tried, or when the wrong-doer could not consider that he had a right to do the act complained of, or when he did not commit it in hunting, fishing, or in pursuit of game, without previous notice, or when on any other account, as the rank or situation of the parties, it might be inexpedient to adopt such summary proceedings. The terms of the enactment apply to every injury that can be deemed *wilful or malicious*, and whether the property affected were public or private; but still the supposed injury must have been *wilful or malicious*, and so charged, (*i*) and it must have actually occasioned some *sensible real damage*, and not a mere trespass *in law*; and therefore the mere fact of trespassing and walking over a party's

(*h*) Sect. 41.

(*i*) *Rex v. Turner*, R. & M. C. C. 239.

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grass is not a trespass within this act, though in point of law a common action of trespass might be sustainable; (j) and for the same reason the power to apprehend, given by a prior, now repealed, act, does not extend to a mere trespasser in walking over a field without any right of way. (k) So the act only extends to the party who actually committed a wilful or malicious injury to real or personal property, and consequently if some persons wilfully sever a fence from the land and thereby damage it, and another person, not one of them, afterwards carry away part of such fence so previously separated, the latter cannot be committed for so carrying it away, though the original parties might have been convicted for the prior injury. (l) The justice is not as a matter of course to adjudge 5*l.* to be paid, but must ascertain what the value of the actual damage in each case has been, and award reasonable compensation according to the amount of the actual injury proved. (m)

6. Other criminal injuries and offences relating to real property in nature of larceny or of arson, &c., provided for by 7 & 8 Geo. 4, ch. 29, 30, 31.

6. With respect to the *other* crimes and offences to real property, and the remedies against the hundred, the 7 & 8 Geo. 4, c. 27, repealed most of the prior enactments, excepting those we have considered relative to forcible entries and detainers, and a few others, which still remain provided for either at common law or by the particular enactments we have just considered. And the 7 & 8 Geo. 4, c. 29, contains the *new enactments* relative to offences partaking of *larceny*, such as burglaries, sacrilege, housebreaking, robberies in houses, and other enumerated buildings and places, especially in parks and places where deer are usually found, warrens, fisheries, trees, shrubs, fruit, vegetables, and offences by separating or stealing glass, wood-work and fixtures, and materials, from the buildings or land, whether by lodgers or others. (n)

The 7 & 8 Geo. 4, c. 30, besides the general clauses against *small* injuries not exceeding *five pounds*, which we have just noticed, (o) contains the new and particular enactments against *considerable malicious injuries*, as by burning or arson, or riotous demolition in part or in the whole of certain buildings, or setting fire to or drowning coal or other mines, destroying sea-banks, damaging any navigation, public bridges, setting

(j) *Butler v. Turley*, 2 Car. & P. 585.

(k) *Per Best, C. J. Dewey v. White*, M. & M. C. N. P. 56.

(l) *Rex v. Harper*, 1 Dowl. & R. 223; see the form, Burn's J. 26 ed. tit. Ma-

licious Injuries.

(m) *Rex v. Harper*, 1 Dowl. & R. 223.

(n) See the enactments and some decisions thereon, *ante*, 161 to 203.

(o) *Ante*, 407.

fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any heath, gorze, furze, or fern wheresoever growing, destroying or injuring trees, shrubs, fruit, or vegetables, fences, walls, gates, or stiles; (p) and the attempt to commit arson, although unsuccessful, was considered a misdemeanor at common law. (q)

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The *Hundred* act, 7 & 8 Geo. 4, c. 31, contains the enactment defining the injuries and offences for which the hundred are liable to make private compensation, and prescribing the proceeding to enforce such compensation, which, though before limited to 200*l.*, is now to be the full extent of the injury. These injuries are now confined to arson, or setting fire to, or in part or in the whole demolishing, houses and certain specified buildings, and those only when committed by *several* persons *feloniously, riotously, and tumultuously assembled.* (r) The liability of the hundred to make compensation for other injuries was repealed by the 7 & 8 Geo. 4, c. 27.

When considering each particular kind of Real Property, the above enactments, as applicable to each, have been stated, and we shall not therefore repeat them. (s) It will be observed that *many* of the enactments are merely repetitions in the same terms as in the former repealed acts, and consequently many former decisions and parts of treatises will continue to be applicable. Thus the term "*Burglary*" is used as before, although the place where it may be committed has been properly limited and fixed to the principal mansion, or to some building immediately connected with the same, and no longer extends generally to the whole curtilage; (t) but as to the hour or *time* of the *night* when the offence may be committed, that is regulated and to be ascertained by the former decisions. (u) Anciently the day was accounted to begin only at sun-rising and to end immediately upon sun-set, but the present rule is, that if there be day-light or twilight (v) enough begun or left to *discern a man's face*, the entry cannot be deemed burglarious. (x) It will be observed, that although, as to night poaching and day poaching, the legislature have defined the precise time when night and day shall be deemed to commence, (y) the precise time when burglary may be committed is left to proof as to the degree of light

(p) See the enactment and decisions, *ante*, 161 to 203.

(q) 1 Wils. 139.

(r) See decisions on this act, *post*, ch. vi. and Chit. Col. Stat. tit. Hundred.

(s) *Ante*, 161, 165, 168 to 203.

(t) *Ante*, 169, 170, 175.

(u) 3 Inst. 63; 1 Hale, 550; 2 East, P. C. 509; 2 Leach, 710; 4 Bla. C. 224.

(v) Latin, *crepusculum*, from *creperus*, doubtful, dark, or uncertain; French, *crepuscule*.

(x) *Supra*, note (u).

(y) *Ante*, 401, 403.

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existing at the time the offence was committed. But on the other hand, if the entry be certainly before twilight has commenced, or after it has ceased, then the circumstance of the night being exceedingly moonlight will not prevent the offence of burglary from being complete. (z)

Criminal injuries and offences to INCORPOREAL property.

INCORPOREAL property, from its nature, is subject comparatively to very few criminal injuries or offences, and certainly not to most of those affecting corporeal property. When, however, such criminal injuries are recognized by law, we may observe that there are generally three descriptions of remedies or punishments: *first*, the preventive; *secondly*, those for compensation, usually only afforded when the injury was at most a misdemeanor; or *thirdly*, punishments either at common law or under particular enactment. We may premise that no injury to *real property incorporeal* can be considered a crime or an offence, unless it affect not merely one individual, but the public in general, or a great many individuals.

In case of crimes or offences to public ways or to navigable rivers or watercourses, or to any other public incorporeal right, and in which, at least in the eye of the law, all the public are interested, any individual may adopt proceedings of the above nature. Thus he may by his own act *abate* or *remove* any obstruction to a highway or public watercourse, and it is said in so doing need not observe that care in avoiding injury to materials as in abating a private injury, (a) though no one is recommended to act upon the supposition that that doctrine, which has been denied, would ultimately be holden sound and tenable. If the obstruction be in progress or continuing, a Court of Equity will by injunction prevent it. (b) If the offence complained of consist in the non-observance of a clear public duty, then the Court of King's Bench will interfere by mandamus, but if the obligation or the offence be doubtful, that Court will leave the parties complaining, first to establish the right, or duty, or obligation, and the offence, upon an indictment at common law, and not interfere till a subsequent application. (c) If any individual has sustained actual and particular injury from the obstruction or other nuisance to the public

(z) 4 Bla. C. 224.

(a) *Lodie v. Arnold*, 2 Salk. 458; and see fully *post*, chap. vii.

(b) See fully *post*, chap. viii., and *ante*,

197, 198, 200, 203.

(c) *Rex v. Corporation of Plymouth*, K. B., A. D. 1832.

right, then we have seen he may proceed in an action on the case for private and particular satisfaction. (d) Or for nominal *punishment*, though usually in effect to compel specific relief, or repair, or performance, any person may *indict* the party occasioning an obstruction or nuisance, or neglecting to repair, for his offence or neglect, and this either at common law, or under the General Highway Act, (e) or the Turnpike Act, (f) or a Canal Act, or some local act; or sometimes, as under the Highway Act, he may proceed more summarily under its provisions.

All *public nuisances* in general, and more particularly as they affect the habitation of houses, and the passing along highways, and consequently what may be termed *public incorporeal* rights, are remediable either by similar *preventive* measures, or by civil action for *compensation*, or by *public prosecution*, as on the behalf of the public. Each of these in their order will hereafter be fully and practically considered.

(d) *Ante*, 11.

(e) 13 Geo. 3, c. 78.

(f) 3 Geo. 4, c. 126.

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THE END.

L O N D O N :

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TEMPLE BAR.

THE
PRACTICE OF THE LAW
IN
ALL ITS DEPARTMENTS;
WITH A VIEW OF
RIGHTS, INJURIES, AND REMEDIES,
AS AMELIORATED BY RECENT STATUTES, RULES, AND DECISIONS;
SHOWING
THE BEST MODES OF CREATING, PERFECTING, SECURING, AND TRANSFERRING RIGHTS;
AND
THE BEST REMEDIES FOR EVERY INJURY, AS WELL BY ACTS OF PARTIES THEMSELVES,
AS BY LEGAL PROCEEDINGS; AND EITHER TO PREVENT OR REMOVE INJURIES; OR
TO ENFORCE SPECIFIC RELIEF, OR PERFORMANCE, OR COMPENSATION.

AND SHOWING
THE PRACTICE
IN ARBITRATIONS; BEFORE JUSTICES; IN COURTS OF COMMON LAW;
EQUITY; ECCLESIASTICAL AND SPIRITUAL; ADMIRALTY; AND
COURTS OF APPEAL.

WITH NEW PRACTICAL FORMS.
INTENDED AS
A COURT AND CIRCUIT COMPANION.

—
IN TWO VOLUMES.

VOL. I.—PART II.
—

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TO

THE SECOND PART.

THE plan and outline of this Work, and of the first *Four* Chapters in particular, have already been sufficiently explained in the Preface. This Part proceeds with the Six following still more important Chapters. In the *Fifth* Chapter are considered the various *precautionary measures* to anticipate and prevent *expected* injuries *before* their inception, and in almost every situation of difficulty that usually gives rise to litigation.

The *Sixth* Chapter states those *preliminary steps* that may be advisable *after the inception* of an injury, but before the commencement of hostile measures or of litigation respecting them.

In the *Seventh* Chapter the numerous remedies by acts of *parties* themselves, or their relations, friends, or third persons, without any assistance of the officers of the law, or of legal process, and either to *prevent, resist, defend, remove, or abate* injuries, or to obtain satisfaction by their own act, as allowed by law, are fully considered; stating all the instances in which the *defence* of the Person, Personal Property, or Real Property is allowed, and the means to be adopted; and when a relation, servant, friend, or stranger may interfere, and how; when and how private individuals may, without warrant or process, *apprehend offenders*; when

and by what means *resistance of process*, escapes, rescues, prison-breaking, and pound-breach, are lawful or criminal, or at least imprudent; when *recaption* of the person, personal or real property, is allowed, and how; the *abatement and removal* of private and public nuisances, and other injuries. The law of Distresses and Seizures for Rent, or upon cattle Damage feasant, or for Poor Rates, Tolls, &c.; and the law of set-off, and Remedies by Retainer and Lien, are also examined.

In Chapter *Eight* are stated the several *preventions and removals of injuries by Legal Authority*; as those by Justices of the Peace, Peace Officers, or by Judges, by obtaining *security to keep the peace* or to be of good behaviour, whether by application to a single Justice or at Sessions, or by exhibiting articles of the Peace in the Court of King's Bench, or by articles and supplicavit to the Chancellor, with the practice on obtaining each of these protections; the removal of Imprisonment by writ of *Habeas Corpus*, with the law and practice respecting the same; the more formal proceedings at Law or in Equity to prevent or remove injuries, and especially the law and practice respecting *Injunctions*, a branch of equitable jurisdiction of the very greatest importance to be well known, as well to practitioners at Law as to those in Equity; the prevention of the loss of an equitable debt or claim by the writ *ne exeat regno*, or of loss of evidence by bills to *perpetuate testimony*, and bills and injunctions to restrain unjust actions or proceedings at law or in other courts; bills of *Interpleader*, and other proceedings. Some preventive remedies in local courts are also noticed.

In the *Ninth* Chapter it is supposed that an injury

has been completed, and that some time having since elapsed, it becomes necessary to ascertain whether any *Statute of Limitations*, or any *presumption from delay*, constitutes any bar to the proper remedy for relief or compensation. Here are considered all the statutes of limitations, and other consequences of delay or laches, in commencing the remedy as well at law as in equity, and in bankruptcy, in cases of executors or administrators, in Ecclesiastical and Spiritual Courts, in Admiralty Courts, and in Criminal Courts; together with the *prejudice* incident to *laches* at common law, and in Courts of Equity, independently of any express limitation by statute.

In the *Tenth* chapter are very fully considered all the remedies at law, and in equity, or elsewhere, to compel *specific relief* or *performance*, whether as respects the rights of *Persons*, *Personal* or *Real* Property, and as it will obviously be frequently preferable to enforce the actual and full *enjoyment* of a right *specifically* than the mere recovery of damages in compensation for the injury, all these *specific remedies* are very fully and practically considered, especially as regards the extensive jurisdiction of the Court of King's Bench by *Mandamus*, and the still more important analogous jurisdiction in Equity, by *Bills for*, and *Decrees compelling the Specific Performance of Contracts* and *other rights*, *Bills to Account*, and other specific remedies; and Bills in Equity to *prevent* the specific enforcement at law of *Penalties* and *Forfeitures*, or legal rights.

The full particulars of the subjects of this part may be ascertained by examining the table of contents and the Analytical Table of each chapter, and every single point or question will be found referred to in

the Index. As *specimens* of the probable utility of the undertaking, and the mode of executing it, the author begs to refer to the arrangement of the important branch of the law relating to *Executors and Administrators*, in pages 510 to 561—to the *Defence, Resistance, and Removal* of Injuries by parties themselves, in pages 586 to 669, and upon which so many questions arise, as well in actions of trespass as in the Criminal Courts—to the law and practice relating to the writ of *Habeas Corpus*, in pages 684 to 695—to *writs of Injunction*, in pages 695 to 731, to the whole chapter on the *Statutes of Limitations*, 736 to 786—to the law and practice upon writs of *Mandamus*, in pages 789 to 810, and to pages 820 to 871, as respects bills for and decrees of *Specific Performance*. The modes of treating those important subjects the author believes are new, and he hopes they may be found in some degree worthy of attention.

The rest of the work, which states the *minutiæ* of the *Practice* of all the principal Courts of *Law* and *Equity*, and of the *Ecclesiastical* and *Spiritual* Courts, and Courts of *Admiralty*, &c. &c., and in *Arbitrations*, and in conducting *Summary proceedings before Justices of the Peace*, is in a great state of forwardness, and is withheld for the present merely in order that all the alterations in the law during the present sessions may be incorporated. In treating of the *Practice of the Courts of King's Bench, Common Pleas, and Exchequer*, the author has pursued the object of the Legislature and of the Judges by endeavouring to *assimilate* the practice of all the Courts; instead, therefore, of writing distinct chapters or parts on the *separate* and *distinct* practice of each Court, and which the author submits would

occasion unnecessary repetition) he has attempted to revive the excellent and lucid plans adopted in Crompton and Sellon's Practice, viz. of stating in one *principal column* the full practice of the Court of *King's Bench*, and then in the same page, in adjoining columns, showing the difference, if any, in the practice of the Courts of *Common Pleas* and *Exchequer*, and in notes *subscribing* the clauses of statutes, and rules and principal forms of the writs and proceedings, showing when any occasional deviation may be advisable. By this plan the Student and Practitioner may *at one view*, and without referring to numerous books repeating the same rules which equally apply to all the Courts, perceive the whole practice of all the courts of similar jurisdiction.

The same plan has been observed as regards the practice of the *Courts of Equity*, and whether the proceeding be before the Chancellor or the Vice-Chancellor, or the Master of the Rolls, or on the equity side of the Court of Exchequer.

As a *distinct* publication not necessarily ineumbering the subscribers to the principal work, a volume of *Forms* or *Precedents* will be published with subscribed notes of practical directions how to apply them. This will contain *forms* of every description of *Conveyance and Contract*, whether relating to absolute, or relative rights, settled by the most eminent conveyancers and adapted to the law as altered in this and the preceding sessions, also the forms of every *Writ* and *Practical proceeding* at *Law* and in *Equity*, and in the Ecclesiastical and Admiralty Courts, and Courts of Error and Appeal.

The author begs to acknowledge the obligations

conferred upon him by several gentlemen, officers of the courts and others, for the ready assistance and valuable information they have afforded him; and he will consider himself still further indebted to any practitioner who will take the trouble of forwarding to him any further information or suggestions early in this vacation.

The author did not venture, until very flattering opinions of the *first* part of this work had been generally expressed, to implicate *his son Henry* in what might turn out a failure; but he cannot now refrain from acknowledging that, in the Fourth Chapter of the first part, relative to *Real Property* and *Conveyancing*, he derived from him much *valuable practical information*, which he could not otherwise have introduced, and which enables him with confidence to recommend that chapter in particular to the attention of Students and the Profession in general.

J. C.

Chambers, 6, Chancery Lane,
20th June, 1833.

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CHAPTER V.

PRECAUTIONARY MEASURES IN ANTICIPATION OF AN INJURY.

- | | |
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| <p>I. Retainer of an attorney or solicitor, and questions to be answered.</p> <p>II. General observations upon precautionary measures.</p> <p>III. Securing evidence.</p> <p>IV. Precautions in cases independent of contract.</p> <ol style="list-style-type: none"> 1. Notices not to trust a wife. 2. ——— Son or daughter. 3. ——— Agent. 4. ——— Partner ; and of dissolution. 5. ——— of bill or note having been obtained by fraud, or lost. 6. ——— of apprentice or journeyman being absent, &c. 7. ——— not to trespass. 8. ——— of danger in a particular place. 9. ——— to ascertain a particular event. 10. Precautions in fixing boundaries. 11. ——— in exercising acts of ownership. <p>V. Precautions in cases of contract.</p> <ol style="list-style-type: none"> 1. Precautions by vendors and purchasers. | <ol style="list-style-type: none"> 2. Precautions by legal and equitable mortgagees. 3. ——— by trustees. 4. ——— of landlord and tenant. 5. ——— by carriers. 6. ——— in creating liens. 7. Performance of conditions precedent, and how. 8. Notices, and how. 9. Requests, and how. 10. Notices of dishonour of bills. 11. Tendering an indemnity. <p>VI. Precautions by an expected defendant.</p> <ol style="list-style-type: none"> 1. Tenders. <ol style="list-style-type: none"> 1. Of a debt. 2. Of rent on land. 3. Of damages. 4. By justices, &c. 5. Fresh demand. 2. Obtaining a set-off, &c. <p>VII. Repetition of these measures when essential, with a view to securing evidence.</p> <p>VIII. Precautions by executors and administrators.</p> |
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PERHAPS of all precautionary measures that of obtaining the advice and assistance of a professional person before adopting any step, is the most important, since very few individuals, who have not practised as well as studied the law, can anticipate on every occasion all the difficulties that may arise, or what may be the most judicious line of conduct to be pursued. This and the three following chapters are intended principally to *assist* individuals in their choice of the best precautionary measures, and of the best remedies ; but still it will be essential in general to have a professional adviser ; with respect to the choice of whom and his functions and duties, a distinct chapter will hereafter be given. It may suffice here to observe that it is essentially important to select not a mere lawyer but a gentleman of known high character, as well for his knowledge of all his professional duties, but also of adequate knowledge of the world, and a good negociator, and disposed to avoid litigation, and

I. RETAINER OF
AN ATTORNEY,
SOLICITOR,
PROCTOR, OR
AGENT.

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above all, one who has not nor is likely to have any connection with the expected opponent which might hereafter render the confidence reposed in him injurious to the interests of his employer, and it might be well in some cases to require an explicit engagement to that effect. (a) It will be prudent on the part of the professional adviser to put to his client, in the first instance, and even in writing, all questions in the slightest degree connected with his case, so as to anticipate every point that might thereafter arise in the course of the expected litigation; and the client should deliberately, when time will allow, answer the same in writing. This and a subsequent conference would probably secure an accurate and useful investigation and explanation, which would govern every subsequent step and prevent the errors and defects too frequently to be attributed to the want of due inquiry and consideration in the first instance. (b)

(a) See the observations of Sir E. Sugden in his excellent work on Vendors and Purchasers, 8th ed. Introd. And see the cases, *Beer v. Ward*, 1 Jacob's R. 77; *Bricheno v. Thorp*, Id. 300; *Cholmondeley v. Clinton*, 19 Ves. 261; *Coop. 80*, S. C. 1 Madd. Ch. Pr. 160; which evince the hazard of employing a solicitor, who, or whose clerks, may afterwards be retained by the opponent; and see the general principle as to injunctions to prevent the disclosure of confidential communications, *Exitt v. Price*, 1 Simon's R. 483; *Yvath v. Winyard*, 1 Jac. & Walk. 394; *post*, chap.

viii. Lord Tenterden frequently stated the impolicy and danger of parting with, or showing title deeds or other documents; and mentioned instances of parties having lost their estates by placing unlimited confidence in their solicitors, who, though honourable themselves, suffered documents to be read by clerks or others in their offices, which were afterwards communicated to an adverse claimant. See further, the *Newcastle case*, 8 Ves. 141, and *Sugd. V. & P. 306*, where a large property was lost by this want of caution.

Questions to be
stated and
answered in
writing.

(b) It may not be devoid of utility to suggest a few of the questions which, in the natural course of litigation, may arise. Such only need be considered as bear on each particular case.

1st. What was the right affected? Was it private or public? or was it both? If private, was it temporal or ecclesiastical, legal or equitable, vested in the party complaining or in his trustee? Absolute or relative; in possession, remainder, or reversion? Depending on any and what contract, or without contract?

2d. Was the injury private or public, civil or criminal, temporal or ecclesiastical, a tort or a breach of contract? And if the former, was it with or without force, immediate or consequential, a nonfeasance, misfeasance, or malfeasance?

3d. What are the several remedies, whether by any and what prevention or removal of the expected injury by the party himself, or the interference of an inferior or superior tribunal, or for enforcing specific performance or compensation by some legal proceeding?

4th. What if any precaution should be taken to prevent the possibility of even remote injury from or litigation with any unknown party?

5th. Supposing an injury is threatened or expected from a particular individual, then is it necessary to take any and what preliminary step, as to make a demand, &c. before the commencement of any hostile measures?

6th. Can the injury be legally prevented or removed by any and what proceedings of the party complaining, or by any and what relation or agent, and without the interference of any constituted authority?

7th. Can the injury be prevented by application to any and what constituted authority, and by what proceeding?

8th. Supposing that the injury has been completed by some person, has it been barred by any and what statute of limitations, or any presumption of payment, &c.? and is there any mode of preventing such bar; and if not, then is there any criminal remedy for the same injury?

9th. Is there any and what mode of ascertaining who in particular was the wrong-

II. "*Measures and laws to anticipate and prevent injuries are more to be encouraged, than those for compensating or punishing such injuries when committed.*"(c) In the ordinary transactions of life, when it is *expected* that an injury, not yet even commenced, will be sustained, or that an unjust action will be prosecuted, it will frequently become *absolutely necessary* to take some *precautionary measures*, either to perfect the right or to prevent the expected injury, or to secure the best remedy for compensation or the best means

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II. General observations relating to the necessity for, or expediency of certain precautionary measures.

doer, as by letter or bill for discovery, or to discover whether a tenant for life is dead, and may or not a search-warrant be obtained?

10th. Is the complainant the proper party to assert the claim or under any disability; and is the known wrong-doer liable to be proceeded against, or privileged or protected?

11th. Is it fit to accept an apology, or to compromise, or to give any and what indulgence, &c. without previous suit?

12th. Is any other step necessary before the commencement of legal proceedings, as demanding inspection of warrant, giving notice of action, &c.?

13th. Can specific *relief* or performance be enforced, either at law by mandamus, replevin, action of detinue, or summary proceeding; or in equity by bill for specific performance, &c.?

14th. Is it *compulsory* or advisable to refer to *arbitration*, and on what terms?

15th. Is the complainant in possession of sufficient *evidence* to support his claim, and if not, how can he obtain it? If not, then how far should that circumstance influence in the choice or abandonment of remedies?

16th. Before what tribunal, or to what justices, or court inferior or superior, should the complaint be preferred?

17th. Is it necessary or expedient to retain any and what attorney, solicitor, proctor, or agent, to commence and proceed in the suit, and on what terms?

18th. By and against whom, or in whose names, should the proceedings be carried on?

19th. What should be the first process, and should the wrong-doer be arrested or only summoned?

20th. What are to be the pleadings or statements of the complainant's case, whether before justices by information, or at law, or in equity, libel in the spiritual or ecclesiastical court, or in the court of admiralty? Is any further statement of facts requisite as instructions for preparing the same? In what respect will the form of the proceeding vary?

21st. On the behalf of a *Defendant*. Has the proceeding been commenced in the proper court; and if not, then can the defendant stop the same by plea to the jurisdiction or by prohibition, certiorari, &c.?

22d. If there be several claimants in different adverse rights, should there be a bill of interpleader, or motion to the court under the stat. 1 & 2 W. 4. c. 58?

23d. If not, what is the proper defence, plea, or answer?

24th. What should be the subsequent pleadings and proceedings?

25th. How should the *Brief* be prepared for the plaintiff or defendant, and what are the proper forms and points to be alluded to; and is it necessary or expedient to have a consultation with the counsel, and when?

26th. What *evidence* should be adduced for the plaintiff and defendant? Is it advisable to examine witnesses on interrogatives under 1 & 2 W. 4, c. 22, s. 4, and how? Or to file a bill for a commission, &c.?

27th. What should be the conduct of the plaintiff and defendant, and their counsel or attorney or solicitor, previous to and pending the trial or hearing?

28th. What should be the verdict, judgment, or decree; award, adjudication, conviction, or sentence? Whether specially or generally; for any and what debt or damages, &c.; and for any and what costs?

29th. What should be the execution, whether against the person, or personal or real property, and what may be taken?

30th. When satisfaction should be entered; and what the consequences of the omission?

31st. What remuneration should be made by the client to his attorney or solicitor; and of taring the bill of the latter?

(c) *Vengeance v. Attwood*, 1 Mod. 202; *Willcock v. Windsor*, 3 Bar. & Adolp. 43.

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of defence; or supposing that such measures have already been adopted, the evidence may be insufficient, and it may therefore be expedient to obtain an admission of the fact, or to repeat the measures. So in various cases, whether before the inception of an injury, or after it has been completed, although no preliminary measure may be absolutely *necessary*, yet it will be found of *essential importance* and *utility*, and highly expedient, to take certain steps before the actual commencement of litigation. Thus, even in a Court of *Law*, the mere circumstance of a complainant having, previously to litigation, evinced a sincere desire to avoid it, whether by seeking explanation, or by temperate remonstrance, or by civil request or notice, to the intended defendant, allowing adequate time for consideration, and for obtaining advice on the propriety of resistance; or, on the part of a defendant, his having offered an explanation or a proper apology, or an arbitration, or made a tender or *bonâ fide* offer to pay what he considers the just measure of the complainant's claim; all these steps (independently of moral obligation and gentlemanly feeling) will, in most cases, strongly incline a judge and jury in his favour, so as at least to induce each to listen more patiently to a detailed statement and evidence, when, in case of an intemperate or hasty action, or of a vexatious or uncandid defence, the judge and jury will suspect the veracity even of the evidence adduced by either party. (d) No one of experience will deny that very small circumstances and judicious conduct of a party will frequently turn the scale in his favour, and still more frequently influence the amount of damages. (e) And if the claim should be prosecuted or resisted in a Court of *Equity*, the previous conduct of the parties will often induce that court, in the exercise of the

(d) It has been not unfrequent for inferior practitioners to issue a writ without a previous letter, or at least before it has been possible to comply with a short notice, and even to declare *de bene esse*, as it is technically termed, on the very day of service of the writ, a practice by late salutary rules and enactments very properly repressed. Rule Trin. T. 1 Wm. 4, A. D. 1831; Rules II. & III. Hil. T. 1832; Stat. 2 Wm. 4, c. 39; Rule Mic. T. 3 Geo. 4, Reg. 11; Tidd, on same, page 38, 39.

(e) In an instance before alluded to, *ante*, 57, note (u), where a lady who had promised marriage was fickle and indecisive, and could not be brought to a decision as to the day of marriage, and afterwards neglected to attend an appoint-

ment for the purpose, a celebrated leading counsel, who afterwards filled the highest legal station, upon consultation with the intended plaintiff, suggested the terms of his letter to the lady, fixing a day, and upon such letter being afterwards read on the trial, Lord Kenyon observed, that though the lady then pretended that the plaintiff was beneath her in station, she might have considered herself fortunate in the prospect of possessing, as her husband, a man who could write so sensible and eloquent an appeal to her judgment and her feelings, and thereupon the jury gave much larger damages, principally in respect of such letter, than they would otherwise have done, as several of the jury afterwards declared.

discretionary jurisdiction over *costs*, to give, or withhold, or increase, or diminish them entirely, according to the judicious conduct of the parties. (*f*) Thus, if a bill for an account or for a discovery be filed against a factor or agent, or other party, without first properly applying to him in a civil manner for an account; (*g*) or if a suit for dower has been instituted by a widow, without first applying to the heir to have it assigned, or if, on the other hand, he vexatiously refuse to assign it after proper request; or if a bill of interpleader be filed, without first applying for an indemnity, or if a party be guilty of any other vexatious conduct, he may not recover costs, though in other respects he succeed. (*h*) So, although an executor be always ready, and offer to pay a legacy, yet, if he qualify his offer by imposing terms which he has no right to require, the suit for the legacy will not be deemed unnecessary, and the costs must be paid out of the residue to which the executor may be beneficially entitled. (*i*)

We will, therefore, in this and the succeeding *three* chapters consider those "*precautionary measures*" which frequently are absolutely necessary, and at all times *advisable* for parties to adopt before they precipitately plunge into litigation,—considerations which are important and interesting to every member of society who may wish to know and safely practise and fulfil his relative rights and duties even in the ordinary course of life.

In the present chapter we will consider the *principal* steps to be taken in various situations *before there has been even an inception of injury*. It cannot be attempted to state *all* the various situations of difficulty which may arise even in the ordinary intercourse with society. The first and most general precaution is, in the first instance, *to secure evidence* in support and proof of the right or injury, or of the defence; and then the steps to be taken may be generally arranged under two heads, *first*, cases *independently of contract*; and *secondly*, cases *of contract*. Of the former,

(*f*) See in general 2 Mad. Ch. Prac. 546; and sometimes a party, by instructing or allowing his counsel to make an unfounded or too severe an attack on the character of his opponent, or of even his solicitor, will induce a Court of Equity to visit him with costs; see the case, *post*.

(*g*) *Weymouth v. Boyer*, 1 Ves. jun. 416; 1 Mad. Ch. Prac. 216; *Collyer v. Dudley*, 1 Turner & Russ. 421. So if a plaintiff is entitled to a discovery, and goes first to the defendant to ask for accounts which he in justice has a right to, then if the defendant refuse and the plaintiff is thereby compelled to file a bill for a dis-

covery, the defendant ought not to have costs; for, although they are in *general* to be paid by a party filing a bill merely for discovery, yet if the plaintiff file his bill without trying first to get the discovery, "*in the way in which men acting with each other ought first to ask their rights*," he ought to pay costs, *Id. ibid.* where it is also said Lord Eldon approved that doctrine.

(*h*) 2 Mad. Ch. Pr. 543 to 573; and see *Collyer v. Dudley*, 1 Turner & Russ. R. 421.

(*i*) *Waller v. Paley*, 1 Russ. R. 375.

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the instances are principally where it may be advisable to give notices not to give credit to a *wife, child, servant, agent, or partner*, or of a *bill* or note having been *obtained by fraud, or felony, or lost*, or not to *harbour* an *apprentice* or *servant*, or *not to trespass*, or notices previous to a claim on a hundred, and notices to ascertain any *event* in which the party is interested.

Those connected with contract are cases in which it may be necessary to take steps to *perfect* a right on a *contract*, as notices by purchasers and mortgagees, and trustees of purchasers, or assignments of real property or personalty, either absolutely or as collateral securities; and on behalf of *landlords*, and notices to qualify certain legal liabilities. Then will be shown how to perform conditions precedent, or to make formal requests, and then are considered certain measures to be observed by expected defendants, so as to anticipate and prevent the liability to an action; and lastly, the very important precautions and rules to be observed by *executors* and *administrators* in the *administration* of assets. It will be our object in this chapter to consider all measures of this nature, *first*, independently of contracts, and, as respects the person, personal or real property; and *secondly*, as regards the perfection of rights founded on *contracts*; *thirdly*, on behalf of expected defendants; and *fourthly*, precautions of executors and administrators.

III. Securing
 evidence of the
 Right or of the
 Injury.(j)

III. Perhaps of all the *precautionary measures* that can be adopted when there is the remotest probability of litigation, that of *securing*, in the *first* instance, *evidence* to establish the right, or the injury, or the grounds of defence, is the most important; for if not in possession of adequate evidence, parties should consider themselves in the same situation as if the essential facts had no existence(k). Such evidence should therefore be ascertained and well considered in the *first* instance, for after open disagreement, and still more after the commencement of litigation, the wrong-doer will have become guarded and less communicative, and probably will decline any admission, and if he should be certain that *two* witnesses (gene-

(j) See end of chapter a repetition.

(k) See *post*, as to Bills of Discovery. On a late trial at Kingston Assizes, 1829, a verdict was obtained upon the mere production of an answer in Chancery, upon which Lord Tenterden observed, that was one of the very few instances in which, in his experience, an answer alone had been relied upon to establish a case at law. It too frequently occurs that upon a client's

statements a suit is precipitately commenced without *first* ascertaining the evidence, and sufficient inquiry into the detail of proofs is not made until just before the trial, after much expense has been incurred, and then it will appear that for want of adequate evidence the suit is not sustainable. This is *grossly absurd and culpable negligence*.

rally essential in the *Criminal Courts* to establish the guilt of perjury) cannot prove the fact so as to convict him on an indictment for perjury, he will perhaps, in his answer to a bill of discovery, be hardy enough wilfully to deny, or to so mis-state the facts, or, as is very generally the case, he will so *qualify* his admission that his answer cannot be safely read in evidence against him. (l) Hence it may frequently be of the utmost importance to secure an admission, or evidence of the requisite facts in the earliest stage. *How* to effect that desirable object must depend on the various circumstances of each particular case, and the character of the parties interested therein. It may justifiably be effected even by stratagem, though no one would willingly or unnecessarily resort to measures of that description, and sometimes a jury would even suspect the veracity of evidence so obtained. (l)

IV, Persons are frequently placed in a peculiar situation of risk of loss or injury, and when it may be expedient to adopt and to secure evidence of having adopted *preventive measures* to avoid it, such as giving a *public* or *private notice*, or taking some other step, and which the law allows and requires, provided the party giving the notice has an interest in the subject, and that the character of another be not thereby unnecessarily libelled or affected, and that the means adopted be the best or the only one that could be resorted to; though if these be not observed, the party giving the notice may subject himself to an action or indictment for a libel. (m)

IV. Other precautionary measures in cases independently of contract, by giving Notices, &c.

1. If a wife have *illegally absented* herself from her husband's house, or conducted herself extravagantly when there, (o) and is likely to endeavour to obtain necessaries or goods on the credit of her husband, he may, and should, in order to protect himself from liability, give a *public notice* prohibiting third persons from trusting her on his credit; and it is advisable also in such a case to give and be prepared to prove a *particular* and private notice or prohibition to every tradesman and person who had been accustomed to deliver goods to the wife on credit; for otherwise, unless in cases where the wife has been guilty of

1. Notice not to trust a wife. (n)

(l) Advertisements in newspapers are very frequently seen, stating, that if a named person will apply at, &c. he will hear of something to his advantage, and when he appears his residence will be ascertained and himself served with a subpoena. This is an innocent ruse.

(m) *Brown v. Croome*, 2 Stark. Rep. 297.

(n) *Id. ib.*

(o) *Etherington v. Parrot*, 2 Ld. Raym. 1006; 1 Salk. 118, S. C.; *Montague v. Benedict*, 3 B. & C. 631; *Holt v. Brien*, 4 B. & Ald. 252; *ante*, 60.

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adultery, the husband may be liable until the tradesman has received actual notice: (p) and though no notice is absolutely necessary when the wife has been guilty of adultery, (q) yet it is always expedient to give the same. (r) If such a notice have been given, and the husband receive back his wife, he thereby revives her authority to contract on his credit for necessities, and impliedly revokes his previous notice. (s) When the husband has causelessly turned away his wife, or improperly refused her necessities, a general notice, or even a special prohibition, is of no avail, and necessities may be delivered to the wife in defiance of such notice, so as to fix the husband. (t)

The notice when given should not unnecessarily calumniate the wife or any third party. It may be in the form in the note. (u)

2. Notice not to
trust a son or
daughter.

2. So with respect to a *son* or *daughter* who has been allowed by the father or mother to obtain goods on his or her credit, and it becomes necessary to determine such authority, a similar *private* notice to each tradesman or person who has been in the habit of delivering goods on the credit of the parent, should be given, or he will continue liable. But as a child has not, like a wife, a *general credit* or power to fix his parent with liability even for necessities, no *public* or *general* notice is absolutely necessary, for any fresh tradesman would trust the child on his own credit at his peril, but only to those who by the direction or authority of the parent have previously delivered goods on credit to his child. (v)

(p) *Bolton v. Prentice*, 2 Stra. 1214, in notes; *Child v. Hardiman*, 2 Stra. 875; *Liddlow v. Wilmot*, 2 Stark. 87.

(q) *Morris v. Martin*, 1 Stra. 647; *Mainwaring v. Sanders*, Id. 706; *Rex v. Flinton*, 1 B. & Adolp. 227; *ante*, 60.

(r) *Norton v. Fagun*, 1 Bos. & P. 226; *Govier v. Hancock*, 6 T. R. 603.

(s) *St. John v. St. John*, 11 Ves. 536; *Harris v. Morris*, 4 Esp. R. 41.

(t) *Harris v. Morris*, 4 Esp. R. 42; *Selw. Ni. Pri.* 5 ed. 275.

(u) CAUTION not to trust Mrs. E. B.

Suggested form
of notice when
a wife has ab-
sented herself.

Whereas Mrs. E. B. my wife, has illegally absented herself from my house, situate at —, under circumstances which exempt me from liability to pay for any necessities or goods she may obtain, or to perform any engagement she may enter into, I hereby give Notice, that any person who may trust her with any necessities or goods or money will do so at his peril; and that I am not, nor will be liable in any respect to pay for or repay the same, or to perform any engagement of the said E. B. Dated, &c.

A. B. of, &c.

Or, (Caution, &c. as above)

Suggested form
of notice where
a wife still re-
sides with her
husband.

Whereas I have found it expedient and necessary myself to purchase all necessities and goods for my wife and my family and establishment at —, and not to suffer Mrs. E. B. my wife to purchase goods or to contract on my behalf: Now therefore I hereby give Notice that Mrs. E. B. my wife, is no longer authorized by me to make any purchases or contract on my behalf, and that I will not be responsible for the performance of any engagement she may enter into. Dated, &c.

A. B. of, &c.

(v) *Ante*, 65.

3. With respect to *agents* and *servants*, it is clear that if a person has been frequently allowed to purchase goods on credit, or do other acts for a principal, and his authority has been put an end to, notice of such revocation must be given, for otherwise the principal will continue liable for subsequent acts, though done without actual authority, but upon the supposition and presumption of a third person that the authority actually continued, at least until it be *generally known* that the agency has ceased. (w) In giving a notice of this nature care must be observed to avoid any libellous expressions, or any terms calculated to injure the character of the factor or agent, or servant, or even to insinuate that he is not trustworthy; and when it is believed that he has acted faithfully, it will be advisable to add words to that effect. (w) The terms may be as in the note. (x)

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3. Notice of authority of agent or servant having ceased.

4. Upon the *determination* of a *partnership* by consent or by effluxion of time, it is *usual* and always expedient for the respective partners to concur in signing and giving *public notice* thereof, lest by fraud or other unforeseen circumstance a retired partner may be afterwards subjected to liability for a subsequent debt or engagement contracted by the other in the name of the late firm. If after the dissolution persons who have previously sold goods or given credit to the firm should, for want of such notice, deliver goods to one of the late partners, who falsely assumes or appears still to act for the firm, all the former partners will be liable, as if the partnership still continued, unless it can be established that there was collusion between the fraudulent partner and such creditor. (y) It is usual to concur in a notice in the subscribed form, (z) and for each

4. Notice of dissolution of partnership, or not to give credit to a partner.

(w) *Nickson v. Brohan*, 10 Mod. 110; *Rusby v. Scarlett*, 5 Esp. Rep. 76; — v. *Harrison*, 12 Mod. 46; Moll. 282.

(x) CAUTION.—Agency of Mr. C. D. for A. B. determined.

Notice is hereby given, that Mr. C. D. of —, is no longer authorized by me, A. B. of —, to draw, accept, or indorse any bill or note, or purchase or sell goods, or contract on credit or otherwise on my behalf, or to transact any other business for me as my agent or otherwise; but I nevertheless certify my entire approbation of his conduct whilst he was in my employ. Dated, &c. A. B.

Suggested form of notice of an agency having been discontinued.

(y) *Parkin v. Carruthers*, 3 Esp. R. 248; *Carter v. Whalley*, 1 Bar. & Adolp. 13; *Heath v. Sanson*, 2 Bar. & Adolp. 291; and *Ex parte Goulding*, 8 Law J. 19.

(z) Take Notice, that the partnership lately subsisting between us as (*Coal-merchants*) at —, has on this — day of — by mutual consent been dissolved; and that by the like consent all debts due from or to our late firm will be paid and received by the undersigned A. B., by whom our said business will in future be carried on upon his sole credit and account. Dated this — day of — A. D. 1833.

Suggested form of public notice of dissolution of partnership in Gazette and newspapers.

A. B.
C. D.
E. F.

Witness to the signatures of the said parties, G. H.

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partner to subscribe his own name, and which constituting a notice, and not an *agreement* to give a notice, need not be stamped. (z) A *public notice* of dissolution will not in general be inserted in the Gazette or other newspapers unless the publisher be satisfied that *all* the partners have *signed a consent* to such publication (though there are exceptions); (a) and when that cannot be obtained, each retiring partner should, for his own protection, especially when he expects fraud from another retiring partner, give an express and *particular notice* of the actual dissolution to all previous customers, and may, under strong circumstances, even circulate *printed handbills*; indeed such particular and individual notice is in prudence advisable even in cases where a public notice in the Gazette and newspapers has been given; for although such public notice may be sufficient to affect all persons who have *not previously* dealt with the firm, (b) yet it may be otherwise as to *previous* customers and connections, who may not have read such Gazette or newspaper. (c) The particular notice to be given to each party who has previously had dealings with the firm should in general be in the same terms as the public notice, and be signed by all the partners; and in general in such private notice, in order to further the interest of the new firm, and prevent any prejudicial supposition of insolvency, it is not unusual to state the grounds on which the other partners retire, and their request of the continuance of favours to the new firm.

Supposing the other partners will either not concur in a dissolution, or in giving a public notice thereof, then, if there be reason to fear the improper circulation of bills, or other danger,

(z) *May v. Smith*, 1 Esp. R. 283; *Jenkins v. Blizzard*, 1 Stark. R. 418.

(a) On a late occasion, (on 15th Oct. 1832,) the following advertisement, in other names, was given, and is a form that might be adopted when the facts are certain, though it would be prudent to substitute the word *improperly* for *fraudulently*.

Notice not to
trust a fraudulent
partner.

"Take Notice, that A. B. late of No. —, St. James's, carrying on business in partnership with me at No. —, as Surgeons, under the firm of "C. D. and Co." has absented himself from business, and is supposed to have left the country. This is to caution all persons from having any dealings with the said A. B. in respect or on account of the said partnership, and from taking any bills or notes purporting to be given by "C. D. and Co." the same (if any) having been *fraudulently* made and circulated by the said A. B. Dated

the — day of —, 1832.

"E. F. No. —."

"Witness, G. H."

(b) *Wrightson v. Pullan*, 1 Stark. R. 375; 2 Chit. R. 121, S. C.; *Abel v. Sutton*, 3 Esp. R. 110; *Triston v. Binns*, 2 Car. & P. 104.

(c) *Williams v. Keats*, 2 Stark. R. 291; *Graham v. Hope*, Peake, 154; *Hawkins v. Ruff*, Id. 186; *Tenny v. Moody*, 3 Bing. 3; *Jenkins v. Blizzard*, 1 Stark. R. 418; *Wright v. Pullham*, 2 Chit. R. 121; *Graham v. Hope*, Peake, 155; *Godfrey v. Turnbull*, 1 Esp. R. 371; *Munn v. Baker*, 2 Stark. R. 255; *Williams v. Keats*, Id. 291; *Newsome v. Cotes*, 2 Campb. 617. In *Munn v. Baker*, 2 Stark. R. 255, Ld. Ellenborough said, "A man might be supposed to look into the Gazette for notices of *dissolution*, though he might not look there for carriers' restrictive notices."

the partner objecting should give the others a written notice of dissolving the partnership, and thereby prohibit them from issuing bills, &c. ; and he may circulate *private notices* to all persons known to the firm, protesting against the injurious proceedings of his copartner, and disclaiming all liability ; and he should file a bill against signing or negotiating securities in the name of the firm, and praying an immediate dissolution ; and should immediately move thereupon, upon affidavit of the impending danger, for an injunction to prevent it. (d)

The form of such *adverse* notice may be to the effect in the subscribed note, taking care to avoid any unnecessary calumny on the other parties. The affidavit to support the injunction should concisely state the improper and irregular conduct of the other partner. The subscribed forms may be readily applied to the circumstances of every particular case. (e)

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(d) *Muster v. Kirton*, 3 Ves. 74 ; *Ryan v. Mackmath*, 3 Bro. C. C. 15 ; *Nawsome v. Coles*, 9 Campb. 619 ; *Lawson v. Morgan*, 1 Price, 503.

(e) Sir,—Finding that my partnership with Mr. A. B. cannot be carried on advantageously, and that from his having incorrectly and otherwise, than in the due course of business, drawn, issued, or made bills, notes, and other securities in the name of the firm, and intimated that he intends to continue so to do, and on account of other irregularities I am likely improperly to incur much risk, if not actual loss, I beg to inform you, that I have, as far as in my power, put an end to such partnership, and that in future I will not pay any bill, note, or other security issued in the name of my late firm, or upon which the name of the firm, or my name, whether as drawer, maker, acceptor, or indorser, and not my own signature, may appear, unless with my express concurrence ; nor will I be in any way responsible for any contracts or engagements that have been or shall or may be made or entered into by the said Mr. A. B. without my express consent. And further take notice, that I shall immediately proceed to obtain an injunction against the said A. B., and that I am ready to give you any further information or explanation you may require. Dated, &c.

Suggested form of private notice of dissolution of partnership.

Sir,—I hereby require you to take notice, that it is my intention to retire from and determine the copartnership now subsisting between us at Christmas next, in pursuance of the power contained in the deed or articles bearing date, &c., enabling me as therein mentioned to determine the said copartnership. And I hereby further require that you will, on such dissolution of the said copartnership, execute to me such bond of indemnity as in the said articles is mentioned against the debts of the said copartnership, a draft of which bond will in due time be previously submitted to you for your approbation, I being ready to execute any such assignment or assurance as shall be requisite or proper on my part concerning the premises. Dated, &c.

Notice by one partner to another of intention to dissolve the copartnership, pursuant to a power in deed for that purpose.

Sir,—I do hereby give you notice, that it is my intention to determine the copartnership subsisting between us in the trade or business of ——— on, &c. next ; and I do hereby require you on or before that day to render a just and true and particular account in writing of all the monies had and received by you for or on account of the said copartnership, and of all transactions relating thereto ; and I do hereby give notice in the mean time not to draw, accept, or negotiate, or make or cause to be made or executed any bill of exchange or promissory note, or other security, for or on account of or in the name of the said copartnership, or otherwise relating thereto, by means of which I might become liable to make any payment whatsoever. Dated, &c.

The like, where the partnership was for an indefinite time.

Notice is hereby given, that the partnership between (*here state the names of the subsisting firm*) in the trade or business of ———, carried on at ———, and elsewhere, will expire on, &c., and that the said trade will be continued by (*stating fully the names of the continuing partners*) under the firm of, &c.

(*To be signed by each member of the retiring firm.*)

Notice in Gazette and otherwise that a partnership will expire on a named day, and that a new firm will continue the trade.*

* See form, *Gough v. Davies*, 4 Price, 502.

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5. Notice of
bills or notes
having been lost
or obtained by
felony or fraud.

5. Another instance of the necessity of taking *immediate precautionary measures* and giving *public notice*, is that of a *negotiable bill or note* having been obtained by undue means, as by robbery, or by *false pretences*, or *lost*, in which cases, from want of a *previous notice*, it may be negotiated and get into the hands of a *bonâ fide* holder, who may become entitled to enforce payment, and the defrauded person, or the loser, may be deprived of all claim, excepting against the person guilty of the fraud, or the finder. (*f*) In case of such a felony, fraud; or loss, *immediate public notice* should be given, stating, as explicitly as the nature of the case will admit, an accurate description of the bill or note, and the time and circumstances of the fraud or loss, with an offer, in case of felony, of a reward for discovery of the offender. So that any person who has read or heard of such notice, and to whom the bill or note might afterwards be offered, may immediately perceive that the latter is the instrument referred to in the notice, and may

Notice in Gazette and otherwise of dissolution of partnership as to one of the firm, and of new firm.*

Notice is hereby given, that the partnership between *A. B. & C.* in the trades and business of, &c. and generally, was dissolved on, &c. last, so far as relates to the said *C.*, and that all debts due to the said late partnership are to be paid, and those due from the same discharged at their house in —, where the business will in future be continued by the said *A. and B.* and by *D.*, under the firm of *A. B. & Co.* Dated this — day of —, A. D. 1833.

A. B.
C. D.

Notice of dissolution, and that one of the partners will continue the trade.

Notice is hereby given, that the partnership heretofore carried on by *A. B. and C. D.* —, at their —, in —, has this day been dissolved by mutual consent, and in future the business will be carried on by the said *A. B.* on his separate account, who will pay and receive all debts due and owing to and from the said partnership in the regular course of trade. Witness our hands this — day of —, A. D. 1833.

A. B.
C. D.

Notice of dissolution, and who to pay, and requesting accounts.*

Notice is hereby given, that the partnership lately subsisting between *A. B. and C. D.* of, &c. heretofore carrying on trade under the firm of *B. and D.*, was on the — day of — last dissolved by mutual consent: all debts due and owing to the said partnership are to be received by the said *A. B.*, and all persons to whom the said partnership stands indebted are requested immediately to send in their respective accounts to the said *A. B.* in order that the same may be examined and paid. As witness our hands.

A. B.
C. D.

The like in another form.

Notice.—The copartnership carried on for some time past at —, by *A. B. and C. D.* under the firm of *A. B. and Co.*, was this day dissolved by mutual consent. Mr. *B.* is empowered to settle all debts due to and by the company.

A. B.
C. D.

The like in another form.

Notice.—The copartnership heretofore carried on at — by *A. B. and C. D.* — under the firm of *B. and D.* was dissolved on the — day of —, by mutual consent.

A. B.
C. D.

(*f*) *Snow v. Peacock*, 3 Bing. 406; *Ld. Raym.* 738; see modern cases, *Gill Cubitt*, 3 Bar. & C. 466, &c. *Chitty on Bills*, 8 ed. 275 to 288. Even after con-

viction of a felonious stealing a bill, the owner is not entitled to restitution if the bill has got into the hands of a *bonâ fide* holder, 7 & 8 G. 4, c. 29, s. 57.

* See a form in Montefiori's Precedents, 371.

refuse to give value for it, or otherwise receive it, and in the case of a felony, may adopt measures to apprehend the offender. (g)

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If the notice be too general, or still more, if it mislead, it will be deemed insufficient; (h) as if it state the loss of a pocket book, and that the contents are of no use to any but the owner, and do not describe the bills therein. (i) Care must be observed to omit any libellous reflection upon any particular person, who might sue for the libel, (k) unless in a clear case of felony or gross fraud, when, for the purposes of justice, it may be proper to describe the offender and his associates, so as to lead to their apprehension. (l) Duplicates of such notices should be instantly forwarded to all parties to the bill or note, (m) and to the Bank of England, and all banking houses to which the securities may possibly be tendered; and printed copies of such notice, in case of felony or fraud, should be immediately left at Bow Street, and other public police offices, and inserted in the Hue and Cry, (a paper circulated by order of the Secretary of State for the Home Department, to announce the perpetration of offences); other copies should be immediately published in the Gazette, and in all the widely circulating newspapers; and notices should be circulated in handbills and placards in the neighbourhood, &c.; at all the expected principal races, fights, large fairs, markets, and places where it is likely that the instrument may be attempted to be circulated; (n) and if the securities were bank notes, or of a nature likely to be transmitted to the continent, the like notice in French and English should immediately be given to the bankers and other commercial agents in the principal towns on the continent, and also inserted in their public papers. (o) If the owner cannot ascertain all the particulars of the securities, he must *instantly* give the best notice he can, and ascertain the particulars as soon as practicable, and thereupon give another fuller notice. (p) And where a party having been robbed of a bill eight days before it was due, neglected to give immediate notice, it was held that he could not recover in trover against a party who discounted the bill six days after the loss. (q) The forms of

(g) See notice and result in *Bridger v. Heath*, Chitty on Bills, 8 ed. 283, note (a).

(h) Per Best, C. J. *Snow v. Peacock*, 3 Bing. 408, 411; *Beckwith v. Corral*, Id. 445.

(i) *Beckwith v. Corral*, 3 Bing. 445.

(k) *Stockley v. Clement*, 4 Bing. 162; *Cohen v. Morgan*, 6 Dowl. & Ry. 8.

(l) Id. *ibid.* Chitty on Bills 8 ed. 276.

(m) Pothier on Bills, pl. 132.

(n) See the proceedings in *Bridger v. Heath*, Chitty on Bills, 8 ed. 283, n. (a); *Snow v. Peacock*, 3 Bing. 406; 11 Moore, 286, S. C.

(o) See *De la Chaumette v. Bank of England*, 9 Bar. & Cres. 208.

(p) *Bridger v. Heath*, Chitty on Bills, 8 ed. 283, 284, n. (a).

(q) *Beckwith v. Corral*, 3 Car. & P. 261; 3 Bing. 445, S. C.

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the notices given in the notes have been adopted and approved in practice, and in an action brought for the publication of the second, it was held not to be libellous, at least without an innuendo, and proof that the plaintiff was the person designed in the notice, and intended to be charged with having forged the acceptance. (r)

(r) *Stockley v. Clement*, 4 Bing. 162.

CAUTION. BILLS OF EXCHANGE.

Notice that bills have been obtained by false pretences.

Whereas three several bills of exchange, bearing date respectively the 18th of July last, drawn by one James Tompkins upon and accepted by me, the undersigned Jonathan Atkins, namely, one for 100*l.*, at three months after date; another for 200*l.* at six months after date; and the other for 300*l.* at nine months after date, were severally obtained from me under *false pretences*, and without any consideration whatever for the same: Now I hereby CAUTION all persons from receiving or negotiating the same, or any of them. Every information respecting the above bills will be given on application to Mr. —, at No. —, — Street, London. Dated this — day of —, A. D. —

JONATHAN ATKINS.

See this form in *Stockley v. Clement*, 4 Bing. 162. An advertisement in a newspaper as follows:

TO BILL BROKERS and OTHERS. CAUTION. REWARD.

Notice of forgery of acceptance or fraud.

"Whereas information has been given to me, that attempts have been made to obtain the discount of a bill of exchange, bearing date, London, May 26, 1825, and purporting to be drawn by one John Stockley (the plaintiff) upon and to be accepted by the Dowager Lady P. Turner, for 6000*l.* with interest, payable twelve months after date to the order of the said J. Stockley: I do hereby give NOTICE, on behalf of the Dowager Lady P. T., that she has not accepted such bill, and that if her name should appear on any such instrument, the same has been *forged*, or her handwriting to the said acceptance of the said bill, if genuine, has been obtained by *fraud*, in total ignorance, on her part, of the intended effect of the signature. Any person who will give positive information to me of the party in possession of the said instrument shall be handsomely rewarded. Dated, &c.

THOMAS BINNS.

This was held not a libel on Stockley, at least without innuendo and proof that he was the person designed to be charged with having forged Lady P. Turner's name.

Notice of felonious stealing, or loss of a bank note.*

Twenty-five Guineas REWARD. LOST or STOLEN, from the person of a gentleman at the Russel Street entrance into the pit of Drury Lane Theatre, on Monday night last, a Bank of England note, value 200*l.* numbered 7071, and dated 3rd February, 1827. When lost it was divided into halves. Whoever will bring the same to Messrs. —, Law Stationers, Royal Exchange, if lost; or if stolen, will give such information as shall lead to a conviction of the offenders, † shall receive the above reward. Dated this — day of —, A. D. —

Notice where a bill for an injunction has been filed.

TO BILL-BROKERS and OTHERS.—Notice is hereby given, that a BILL has been filed in the High Court of Chancery, by A. M., of —, tailor, against W. B. S., of — warehouseman, (trading under the firm of S. and Son, Manchester, warehousemen,) W. W., late of Paternoster-row, accountant, (who it is believed has left this country,) and J. J. S., of —, solicitor, and J. E., of —, aforesaid, tailor, which bill does pray that a certain bill of exchange, dated on or about —, 1832, for the sum of £400, payable 3 years and a half after the date thereof, to the order of W. S. and Son, and purporting to be accepted by the firm of E. and M., may be delivered up to the said A. M. to be cancelled; and that the said, &c. may be restrained, by the order and injunction of the said Court of Chancery, from indorsing or otherwise negotiating and parting with the said bill of exchange. And the public are hereby cautioned against receiving or negotiating the said bill of exchange, as payment of the said bill of exchange will be resisted by the said A. M. Dated this 9th day of March, 1833.

B. H. S., — street, Solicitor for the said A. M.

* N. B. This form was adopted in *Bridger v. Heath*, Chitty on Bills, 8 ed. 283, 284, note (a).

† This alternative is material to avoid violations of stat. 7 & 8 G. 4, c. 29, s. 59.

In framing such notice care must be observed not to contravene the enactment, that if any person shall publicly advertise a reward for the return of any property stolen or lost, and shall in such advertisement use any words *purporting that no questions will be asked*; or shall make use of any words in any public advertisement, purporting that a reward will be given or paid for any property which shall have been stolen or lost, *without seising or making any inquiry after the person producing such property*; or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property; or if any person shall print or publish any such advertisement; in any of the above cases, every such person shall forfeit 50*l.* for every such offence, to any person who will sue for the same by action of debt, with full costs of suit. (s)

These rules affecting the loss of negotiable securities may readily be applied to the loss of *any other property*, and should be observed in order to *prevent* third persons from purchasing or receiving the property; for although after prosecution of the offender restitution may be attainable by law, yet the proceeding for that purpose is usually attended with increased trouble and expense. (t) With respect to *horses* there is a peculiar enactment enabling the owner to seize the same, unless they have been regularly sold in market overt in a prescribed form. (u)

Loss of other property.

6. In case an *apprentice* or *servant*, or a *mere journeyman*, hired for an unexpired term, or to complete some unfinished work, (x) absents himself, then to fix any third person with liability to an action for continuing to harbour him, he must receive a general or particular *notice* of the circumstances. For although if he *took* or *enticed* the party away he would be immediately

6. Notice of apprentice or journeyman having illegally absented himself.

(s) 7 & 8 Geo. 4, c. 29, s. 59.

(t) Id. *ibid.*

(u) *Ante*, 132, 133; see Burn's Justice, tit. Horses.

(x) *Hart v. Aldridge*, 1 Cowp. R. 54. In *Gunter v. Ashton*, 4 J. B. Moore, 12, the plaintiff recovered a verdict for 1,500*l.* damages, for a conspiracy to seduce away, and actually seducing several journeymen

piano-forte makers from plaintiff's employ to work for defendant, by improper representations and promises, in order to prevent plaintiff from ability to complete a contract with defendant, and thereby to subject him to loss of the contract and large stipulated damages. See further next chapter.

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liable to an action without previous notice, (y) yet a notice must precede any suit for merely detaining or harbouring. (z) The subscribed form of notice may be adopted. (a)

7. General and particular notices not to trespass.

7. Under this head of *precautionary measures* may be classed *general* and *particular notices not to trespass on land*. It is not absolutely essential to a right to sue for such a trespass that any previous notice should have been given; (b) but judges and juries in general discountenance and discourage actions for petty trespasses on land, unless the trespass has been *wilful*; and it is enacted, that in such actions the plaintiff shall recover no more costs than damages, when the verdict is for a sum under forty shillings, unless the judge shall certify upon the back of the record that the trespass was *wilful and malicious*, in which case the plaintiff shall have *full costs*, however small the damages. (c) It is therefore always prudent before the commencement of any proceeding against a trespasser on land, to be secure in ability to prove that he had received a notice not to trespass, and *afterwards wilfully* persevered in intruding. After which notice it is usual for juries to give larger damages, or at least for the judge to *certify* that the trespass was *wilful and malicious*, so as to entitle the plaintiff to full costs. (d) It was formerly supposed that after proof of such a notice, and a subsequent trespass, the judge was *bound* to certify. (e) But that doctrine was afterwards overruled, and though *usual* to certify, a judge may

(y) *Reg. v. Daniel*, 5 Mod. 182; *Fores v. Wilson*, Peake's R. 55; 1 Bla. R. 142; *Hart v. Aldridge*, Cowp. 54; *Keane v. Boycott*, 2 H. Bla. 511; *Westerdell v. Dale*, 7 T. R. 310; *Guppy v. Jenkins*, 1 Anst. 256.

(z) *Fitz. N. B.* 167, 168; *Empson v. Bathurst*, *Winch*, 51; *Fawcett v. Beavres*,

2 Lev. 63; *Adams v. Bafelds*, 1 Leon. 240; 1 Bla. C. 429; 3 Bla. C. 142; *Blaks v. Lanyon*, 6 T. R. 221; *Eades v. Vandeput*, 5 East, 39. But after recovery from servant of a penalty no action lies against third persons, *Bird v. Randal*, 3 Burr. 1345.

(a) CAUTION.

John Tompkins, an ABSENT APPRENTICE, (or SERVANT, &c.)

Notice of apprentice or journeyman having absented himself.

Take Notice, that John Tompkins, now in your service or employ, or harboured by you, is my *Apprentice* for an unexpired term of years, [or is my *Servant* to complete certain work still unfinished,] and is now unlawfully absent from my service without my consent, and that if you or any person shall after this notice *harbour*, or retain, or employ, or cause to be employed or retained, the said John Tompkins, or neglect to cause him immediately to return to my house and premises, situate at there to perform his duty as such apprentice, [or servant,] I shall immediately cause legal proceedings to be instituted against you and all others so offending, for such misconduct; and I further give notice, that I shall attend at your house situate at between the hours of 11 and 12 in the forenoon of the day of instant, there again to demand, and to receive and take away my said apprentice [or servant.]

Dated, &c.

To Mr. G. H. and all others.

(b) 3 Bla. C. 209, note 3, Chitty's Game Laws, 228, 229.

(c) 22 & 23 Car. 2, c. 9, sect. 136; 8 & 9 Wm. 3, c. 11, s. 4.

(d) 3 Bla. C. 214, 215; and see *Feize v. Rundall*, 1 Esp. R. 225.

(e) *Reynolds v. Edwards*, 6 T. R. 11.

refuse to do so, especially if there was a *bonâ fide* claim of a right of way or the action should appear litigious. (f)

When no particular trespasser is known, then it is proper to give a *public general notice* upon a board in the form in the note, explicitly describing the land not to be trespassed upon, and prohibiting any trespass thereon, and stating that any person entering without leave will be proceeded against as a wilful trespasser. (g)

If a *particular* person be suspected of habitually trespassing, or that he intends to do so, then he should be served with a *particular notice* to the same effect; accompanied with an offer, in case of any doubt, to point out the particular closes in the possession of the party giving the notice, so as to exclude any pretence of his ignorance of the boundary. Care must be taken to secure evidence of any person intended to be sued having read or at least received the notice, and that it was given by the authority of the *occupier* of the land, who must be the plaintiff. (h) If after such a notice a party should in defiance of it wilfully trespass, a jury will in general give larger damages; and an instance has occurred where 500*l.* damages were given for a trespass after notice, accompanied with insult, and the court refused to disturb the verdict on account of excessive damages; (i) and however small the damages, the judge will in general *certify* so as to enable the plaintiff to recover full costs. (k) It is expedient from year to year to renew such notice, but in one case the judge certified although the notice had been served four years before the trespass complained of, and although the defendant was unacquainted with the boundaries, and had endeavoured by inquiries to avoid committing a trespass. (l) A notice given by a gamekeeper of a lord of a manor would suffice as to lands or waste in the possession of the lord, because it would be presumed that he acted by the orders of his employer, it being within the general scope of his authority to

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General printed
notice not to
trespass.

(f) *Reynolds v. Edwards*, 6 T. R. 11; *Good v. Watkins*, 3 East, 495; *Harper v. Carr*, 7 T. R. 449.

(g) The notice may be *verbal*, but it is better in writing, and should be very explicit, showing where the party must not trespass. A general printed notice stuck up, stating that the *Stanmore Association* would prosecute all persons trespassing, but not signed by the plaintiff nor addressed to the defendant, was held to be an insufficient notice not to trespass on his lands. *Sellon v. Huntsmen of Berkley Hunt*, Chit. Game L. 2d ed. 229. The form of a *general notice* may be thus, taking care to include enough land of the party whose

names are subscribed. CAUTION. TAKE Form of general
NOTICE, that all trespassers on any land, on notice not to
either side of the adjoining highway, for trespass.
half a mile in length and one mile in depth,
on each side of and opposite to this notice,
will be prosecuted as wilful trespassers,
and under the Game Act, and otherwise,
according to law. JAMES ATKINS.

(h) *Good v. Watkins*, 3 East, 495.

(i) *Merest v. Harvey*, 1 Marsh. R. 139;
5 Taunt. 442, S. C.; and see 3 Bla. C.
210, note, 5.

(k) Tidd's Pract. 9th ed. 968; *ante*,
450, 451.

(l) *Reynolds v. Edwards*, 6 Term Rep.
11. But see *supra*, note (f).

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warn persons off the manor who had no authority to sport there. (m)

The particular notice may be to the effect of the subscribed form, signed by all the occupiers of land who concur, or separately by any individual. (n)

Supposing there should be any unfounded pretence by

(m) *Per* Lord Ellenborough in *Good v. Watkins*, 3 East, 498.

(n) Parish of _____ and County _____ January, A. D. 1833.

Sir,

Suggested form
of a notice not
to trespass to a
particular per-
son, and to be
signed by several
occupiers.

Take notice that we whose names are subscribed are respectively the occupiers of all the several farms and land, situate and being in the parishes of _____ and _____ in the county of _____ and which are on both sides of the highway, leading from _____ to _____ and extend along the said road in the said parishes for a mile and upwards, and are also upwards of a mile in depth from the said road on each side, [or state the several closes by name and their local situation as fully as possible,] and we do hereby respectively give you notice and require you not to hunt, sport, shoot, or otherwise trespass or walk, or ride into or over, or incite, or encourage, or permit any other person, or hounds, pointers, or other dogs, to enter any part or parts of the said lands, whether in pursuit of game, or rabbits, or foxes, or other animal or bird, or on any other pretence whatever; and that if you should nevertheless in any way trespass on the same or any part thereof, actions and informations will be prosecuted against you as a wilful trespasser, and other proceedings will be had against you according to law and the statutes in that case provided. And we further give you notice, that any further information respecting the precise situation of the lands above referred to, may be obtained by you upon application to Mr. _____ at _____ Dated this _____ day of _____ A.D. 1833.

A. B.

C. D.

E. F.

G. H. &c.

[Place of Residence and date.]

Suggested form
of a separate
notice after re-
peated tres-
passes.

Sir,—Whereas notwithstanding my several requests to you, to abstain from so doing, you have repeatedly trespassed over my lands, situate in the parishes of, &c. in the county of _____ in pursuit of game and otherwise, and have thereby subjected yourself to an action; and whereas I have hitherto anxiously abstained from litigation, but you have intimated your intention to repeat your trespasses, now therefore I hereby give you notice not again to trespass or to hunt, shoot, or otherwise sport, on such my lands, either on horseback or on foot, or by your huntsman, gamekeeper or servant, nor to excite, or encourage, or permit hounds, pointers, or other dogs to enter such lands, and that if you should do so after this notice, I shall immediately proceed in an action against you as a wilful trespasser and otherwise according to the statutes; and I hereby give you notice that the lands above alluded to, are, &c. [here enumerate each field and its exact local situation, and even in doubtful cases deliver a rough but accurate sketch of the estate, and then] and all other my lands in the said parishes, and the particulars of which my bailiff, E. F. will upon your application to him at, &c. fully point out to you. Dated, &c. J. B.

To Mr. C. D.

Notice not to
fish.

Sir,—I do hereby give you notice and require you not to enter, or cause or procure to be entered any of my closes, lands or premises, fisheries, ponds, streams, or watercourses, situate and being in the parish of, &c. in the county of, &c. to angle, or otherwise fish, or attempt to angle or fish, take or carry away any fish from the same, or for any other purpose whatsoever; and in case you do not as yet know the local situation of such my said closes, land and premises, fisheries, ponds, streams and watercourses, or the boundaries or extent thereof; I hereby give you notice that the same will be pointed out and shown to you, upon reasonable application, at my dwelling house, situate at, &c. And I do further give you notice, that in case, after your being served with this notice, you shall commit any trespass upon any part of my said closes, lands, or premises, fisheries, ponds, streams or watercourses, you will not only be proceeded against according to law, as a wilful and malicious trespasser, pursuant to the statute in such case made and provided, but will be otherwise prosecuted for such offence according to law. Dated, &c. A. B.

To Mr. _____ and all others attempting to trespass on the above mentioned premises.

recent usage or otherwise, then it would be advisable in the notice to allude to such unfounded and pretended claim, taking care not by any ambiguity to appear to admit that it is even doubtful, but offering by documents or otherwise to satisfy the trespasser that he has no colour of right; after which, if he should decline receiving the information and repeat the trespass it is probable that the judge would certify that he was a wilful trespasser.

8. In other cases, when to put an end to trespasses a party has found it necessary to *obstruct* a disputed way, or where in the enjoyment of his private property he has found it expedient to keep in a yard or close a *dangerous dog*,^(o) or if any savage cattle are legally placed in a close through which there is no right of way, but which has *sometimes* been trespassed upon, it is highly proper to give the best *public notice* of the danger, and even particular notice to each individual who has been accustomed, although illegally, to enter the same, or who might not be able to read, or might enter at night; for otherwise, if death or personal injury should ensue, the occupier might be liable even to criminal punishment for the manslaughter, or civilly liable to an action to make compensation.^(p) The cases of this description will be more fully noticed when we consider the preventive measures by the act of a party expecting an injury. So it should seem that any person, the situation of whose property might probably otherwise occasion damage to another, is bound to give full notice of the danger; it was therefore held that the owner of the wreck of a vessel, sunk in a public navigable river, ought to give notice of the hidden danger by placing a buoy over, and that if he neglect to do so and injury ensue to another he is liable to an action, although he stationed a watchman near at hand to warn persons against the nuisance.^(q)

8. Notices that a way erroneously claimed has been stopped, or of danger in a particular place.

9. So if it be important to a wife, or other relation, or any person, to ascertain an event in which he or she is interested, and all other more delicate and private means have failed, a publication by another person under her authority, in a newspaper, framed in terms essentially to obtain sufficient informa-

9. Notice to ascertain any other event in which a party is interested.

(o) See observation of Tindall, Ch. J. in *Sarch v. Blackburn*, 4 Car. & P. 297; post, ch. vii.

(p) *Bird v. Holbrook*, 4 Bing. 628; *Ilett v. Wilks*, 3 Bar. & Ald. 304; *Jay v.*

Whitfield, 3 Bar. & Ald. 308; and *Sarch v. Blackburn*, 4 Car. & P. 297.

(q) *Harmond v. Pearson*, 1 Campb. R. 515.

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tion and not unnecessarily calumnious, may be legal, although it might be construed to cast at least a doubt upon the character of the husband or other party. (r)

But in all these cases avoidable calumny should be omitted; and therefore an advertisement in a public paper strongly reflecting upon the character of a person, who had been declared a bankrupt, was holden libellous; although it was published with the avowed intention of convening a meeting of the creditors, for the purpose of consulting upon the measures proper to be adopted for securing their own interests, it appearing that the legal object might have been attained by means less injurious. (s) So supposing that it be suspected that property of a

Form of notice
to ascertain any
event.

(r) See form in this note. *Delany v. Jones*, T. T. 43 Geo. 3, (A.D. 1803,) 4 Esp. R. 191. Case for a libel, plea not guilty. Declaration stated that defendant, who then carried on the business of a stationer, intending to charge plaintiff with the crime of bigamy, and to bring him into danger of legal punishment, published the false and malicious libel following, that is to say,

"Ten Guineas Reward. Whereas by a letter, lately received from the West Indies, an event is stated to be announced by a newspaper that can only be investigated by these means: This is to request if any printer or other person can ascertain that A. B. Esq. (the plaintiff) some years since residing at Cork, late lieutenant in the North Lincoln Militia, was married previous to nine o'clock in the morning of the 10th of August, 1799, they will give notice to C. D. (the defendant,) No. 14, Duke-street, St. James's, and they shall receive the above reward." There was an *innuendo*, that the defendant meant thereby to insinuate and to have it understood that the said plaintiff had been and was married before the time mentioned in the advertisement, and had another wife then living, he being then married to one E. F. his present wife. The defence relied on, and given in evidence, was, that this advertisement had been inserted by the authority of the plaintiff's wife, for the purpose of making a discovery, which was important for her to know, namely, whether the plaintiff had another wife living? That beside this, from the terms of the advertisement, no direct slander was conveyed, without which there could be no libel. The advertisement might be to discover an heir, the legitimacy of a person, or for such like purpose, which would not be a libel. It was answered by Erskine, for plaintiff, that to constitute a libel it was not necessary that the libel should be apparent to all the world. If a man send an advertisement to a newspaper so wrapped up that, though not intelligible to the bulk

of mankind, it is so to minds more intelligent, still it was a libel, and that the libellous tendency of this advertisement could not be mistaken.

Lord Ellenborough, in summing up to the jury, said, "this paper is relied upon as necessarily carrying with it the imputation that the plaintiff was guilty of bigamy; you must be of opinion that it does carry such imputation before you can find a verdict for the plaintiff, as that meaning is necessary to make the paper a libel at all. The plaintiff's counsel contended that you are to take into your consideration only whether the advertisement conveys a libellous charge against the plaintiff or not; I am of a different opinion; I conceive the law to be, that though that which is spoken, or written, may be injurious to the character of the party, yet, if done *bona fide*, as with a view of investigating a fact in which the party making it is interested, it is not libellous. If, therefore, this investigation was set on foot, and this advertisement published by the plaintiff's wife, either from anxiety to know whether she was legally the wife of the plaintiff, or whether he had another wife living when he married her, though that is done through the medium of imputing bigamy to the plaintiff, it is justifiable; but in such a case it is necessary for the defendant who publishes the libel to show that he published it under such authority and with such a view. The jury are, therefore, first to say, whether the advertisement imputes a charge of bigamy to the plaintiff, and if they think it does, then to inquire whether the libel was published with a view, by the wife, of fairly finding out a fact respecting her husband, in which she was materially interested. If it was so, the publication is not a libel, and the defendant is entitled to a verdict."—Verdict for defendant.

(s) *Brown v. Croombe*, 2 Stark. R. 297; and see observations in *Flint v. Pike*, 4 B. & Cres. 473; 6 Dowl. & R. 525.

bankrupt has been removed from his premises and concealed, so as to constitute an offence against the bankrupt act, (1) an advertisement describing the property and the circumstances of the removal, and the quarter of the town where it is supposed to be concealed, with an engagement to pay the statutory reward upon receiving information leading to a discovery of the offence, may be so framed as almost to designate the offender, and yet avoid so specific a statement as to enable him, whether guilty or innocent, to sustain any action for the publication. Of course, in any advertisement of this nature, care must be observed not to violate the before mentioned prohibition against advertisements, purporting that no questions will be asked, &c., respecting any goods feloniously stolen. (u)

10. When *tenants* have been in possession many years, under long or renewable leases, it may be expedient for the owners in fee in certain cases, especially when freehold and copyhold land is intermixed, to obtain from time to time authentic evidence of the proper *boundaries* of the different parts of their estates, and which may have been rendered uncertain by alteration of fences, divisions of closes, and other innovations. (x) This may be effected by a proceeding in the nature of a limited parochial perambulation in the presence of young witnesses, and by marking trees, or by fixing other marks, denoting the correct boundary, in the presence, if possible, of the owner of the adjacent property, and sometimes of the lord of the manor or his steward, where copyhold is intermixed, and whose attendance ought always to be required in the presence of several young witnesses. By this means future loss or dispute may be prevented by the consent and agreement of the respective owners in fee; and in case of copyhold, with that of the lord; in the absence of consent, by application to the Court of Chancery, either for an issue or a commission, the same object may be obtained even adversely. (y) But in support of such an application two facts must be established, before either will be granted by the court, viz.: *first*, the title to some land may be in dispute; and *secondly*, that the party applying has some

10. Precaution before inception of any injury, to fix and keep up boundaries of estates, and to exercise acts of ownership.

(1) 6 Geo. 4, c. 16, s. 120.

(u) *Ante*, 448. And according to a recent decision, in advertising a reward, it is expedient to notify that it shall be paid only to a party who, in consequence of and acting upon the notice, causes the culprit to be apprehended, for otherwise a party giving information, although from revenge, will be equally entitled to the reward. *Williams v. Curwardine*, Oxford Circuit,

cor Parke, J. March, 1833, Talford, serj. and Godson for plaintiff, Curwood for defendant.

(x) *Ante*, 196; and *post*, ch. viii. In the country there is almost a religious persuasion against removing or effacing boundary or mere stones. "Cursed is he that removeth his neighbour's mere stone."

(y) *Post*, ch. viii.

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equitable ground for relief; for if the confusion were occasioned by the party himself, or by those whom he represents, he would be left to his remedy at law by action of ejectment or otherwise, to recover any part of the property from which he has been ousted. (z) So in a bill for a commission to ascertain boundaries, all persons having any interest in the property are necessary parties. (a) It will frequently happen that the same person and his ancestors have been in possession of copyhold as well as freehold, and it would be impracticable without such a proceeding, after many years, to distinguish what is copyhold and what freehold; and hence we have seen that a vendor is not in general to be required to point out precisely what is freehold and what copyhold. (b) But still it may be most important for the party in possession of the whole to ascertain the precise situation of copyhold, for otherwise, if he should, though inadvertently, cut trees for sale on the copyhold part, a forfeiture might ensue; though probably a court of equity would relieve, where the waste was committed in ignorance. (c)

11. Exercising
 acts of owner-
 ship.

11. Besides the keeping up the evidences of boundaries of estates, it is also essential twice or more, within every twenty years of each other, to *exercise* distinct, open and notorious *acts of ownership*, in the presence of young witnesses, over such parcels of land, and other rights, that would be otherwise likely to become disputable. It is especially incumbent on lords of manors to adopt this precaution as to small parcels of waste adjoining the inclosed lands, whether of freeholders or copyholders, for otherwise, after twenty years, the presumption may be that such parcels of waste belong to the owners of the inclosed land. (d) It will not be *absolutely necessary* to eject the wrongful occupier, provided he will attorn, or from time to time make payment or acknowledgment that he is not entitled to the property, but occupies by permission; but it will be safer to have the acknowledgment in writing and duly signed; or, at least, the payment should be evidenced by several young witnesses, and frequently to have the acknowledgment so evidenced repeated. (e)

So, to prevent twenty years' continued user growing into evi-

(z) *Godfrey v. Littell*, 1 Russ. & M. 59; *Raley v. Best*, Id. 659.

(a) *Raley v. Best*, 1 Russ. & M. 659.

(b) *Ante*, 237; and see *Scott v. Hanson*, 1 Russ. & M. 131.

(c) See 1 Tho. Co. Lit. 674, in notes.

(d) See observations of Littledale, J., *Doe v. Pearsey*, 7 Bar. & Cres. 309, 310; *ante*, 237, 273, 274.

(e) Id. *ibid.* Bul. Ni. Pri. 104; *Doe v. Clark*, 8 Bar. & Cres. 717; *post*, ch. ix. *Of Limitations of Actions*.

dence of a custom or prescriptive right, there should be an open and public interruption continued, till the persons affected by it have full knowledge of its existence, at least once in every twenty years, or an acknowledgment in writing that the easement is only by favour and not of right. (f)

On the other hand, a person insisting upon his right to land, or to an easement or privilege over the land of another, if interrupted, must not only, within every twenty years, perform acts in assertion of his right, but must, if materially interrupted, litigate and bring the intruder to submission within that time or he may lose his right. (g)

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V. With reference to contracts, upon which so many rights are founded, precautionary measures are still more frequently essential. Here the terms of the contract should generally fix the right, and parties are too apt to complain of the supposed defect in the law, when in truth their situation is entirely attributable to their own want of care and circumspection in entering into the contract, and in not introducing terms sufficiently guarded. (h) Thus, if a party discount a bill upon the representation of a party presenting it for the purpose, that he is justly entitled to the same, and it turns out otherwise, he will complain that sufficient protection is not afforded by law to the *bonâ fide* holder of a bill; whereas if he had, before he advanced his money, applied to the supposed acceptor to know whether it was an available security, and the latter had answered in the affirmative, then he might be precluded from afterwards disputing its validity. (i) Again: it has been a popular complaint that the law is imperfect in allowing a vexatious landlord to sustain, perhaps, successive actions for small dilapidations, when in truth the tenant, by his own improvident and unqualified covenant or contract to keep in repair at all times, has subjected himself to such actions, when he might have stipulated that no action should be brought, except at the end of the tenancy, without three months' previous notice to repair; nor even then, unless the amount of the dilapidations amounted to 20*l.* or any other named sum. It is a well known and just

V. Precautions
in cases of con-
tracts.
General obser-
vations.

(f) *Benest v. Pisson*, Knapp's R. 60; *Moore v. Rawson*, 3 Bar. & Cres. 332.

(g) *Id. ibid.*; and see enactments on 2 & 3 W. 4, c. 71; ante, 285.

(h) *Ante*, 118 to 120; *Scaife v. Tobin*, 3 B. & Adolp. 523, 531.

(i) *Leach v. Buchanan*, 4 Esp. R. 226; *Cooper v. Le Blanc*, 2 Stra. 1051.

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maxim, vigilantibus non dormientibus leges subseruiunt, and if parties will make absurd or loose contracts, it is not for the law to unmake them, or exonerate from the obligation to perform their own stipulations. (j) Though, in case of *mistake*, we have seen that sometimes at law, and in general in equity, the terms may be *reformed* according to the contract of the parties; (k) and *fraud* will at law as well as in equity, when clearly established in evidence, afford ground for relief. (l) And equity will relieve against some *catching* bargains. (m) It may suffice here to refer to the preceding observations and authorities to establish the necessity for much greater precaution than is usually observed in entering into contracts of every description, and to remark, that, even up to the present time, the most common contracts, as between landlord and tenant, are not framed with sufficient care, however unnecessarily voluminous, verbose and expensive the leases and contracts may too frequently be drawn. We have in the preceding pages suggested how contracts should be framed in general; (n) and especially the precautions to be observed in contracts of sureties, (o) or guarantees; (p) and between vendors and purchasers of personalty, (q) or real property, (r) or in creating a lien, (s) and what words should be introduced in grants and conveyances of rights of way, or common, or other easements. (t) It might suffice here to recommend every party about to enter into any contract, or to *sell or buy*, and for his solicitor *previously* to state *in writing* every circumstance and contingency relating to the subject, and well to consider and determine upon the expediency of introducing in the terms of the bargain every proper stipulation and qualification of the bargain, and very *explicitly* to state on the face of the written agreement every possible stipulation that ultimately may be assented to. A fair copy of the proposed agreement should be ready to be signed *immediately* the parties have agreed, lest afterwards either should attempt to change the terms. (u) If this course were adopted concisely, instead of crowding agreements and leases

(j) *Ante*, 118 to 120, 122.

(k) *Ante*, 123, 124.

(l) *Per* Ashurst, J. in *Cockshott v. Bennett*, 2 Term Rep. 763.

(m) Chit. Eq. Digest, tit. Agreement. But not at law; see the singular cases, *Thornborow v. Whitaker*, 2 Lord Raym. 1164; *James v. Morgan*, 1 Lev. 111; *Farrant v. Olmius*, 3 Bar. & Ald. 692. But unless where a specific sum is to be paid, the jury may give small damages for the breach of an absurd contract, 1 Lev. 111.

and 3 Chit. Commercial L. 100.

(n) *Ante*, 113 to 124; 6 Ves. 34; *Agar v. Macklen*, 2 Sim. & Stu. 420; 1 Meriv. 15.

(o) *Ante*, 82, 83, 122.

(p) *Ante*, 126 to 130; *post*, 459, &c.

(q) *Ante*, 125, 126; *post*, 463, &c.

(r) *Ante*, 122.

(s) *Ante*, 293 to 300; *post*,

(t) *Ante*, 156 to 168, 211, 214.

(u) *Ante*, 293, 294, note (b).

with numerous synonymous words, much vexatious litigation and expense would be avoided. (x)

We will now consider some precautionary measures which should precede, or accompany, or follow the completion of contracts, particularly between *vendors* and *purchasers*, whether of personalty or realty; *mortgagees* whether legal or equitable; and between *landlord and tenant*; *carriers*; and parties claiming a *lien*.

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Precautions in
some particular
contracts.

1. A *purchaser* of goods, or other tangible *moveable chattel*, should also observe some precautionary measures, as giving notice and obtaining an acknowledgment of his right from all third persons having the custody of them, before he pays his money; for after such acknowledgment the party making it could not dispute his title. (y) He must also take care and have all usual documents delivered to him, or another person may have a better title. (z) A party taking one part of a *bill* in sets, unless that part has been accepted, should ascertain what has become of the others. (a) We have seen that before advancing money on a purchase or discount, or otherwise acting upon any *chose in action* or security, a party, to be secure, should obtain good evidence that no other person has any objection to its validity; and for that purpose should apply to the acceptor, drawer and indorsers, to ascertain whether he may safely take the security. (b) And with regard to bills of exchange and promissory notes, no one should take them from a stranger, or under any suspicious circumstances, for if it should turn out that the same have been stolen or lost from the real owner, and the former has not taken due precautions, the latter may still be entitled to the same, and the party so taking may lose the amount. (c)

1. Precautions
by a purchaser
or mortgagee of
personalty.

Precautionary measures are still more essential on the behalf of a party who has purchased, or had assigned to him as a *collateral security*, any *personal property*, or ship at sea, and especially debts and *choses in action*. If the thing itself be tangible and capable of delivery, then, to be *perfectly secure*, possession should in general be taken, and the former owner must not be suffered to have even a *concurrent possession*, unless authorized

Taking possession and giving notice of assignment of a debt or chose in action, or of a ship at sea.

(x) See suggested stipulations between landlords and tenants, *post*.

(y) *Gosling v. Birnie*, 7 Bing. 339.

(z) *Lang v. Smith*, 7 Bing. 284.

(a) *Holdsworth v. Hunter*, 10 B. & Cres.

449; *Lang v. Smith*, 7 Bing. 294; Chitty on Bills, 8th ed. 176, 177.

(b) *Ante*, 457, note (h).

(c) *Ante*, 457; Chitty on Bills, 8th ed.

275 to 297.

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by the terms of assignment, and which is sometimes hazardous. (d) If the thing itself were at a distance and incapable of immediate delivery, as in the case of a ship at sea, it was held that then all the documents relating thereto must be delivered, and all due measures taken to *register the title*, and actual possession should be taken on arrival. (e) But the law as respects the necessity for taking possession of *ships* was expressly altered by the present Bankrupt Act, 6 Geo. 4, c. 16, s. 72, which provides that the doctrine of a bankrupt being a reputed owner of a *ship or vessel* shall not extend to invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a *security for a debt*, either by way of mortgage or assignment, *duly registered* according to the provisions of the Registry Act, 4 Geo. 4, c. 41; still however it will be observed, that a *due register* of the contract of transfer is absolutely necessary to prevent the operation of the bankrupt laws. (f) As to other *moveable* personal property, if a *trader* be allowed to continue to be *the reputed owner* up to the time of his act of bankruptcy, his assignees will in general be entitled to the property, although in truth he be not the real owner. (g) But with respect to *fixed* stills and machinery in mortgage, it would be otherwise. (h)

The necessity for taking possession of personalty qualified.

We have seen that if the deed or instrument of assignment do not give any *immediate* right of possession, then the not taking it is no badge of fraud. (i) And the absolute necessity for the purchaser or assignee of *moveable goods*, assigned as a security for a debt, *immediately to take possession*, even when he *might legally do so* according to the terms of his security, has

(d) *Ante*, 107; *Edwards v. Harben*, 2 T. R. 587; *Hodgson v. Le Bret*, 1 Campb. 236, in notes; *Id.* 333. But see *Martindale v. Booth*, 3 Bar. & Adolp. 498; *Joseph v. Ingram*, 1 J. B. Moore, 189; *Benton v. Thornhill*, 2 Marsh. Rep. 427.

(e) *Marr v. Glennie*, 4 Maule & Selw. 240; *Monkhouse v. Hay*, 4 Moore, 549; 2 Brod. & B. 114; 8 Price, 256, S. C.

(f) 6 Geo. 4, c. 16, s. 72.

(g) 6 Geo. 4, c. 16, s. 72. "That if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order or disposition any goods or chattels whereof he was reputed owner, or whereof he hath taken upon him the sale, alteration or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission; provided that nothing herein con-

tained, shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an act of parliament, made in the fourth year of his present majesty, entitled, 'An Act for the Registering of Vessels.'" See the cases as to *reputed ownership* of a bankrupt in general. *Lingham v. Biggs*, 1 Bos. & Pul. 82; *Toussaint v. Hartop*, Holt, C. N. P. 335; *Lingard v. Messiter*, 1 Bar. & Cres. 308; 2 Dowl. & R. 495, S. C.; *Storer v. Hunter*, 3 B. & Cres.; but see *Shaftesbury v. Russell*, 1 Bar. & Cres. 666; 3 D. & R. 84.

(h) *Horn v. Baker*, 9 East, 215.

(i) *Ante*, 107; *Edwards v. Harben*, 2 T. R. 587; *Gross v. Neale*, 5 Moore, 10; *Martindale v. Booth*, 3 Bar. & Adolp. 498, where see the form of such a deed, which may be properly adopted.

by a recent decision been much qualified; and the suffering the assignor to continue in possession, is not now to be deemed as *necessarily* a badge of fraud, but is only a circumstance which with others may be left to a jury to determine whether or not the transaction and possession were fraudulent; and it should seem that, provided all the creditors of the assignor had *immediate notice*, (which should always in prudence be given, *(k)* or possession taken,) or knowledge of the assignment, and the assignor be not a *trader*, he may now safely, in many cases not affected by the peculiar bankrupt laws, be suffered to continue in possession, although by the terms of the assignment the assignee *might legally* take possession. *(l)* And even

(k) The following form of notice may be adopted and sent to each creditor of the assignor whose name can be ascertained. But even a *bond fide* purchase might be void if a purchaser know at the time that the vendor has an action pend-

ing against him, and that he sells with a view to avoid an *expected* execution, and not to satisfy it out of the purchase money, but to apply the same to his own use. See observations of *Ld. Ellenborough* in *Sheriff v. Wilks*, 1 East's Rep. 51.

Sir,—Take Notice, that by assignment (or bill of sale) dated, &c. *G. H.* of, &c. assigned and conveyed all (&c. stating the property assigned, as all his household goods, chattels, and effects, then being in his house and premises, situate, &c.) for just and lawful consideration, and to secure the payment of £—— at certain time therein mentioned, with authority to me to enter at any time and take and carry away and dispose of to my own use the said property, but with power and permission to the said *G. H.* in the meantime to use and occupy the same goods, chattels, and effects; and which assignment I am ready to show to you upon any reasonable application and notice for that purpose. Dated, &c.

Suggested form of notice of assignment of personality as a security, &c.

To Mr. *A. B.* of, &c.

Your's, &c.

(l) *Martindale and another v. Booth and others*, 3 B. & Adolp. 498. The facts were these:—*A.* being indebted to *B.* in the sum of £10 for goods, applied for a further supply upon credit, and for a loan. *B.* refused to grant either without security; and it was then agreed that *A.* should give a bill of sale of his household furniture and fixtures, and that *B.* should give him credit for £200 on that security. Before the bill of sale was executed, *B.*, upon the faith of such agreement, advanced to *A.* £90 in money and goods, and afterwards, on the 8th March, 1828, *A.* executed a bill of sale, whereby, in consideration of the debt of £100, he bargained and sold to *B.* all his (*A.*'s) household goods (*without any schedule*) and furniture, &c. with a proviso that if *A.* should pay the £100 by instalments, the first of which was to be due on the 7th June, the deed should be void; but in default of payment of any of the instalments at the times appointed, it should be lawful, although no advantage should have been taken of any previous default, for *B.* to enter upon the premises and take possession and sell off the goods. There was a further proviso that *until such default* it should be lawful for *A.* to keep possession of them. In 1823 *A.* had given a warrant of attorney to *C.* and *D.* as se-

curity for a debt of £1100; and they in Nov. 1828 entered up judgment and sued out a *fi. fa.*, under which the sheriff seized the goods. It was held by the Court, in an action of trespass brought by *B.* against the sheriff, that under these circumstances the bill of sale was not fraudulent, by reason of *A.*'s having continued in possession; and that after a conveyance of goods and chattels, want of possession does not *necessarily* constitute fraud as against creditors, but is only evidence of it, that may or may not, under all the circumstances, induce a jury to find fraud.

Lord Tenterden, C. J., said: I am of opinion that the deed of sale was not absolutely void. Much has been said as to the secrecy attending that transfer, but the observation applies with equal force to the warrant of attorney, which was unknown to the plaintiffs, and which *Combe and Co.* forbore to act upon for so long a time. The consideration for the bill of sale was not only an antecedent debt, but a sum of money to be advanced by the plaintiffs to enable *Priest* to carry on his trade. The omission of the plaintiffs to take possession of the goods was perfectly consistent with the deed; for it was stipulated that *Priest* should continue in possession until default made in payment of

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the possession by a *trader*, if he were not originally the absolute owner of the property, would not necessarily, in the event of his bankruptcy, entitle the assignee to such property. (*m*) This recent decision appears to qualify the former decisions and treatises. (*n*)

Delivery of securities and notice of assignment of choses in action and securities of that nature.

In the case of *debts and choses in action*, all securities relating to them must be delivered up, and *notice should be given to the*

all or any of the instalments; and that on such default it should be lawful, although no advantage should have been taken of any previous default, for the plaintiffs to enter and take possession of the household goods and furniture. The possession by Priest therefore being consistent with the deed, and it having been given in consideration of money advanced to enable Priest to carry on his trade, I cannot say that it was absolutely void.

Little Dale, J.—I am of the same opinion. The cases show that continuance in possession of goods and chattels by a vendor, after the execution of a bill of sale, is a badge and evidence of fraud; but I think that, under the circumstances of this case, a jury would have negatived fraud. In *Joseph v. Ingram*, 1 J. B. Moore, 189, Dallas, J. denies that *Edwards v. Harben*, 2 Term Rep. 587, lays down a general rule that in transferring chattels the possession must accompany and follow the deed. There was in *Joseph v. Ingram* a mixed possession, for the vendee superintended the management of the farm, and was occasionally present. That case however shows the opinion of the Court of Common Pleas to have been, that a change of possession is not in all instances necessary.

Parke, J.—I am of the same opinion. I think that the want of delivery of possession does not make a deed of sale of chattels absolutely void. The dictum of Buller, J. in *Edwards v. Harben*, has not been generally considered, in subsequent cases, to have that import. The want of delivery is only evidence that the transfer was colourable. In *Benton v. Thornhill*, it was said in argument, that want of possession was not only evidence of fraud, but constituted it; but Gibbs, C. J. dissented; and although the vendor there, after executing a bill of sale, was allowed to remain in possession, Gibbs, C. J. at the trial, left it to the jury to say, whether, under all the circumstances, the bill of sale were fraudulent or not. It is laid down in *Sheppard's Touchstone*, 224, (7th ed.) "that a bargain and sale may be made of goods and chattels without any delivery of any part of the things sold;" and afterwards, in page 227, it is said, "that the word *gift* is often applied to moveable things, as trees, cattle, house-

hold stuff, &c., the property whereof may be altered as well by gift and delivery as by sale and grant, and this is, or may be, either by word or writing;" and in a note to this passage by the editor, it is said, "that, by the civil law, a gift of goods is not good without delivery, yet in our law it is otherwise, when there is a deed; also in a *donatio mortis causa* there must be a delivery." Then it is evident that the bill of sale, in this case, without delivery, conveyed the property in the household goods and chattels to the plaintiffs. It may be a question for a jury, whether, under the circumstances, a bill of sale of goods and chattels be fraudulent or not; and if there were any grounds for thinking that a jury would find fraud here, we might, this being a special case, infer it; but there is no ground whatever for saying that this bill of sale was fraudulent. It was given for a good consideration, for money advanced to Priest to enable him to carry on his trade, and his continuance in possession was in terms provided for.

Patteson, J.—There is no sufficient authority for saying that the want of delivery of possession *absolutely* makes void a bill of sale of goods and chattels; *Martin v. Podger*, 2 Bla. R. 701, establishes that want of possession is a badge of fraud which is to be left to the jury. Then, if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration. Here the possession was consistent with the deed, for the reason already given. The continuance of possession by the vendor is provided for by the deed, and the purchaser was not bound to enter for the first or the subsequent defaults in paying the instalments. That being so, the possession does not show fraud. The judgment of the Court must be for the plaintiffs.—Judgment for the plaintiff.

(*m*) *Shaftesbury, Earl, v. Russell*, 1 Bar. & Cres. 666; 3 Dowl. & R. 84; but see *Darby v. Smith*, 8 T. R. 82, which establishes, that in case of a trader, possession should be taken as soon as he makes default in his engagement, though he were not the original owner.

(*n*) Tidd. Prac. 9th ed. 1004, 5; *Lovich v. Crowder and others*, 8 Bar. & Cres. 134; *Bailey v. Culverwell*, id. 456.

debtor and to all persons having any legal or equitable interest in the property assigned. (o) And this doctrine extends not only to securities for the *immediate* payment of money, but also to the assignment of a *post obit bond* or *policy of insurance*, of the assignment of which immediate notice should be given to the insurance office. (p) This is particularly necessary when the party transferring is a *trader* or subject to the *bankrupt* laws. (q)

But it is also necessary, by the general law, to prevent the party assigning from fraudulently himself receiving the debt, or again transferring the interest to another person, who, by adopting the precautions which the first party ought to have observed, would acquire the better title or *better equity*. (r) Therefore it was held where a person having a beneficial interest in a sum of money, invested in the names of trustees, assigned it for valuable consideration to *A.*, but no notice of the assignment was given to the trustees; and afterwards the same person proposed to sell his interest to *B.*; and *B.* having made inquiry of the trustees as to the nature of the vendor's title and the amount of his interest, and having received no intimation of the existence of any prior incumbrance, completed the purchase, and gave the trustees notice; it was held that *B.* had a *better equity* than *A.* to the possession of the fund, and that the assignment to *B.*, though posterior in date, was to be preferred to the assignment to *A.* (s)

We have in the preceding part stated some precautions to be observed as well by vendors as purchasers, and to which we refer. (t) A *vendor* of an interest in *realty* ought to have his title investigated, abstracted, and evidence in proof of it ready to be produced and established *before* he carries his estate to market; for if he sell it with a confused title or without being ready to produce deeds and vouchers, he must be at the expense of clearing it. (u) Whereas if these matters had been previously ascertained, he might have avoided difficulties by specially providing against them in the particulars and conditions of sale, and guarding against the necessity of establishing a

Precautions to be observed by vendors of *real* property.

(o) See the learning in *Dearle v. Hall*, *Louveridge v. Cooper*, and *Cooper v. Fynmore*, 3 Russ. R. 1 to 65, *per tot.*

(p) *Williams v. Thorp*, 2 Sim. R. 257, 670; *Dearle v. Hall*, 3 Russ. R. 1, 12, 13.

(q) 6 Geo. 4, c. 16, s. 72. See *ante*, 460, note (g).

(r) *Dearle v. Hall*, and other cases, 3 Russ. R. 1 to 65; and see *post*, as to

Better Equity, in case of second mortgages or incumbrances on *real* property.

(s) *Id. ib.*; and see the learned judgment of the Master of the Rolls, *Id.* 12, 13.

(t) *Ante*, 292 to 305; no indictment lies, *Rex v. Coddington*, 1 Car. & P. 661; 3 Burn's Jus. 603.

(u) *Wilson v. Allen*, 1 Jac. & W. 625, 624; *ante*, 295, &c.

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title by production of some documents out of his power or the calling for which would require great expense. Besides, if, before he has ascertained from a confidential adviser that he may safely expose his interest to sale, he should do so, he would incur the risk of his defect of title being discovered and disclosed to another party, who might claim and recover the property. (v) If he sell generally without qualification, he must speedily make out an unquestionable title, (x) whereas if sold excluding inquiry into the title beyond a certain period, and with his own bond of indemnity, he would probably get just as much purchase-money as if he had sold without qualification. He must be cautious also as to the terms of his *advertisement* and *conditions* of sale, by which he would be bound. (y) He must not only deliver an abstract of a good title, but also produce the deeds and vouchers, and establish the facts proving it within a reasonable time; (z) and though the merely undertaking to deliver an abstract and possession at a particular time does not make it of the essence of a contract, (a) yet Courts of Equity are not disposed to extend the doctrine, that the precise time for completing a contract of sale is not material. (b) If the abstract delivered is imperfect, then the vendor will have to pay the costs of a suit for specific performance up to the time of the defects being supplied. (c) So if the title appear in the abstract not to be satisfactory, and the purchaser on that account refuse to take possession, the vendor will have to account for rents received by him, or which, had it not been for his wilful default, might have been received. (d)

A vendor, having agreed to sell, must produce within a reasonable time all documents reasonably required, or he will have to pay costs, though he may ultimately succeed in enforcing a specific performance of the contract of sale; (e) though if the purchaser require too much and the vendor produce too little, then neither party will be entitled to costs. (f) The vendor should not execute, or at least part with, the conveyance reciting payment of *consideration* money when he has not received *the whole*, without taking adequate security under seal for the payment; for a false recital of payment would be an estoppel and bar to an action at *law* for the purchase-money

(v) *Wilson v. Allen*, 1 Jac. & W. 623, 625; *ante*, 295, &c.

(x) *Ante*, 436, note (a).

(y) *Elphinstone v. Bedreschund*, Knapp's Rep. Privy Council, 344; *ante*, 295; *Scott v. Henson*, 1 Russ. & M. 128, as to what misdescription or too luxuriant a description may be excused.

(z) *Newall v. Smith*, 1 Jac. & W. 264.

(a) *Boehm v. Wood*, 1 Jac. & W. 419.

(b) *Lechmere v. Brasier*, 2 Jac. & W. 289.

(c) *Wilson v. Allen*, 1 Jac. & W. 623.

(d) *Wilson v. Clapham*, 1 Jac. & W. 36.

(e) *Newall v. Smith*, 1 Jac. & W. 263.

(f) *Id.* 264.

remaining unpaid, unless merely fraudulent, (g) though not so in equity. (h)

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On the other hand, a *purchaser* should be cautious in taking possession before an abstract of a good title has been delivered, for taking possession generally waives objections then apparent; (i) and a person purchasing leasehold property is supposed to contract with notice of the clauses in the lease, (j) and he should, therefore, take care to know them before he agrees to purchase.

Precautions to be observed by purchasers of real property.

A *purchaser* should always, before he parts with his money, have the title-deeds produced and delivered to him, and the conveyance executed in the presence of witnesses not under the controul of the vendor, and who may at all times be readily found. If he should omit to obtain possession of the deeds, and the vendor should afterwards fraudulently again sell the estate, it is true that the vendor might at any time at law recover the deeds by action of detinue; (k) for by the execution of the deeds the *estate* or interest passed and also the property in the deeds, even as we have seen if an improper alteration in the conveyance were made. (l) But difficulties might arise in equity, (m) and at least he would be blameable for thus enabling the vendor to practise a fraud for which he could not be indicted. (n) A purchaser should also, if there be an outstanding term or legal interest vested in a trustee, though attending the inheritance, and which cannot immediately be got in, take care to give notice of the conveyance to such trustee, who will thereby be converted into a trustee for the purchaser. (o) In *Register* counties the conveyance must also be registered. (p) And although the actual necessity for a *formal attornment* by the tenants of an estate to the purchaser was put an end to by the statute 4 Ann. c. 16, s. 9, (q) so that now the latter can, after the conveyance to him has been executed, by action compel the payment of rent and performance of covenants by the tenant without such attornment, yet the statute provides that no such tenant shall be prejudiced or damaged by payment

(g) *Rowntree v. Jacob*, 2 Taunt. Rep. 141; *Henderson v. Wild*, 2 Campb. 561; *Lamper v. Corpe*, 5 Barn. & Ald. 606; Sugd. V. & P. 554, 555, 8th ed.

(h) *Coffin v. Coffin*, 2 P. Wms. 291; but in equity payment will be presumed after a great length of time, *Bidlake v. Arundel*, 1 Cha. R. 93; Sugd. V. & P. 554, note I.

(i) *Burnett v. Brown*, 1 Jac. & W. 168.

(j) *Walter v. Maund*, 1 Jac. & W. 181.

(k) *Harrington v. Price*, 3 B. & Adolp. 170.

(l) *Ante*, 304.

(m) *Ante*, 304; *Rex v. Coddington*, 1 Car. & P 661.

(n) *Id. ibid.*

(o) See observations in *Dearle v. Hall*, 3 Russ. R. 12, 13.

(p) *Ante*, 305.

(q) See section and notes Chit. Col. Stat. p. 54.

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of any rent to any grantor or conusor, or by breach of any condition for non-payment of rent *before notice* shall be given to him of such grant by the consuee or grantee. (r) Consequently, in order to prevent the tenant from making protected payments to the vendor, in consequence of his ignorance of the sale, it is still necessary to give him *notice* of the conveyance; and it is advisable to give such *notice in writing*, and it may be to the subscribed effect. (s) After such notice, if the tenant should pay his rent to the vendor he will be liable to pay it over again to the purchaser. (t) It is also still highly expedient to obtain from the tenants *a regular written Attornment*, because after the same has been given or after any admission of the purchaser's title, the tenant will not, (u) unless under special circumstances, (x) be allowed to dispute the purchaser's title. And after a tenant has attorned or repeatedly paid rent to a party claiming derivatively from the lessor, the Court will, in an action against him, confine him to one plea, and will not allow him to plead several pleas traversing different parts of the derivative title. (y) The *form* of an *attornment* is subscribed. (z)

(r) 4 Ann. c. 16, s. 10, and see the previous law, Co. Lit. 309 a; 2 Bla. C. 288; *Birch v. Wright*, 1 T. R. 384—386; and see the cases since the statute,

Moss v. Gallimore, Dougl. 283; *Thursby v. Plant*, 1 Saund. R. 234; *Semley v. Hodson*, 16 East, 99.

Form of notice
to tenants of a
conveyance to a
purchaser.

(s) SIR,
I hereby give you notice, that by conveyances duly executed and dated, &c. Mr. A. B. of &c. your late landlord and all other necessary parties, duly sold and conveyed all the estate and interest in the messuage, farm and lands, situate at, &c. and which you hold or claim to hold as tenant thereof, and that the right to such estate and premises is now vested in me, and that you must pay to me all rents accruing due since the — day of —, A. D. —, and observe and perform with me all covenants and agreements and terms upon which you hold or claim to hold the said premises.
To, &c. Yours, &c.

(t) *Semley v. Hodson*, 16 East, 99;
Moss v. Gallimore, Dougl. 279.

(u) Id. ib.; *Doe v. Parker*, Peake, Evid. 304; *Rogers v. Pitcher*, 6 Taunt. 202.

(x) *Rogers v. Pitcher*, 6 Taunt. 202.

(y) *Strut v. Craigh*, Clit. Prac. 134;
Whale v. Lenox, 5 Bing. 12; *Gully v. Bishop of Exeter*, Id. 42; 10 Bar. & C. 603, S. C.

Form of attorn-
ment before
suit.*

(z) Be it remembered, that we whose names are hereunder written, being the several tenants in possession of certain farms and premises, situate and being in the parishes of —, and in the county of —, do hereby severally attorn tenants to A. B. of, &c. for such parts of the said premises as are in our respective possessions; and we and each and every of us have this day severally paid to the said A. B. the sum of 1s. upon such attornment, on account and in part of the rent due and to become due from us severally and respectively for and in respect of the said premises; and we do severally and respectively become tenants thereof to the said A. B. from the — day of — last past. As witness our hands, this — day of —, in the year of our Lord —.

Witness J. K.

C. D. &c.

The above is the usual form. No words of agreement should be introduced, that would require an agreement stamp; see *Cornish v. Sewell*, 8 Bar. & Cres. 471; *Chitty's Stamp Act*, 119.

* See *Cornish v. Sewell*, 8 B. & Cress. 471.

2. A mortgagee, whether of personalty or of real property, when the *legal* interest has been transferred to him, stands in a court of law in the same situation as if he were the *absolute purchaser*. In the preceding part we have considered some points relating to mortgagors and mortgagees, whether legal or equitable. (b) We also have seen what precautions must be observed by a purchaser as well of personalty (c) as of realty, and we have noticed many of the rules to be observed by persons taking personal or real property as security for the payment of a debt. (d) We have seen that a mortgagee of *personal* property, to be *perfectly secure*, ought immediately to take and keep possession of the chattels. (e) But with respect to *real* property, as the right is generally evidenced by title deeds, it is otherwise, and the neglect to take possession is wholly immaterial, as well as regards the realty itself as also all annexations to the same. (e) It remains only to notice a few other peculiarities at law and in equity, confined to *legal and equitable mortgages*, whether of real or personal property. The solicitor for a proposed mortgagee should stipulate in writing that the reasonable expenses shall at all events be paid. (f) It may be expressly stipulated that a receiver shall be appointed even before default, but if there be only a general preliminary agreement to execute a mortgage upon the *usual or proper* terms, then the appointment of a receiver of rents *before default* in payment of interest, and before the time appointed for repayment of the principal money, being an annoyance as well as considerable expense, would be deemed an unusual, unreasonable and improper stipulation. (g)

A mortgagee should be more careful in obtaining possession of all the *title deeds* than even a purchaser, for if he should omit to obtain and keep the same, a *second mortgagee* might have the preference. (h) In case also of a mortgage only of the equitable interest, a mortgagee should *give notice* of his security to the trustees in whom the legal interest is vested, by which means they would be converted into trustees for his

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2. Precautions
by mortgagees,
whether legal or
equitable. (a)

(a) *Ante*, 333 to 336. It would be beyond the limits of this work to state *all* the precautions to be used by persons when making contracts; but there is one precaution which may be here adverted to, namely, that a mortgagee should take care not only to have all the title-deeds, but also to be well assured that the *legal estate* is duly conveyed to him, for otherwise the *real legal owner* may sue him in trover or detinue for the deeds. *Harrison v. Price*, 3 Barn. & Adolp. 170.

(b) *Ante*, 257, 300, 333 to 336, 319 to

321.

(c) *Ante*, 112 to 130.

(d) *Ante*, 292 to 301, 459.

(e) *Horne v. Baker*, 9 East's R. 215; *ante*, 460.

(f) See suggested form of agreement, *ante*, 300.

(g) In King's Bench, A. D. 1831, decision upon an award expressly reserving that point, *Robson v. St. Leger*, in matter of *Frowd and Ross*.

(h) *Harrington v. Price*, 3 Bar. & Adolp. 170; *Loveridge v. Cooper*, 3 Russ. R. 1.

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benefit. (i) In register counties the conveyance must also be registered. (k) A mortgagee should also cautiously abstain from afterwards allowing the mortgagor to have the possession of the deeds, though it has been held that the mere circumstance of a mortgagee of a lease parting with the deeds to the mortgagor, who has pretended that he wants to show them to an intended purchaser, and afterwards, concealing the incumbrance, conveys to a purchaser, will not deprive the mortgagee of the benefit of his security, provided the purchaser's solicitor had any knowledge of the subsisting incumbrance; (l) and it seems there must be either direct fraud, or negligence amounting to evidence of fraud, to induce a Court of Equity to interfere for the purpose of postponing a party who insists on the legal benefit of his deed conveying the legal estate to him. (m) The same regulations of the statute of Anne respecting purchasers extends to mortgagees, who, when they wish immediately to interfere and prevent the mortgagor himself from receiving the rents, must give the tenants the like notice of the mortgage and of the necessity to pay the rent to him; for otherwise a payment of rent to the mortgagor would, by the terms of the act, be protected. In general only such notice is given, without requiring an attornment, but the latter qualified by a statement, "whilst the said mortgage is subsisting and until a reconveyance has been executed by the mortgagee," would also be advisable, and the subscribed form of notice would suffice. (n)

Equitable mortgagee of real property when not secure.

Although the statute against frauds (29 Car. 2, c. 3, s. 4,) in general renders invalid any verbal transfer of an interest in land, yet we have seen that for some purposes and to most intents between mortgagor and mortgagee, a mere deposit of title-

(i) See observations in *Deurle v. Hall*, 3 Russ. R. 12, 13.

(k) *Ante*, 305.

(l) *Evans v. Bicknell*, 6 Ves. jun. 174; *Martinez v. Cooper*, 2 Russ. R. 198.

(m) *Id. ib.* 217; *Harrington v. Price*, 3 Bar. & Adolp. 174.

Notice by a mortgagee not to pay rent to a mortgagor.

(n) Sir,
Take notice, that by indentures of lease and release, bearing date, &c. (date of indenture,) the release being of three parts, and made between A. B. of —, of the first part; C. D. of —, of the second part; and E. F. of —, of the third part; the messuage, &c. now in your occupation, situate and being in the parish of —, in the county of —, were conveyed and assured (amongst other things) to the said E. F., for better securing the payment of the sum of — and interest, by the said C. D. to the said E. F. at a certain time in the said indenture of release mentioned, and now past; and which said sum of £— with a considerable arrear of interest thereon, is still due and unpaid to the said E. F. I do therefore, as the attorney of and for the said E. F. hereby give you notice not to pay any rent now due or hereafter to become due from you for the messuage, (&c.) to the said C. D. or to any other person or persons than to the said E. F. or to me as his attorney, or to such other person or persons as shall be duly authorized by him to receive the same. Dated, &c.

To Mr. G. H.

Yours, &c. I. K.

deeds, with intent to give a lien thereon, is considered to be an *equitable* mortgage and to entitle the creditor to file a bill in equity to compel the completion of a *legal* mortgage. (o) Although a verbal deposit may suffice, yet if it be intended to secure *prior advances* or to be a current or continuing security, it is better to be reduced into writing. (p)

But this is an insufficient security, for if the deeds have been improperly obtained from the real owner, the latter may maintain trover against the party who might afterwards hold the same, but who has no actual conveyance, and who therefore cannot be considered as a *purchaser*; and even the trustees under a post-nuptial settlement may recover them from the depositor. (q) And even where the party who deposited the deeds had a right to do so, it has been held that the deposit *at law* gives merely a right to retain the deeds, and creates no legal interest in the estate, and therefore the party holding the deeds has no defence to an action of ejectment, and must file a bill to obtain a legal mortgage. (r) And an *equitable* mortgage by a mere deposit, without express declaration of the intention of the parties, constitutes no security for *prior advances*. (s) However, a party holding a lease by way of deposit and as a security, may be compelled to accept an assignment so as to charge him with all the covenants in the lease which he holds. (t) To secure the party holding the equitable mortgage by a mere deposit of deeds, he ought to serve upon all known trustees and tenants a *written notice* of such deposit, unless he be sufficiently collaterally indemnified, or from motives of friendship to his

(o) *Ante*, 335; 1 Mad. Cha. 537, 538; *Ex parte Coombe and another*, 4 Mad. R. 249; *Russell v. Russell*, 1 Bro. C. C. 269; *Ex parte Haigh*, 11 Ves. 403; *Norris v. Wilkinson*, 12 Ves. 197; *Doe dem. Maslin v. Roe*, 5 Esp. R. 105; *Richards v. Borrett*, 3 Esp. R. 103; *Boson v. Williams*, 3 Young & J. 150.

(p) *Mountford v. Scott*, 1 Turner & Russ. R. 274; but as the Stamp Act, 55 Geo. 3, c. 184, schedule, title Mortgage, imposes the same stamp "upon any agreement accompanied with a deposit of title deeds as upon a mortgage deed, it has become the practice, especially upon mere supposed temporary loans, to dispense with any written memorandum containing words of agreement. But still a mere acknowledgment in writing of the object of the deposit might be made without constituting an agreement or requiring any stamp. The

following form for that object has been adopted:—"Memorandum, Mr. A. B. has advanced to me C. D. the sum of 100*l.*, for which I have placed in his possession my policy for 300*l.* as a security.

C. D.

8th September, 1823.

(q) *Kerrison v. Dorrien*, 9 Bing. 76; *ante*, 336, note (l).

(r) *Ante*, 335, note; *Doe dem. Maslin v. Roe*, 5 Esp. R. 105; 1 Mad. Ch. Pr. 537, 538; *Ex parte Coombe and another*, 4 Mad. R. 249; *Russell v. Russell*, 1 Bro. C. C. 269; *Ex parte Haigh*, 11 Ves. 403; *Norris v. Wilkinson*, 12 Ves. 197; *Richards v. Borrett*, 3 Esp. R. 103; *Boson v. Williams*, 3 Young & J. 150.

(s) *Mountford v. Scott*, 1 Turn. & R. 274.

(t) *Ante*, 336, note (i).

Memorandum of acknowledgment of a deposit of deeds to create an equitable mortgage.

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debtor resolve to incur the risk of all consequences of the forbearance. (u)

An equitable mortgage or alienation of *copyhold* may, we have seen, be effected by a mere deposit of the copies of the *Court Rolls*. (v) But we have seen that regularly the transaction and the covenant to surrender should, to perfect the lien, be presented by the homage and entered on the Rolls; (x) and even then, we have seen, that in the case of copyhold a *bonâ fide* purchaser may not be prejudiced by such proceeding without his actual knowledge. (y)

What is considered a *Better Equity*.

Precautions by giving notices of an incumbrance sometimes give the party what has been termed *a better equity*; the nature of which will be found explained in the subscribed note, (z)

(u) There are cases in which, by the omission to give notice, another party may acquire what is termed *a better equity*, ante, 463, and infra, n. (z), *Foster v. Blackstone*. The form of the notice, when the party does

not mean immediately to enforce a *legal* mortgage, or to take possession, or to require payment to him of the rents, may be thus:—

Notice of an equitable mortgage by mere deposit of title-deeds.

" Sir,—Take notice that Messrs. —, of, &c. have deposited in my possession as a lien and equitable mortgage, certain deeds and documents constituting their title and evidence of their right to an estate situate at, &c. and now in the possession of, &c. and to secure the repayment of £—, and interest, and also all further advances and interest thereon; you will, therefore, take notice of this my interest in and claim upon this estate, so that I may at all times retain the same and have a preference against all or any *subsequently* created interest or charge. But until notice to the contrary you are at liberty to pay your rent to the said Messrs. —. Dated, &c.

To, &c.

Yours, &c.

(v) *Ante*, 235.

(x) *Ante*, 235, note (s), 333 to 336,

(y) Sugd. V. & P. 8th ed. 759, that the contents of Court Roll are not always notice to a purchaser; and see *Ex parte Warner*, 19 Ves. 202; *Amber v. Amber*, 5 Ves. 582; Chit. Eq. Dig. 656, 303, 304.

(z) *Foster v. Blackstone*, 4 March, 1833, in Rolls Court. In this case, by the effect of certain instruments executed by the late Duke of Marlborough, the Marquis of Blandford, the present Duke, Mr. Coutts, and other trustees, very large estates were limited in trust for the payment of particular debts there stated, either by sale, mortgage, or the grant of annuity. It was provided that, according to the time when the estates were converted, the surplus monies should be paid either to the late or the present duke. The present duke, then the marquis of Blandford, granted in 1813 three very large annuities for life, and in 1814 he borrowed a sum of 20,000*l.* stock from Sir C. Cockerell. After the grant of the annuities the marquis executed a deed, the effect of which was to charge the trust estates with their payment, and in the following year Sir Charles took a more formal instrument for the purpose of securing his loan, and by which the marquis assigned over to him all his interest of whatever

nature in the trust estates, or in the monies to be produced by them. In consideration of these facts, the Master had found that the annuitants were to be considered as incumbrancers entitled in priority to Sir Charles, who had taken an exception to the report in that respect. The question for the Court now to decide was, which party was entitled to a *priority of claim*? It was insisted by Sir C. Cockerell that he was entitled to priority, because he had a *better equity*, arising from the nature of his instrument. The annuitants had only a *power of distress*, and a *term created for their protection*, whereas the nature of the case was, in fact, inconsistent with both.

His Honour could nowhere find in the authorities what in terms was "*a better equity*," but on a reference to all the cases he considered that it might thus be defined:—*If a prior incumbrancer did not take a security which effectually protected him against any subsequent dealing to his prejudice by the party who had the legal estate, a second incumbrancer, taking a security which in its nature afforded him that protection, had what might properly be called, "a better equity."* In this view of it, Sir C. Cockerell had not a *better equity*. No doubt his deed was more formal, and better suited to the interest which he meant to acquire by it; yet, in the consideration

and which has also been illustrated by a well considered case already referred to. (a) And there are many cases respecting the effect of *notice of a prior equitable mortgage*. (b)

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3. It will frequently be at least expedient that a *trustee* should give notice to tenants, occupiers, and others, of his legal claim upon the property, whether by *rent charge, annuity or otherwise*, so as not to endanger the interests of their *cestui qui trust*. In the subscribed note a form of that nature is given. (c)

3. Precautions by trustees.

4. Perhaps there is no contract requiring so much precaution and consideration as that between a *landlord and a tenant*, since it is not limited to a single act or confined to a short space of time, but the reciprocal obligations may and probably will, during a long term of years, be shifted from the original to new

4. Precautions by landlords and tenants in general.

of a court of equity, the informal deed amounted to an equitable charge on the trust estates, and entitled the annuitants to the same remedy which Sir Charles would have acquired by his more formal instrument. On another ground, however, Sir Charles had a better equity. The late duke died in 1817; the trust estates were sold between 1817 and 1819, and the whole interest in them, according to the effect of the instruments, vested in the present duke of Marlborough. In 1819 Sir Charles gave notice of his security to the trustees who were then possessed of the

monies. After that notice they could never give any title to a subsequent incumbrancer as against Sir Charles; he acquired by it an effectual security against any after-dealing to his prejudice, and therefore in respect of that priority he had a better equity, and was entitled to priority; and see *ante*, 463.

(a) See *Dearle v. Hall and others*, cases, 3 Russell's R. 1 to 65, where the learning on this subject was ably observed upon; and see *ante*, 463.

(b) *Kierson v. Mill*, 13 Ves. 118; *Winter v. Lord Anson*, 1 Sim. & Sta. 131.

(c) Sir,

Take notice that by an indenture, bearing date, &c. and made between A. B. of, &c. of the first part, E. F. of, &c. of the second part, and me the underwritten G. H. of the third part, and I. K. of, &c. of the fourth part; the said A. B. for the considerations therein mentioned did give, grant and confirm unto the said E. F. his executors, administrators and assigns, for and during the natural life of the said A. B. one annuity or clear yearly sum of —, of lawful money of Great Britain, to be yearly issuing, growing, had, received, and taken by him, the said E. F., by and out of a certain manor, and certain messuages, lands, tenements, hereditaments and premises therein particularly mentioned, situate and being at — in the county of —, and comprising amongst other things, certain lands and premises in your occupation; the same annuity or yearly sum of — to be payable quarterly, at the time and in manner therein mentioned, with power of distress and entry in case of the nonpayment thereof; and for the further better and more effectual securing of the payment of the said annuity or yearly sum of —, at the times and in manner aforesaid, the said A. B. did thereby grant, bargain, sell and demise, the said manor, messuages, &c. (as before) unto me the said G. H. for a term of — years, if the said A. B. should so long live. And I do hereby further give you notice, that there is now due and owing to the said E. F., the sum of —, for arrears of the said annuity or yearly sum of —, up to the — day of — last; and I do hereby require you not to pay any rent now due, or hereafter to become due, for the aforesaid lands and premises in your occupation or any part thereof, to the said A. B. or to any other person than me the said G. H. or such other person or persons as I shall appoint to receive the same until the said sum of —, together with the growing and future payments of the said annuity or yearly sum, and all costs, charges and expences sustained and occasioned by the non-payment thereof, shall have been fully paid and satisfied. Dated, &c. G. H. *

To Mr. C. D.

Notice by the trustee of a term for securing an annuity to pay him the rent for satisfaction of arrears, &c.

* See this form in Mr. Tidd's Forms, 615.

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parties, who afterwards again and again may be changed. Therefore, in entering into a contract of this nature (although the *title*, (d) and the *liberality* of the landlord, and the probable industry, character and solvency of the first tenant, no doubt, form principal inducements,) yet those alone are not to be relied upon; for not only the dispositions and circumstance of the *original* parties may change, but the principles and dispositions of unknown parties should be provided against; and hence the great importance of introducing the most guarded stipulations on each side, and powers for either party to determine the tenancy, when by a *change of circumstances* its continuance would be injurious either to one of the parties or to the estate. It is for want of early precaution and circumspect stipulations that most of the litigations between these parties so frequently arise. (e)

Suggested preliminary agreement between landlord and tenant.

We have before stated the necessity, in contracts between landlord and tenant, to introduce every stipulation that might possibly be essential during a long term, and to specify what shall be done by each party in every possible contingency. (f) Every landlord, or his solicitor, should constantly have by him a very full *agreement for a lease*, containing every possible stipulation

(d) No proposed lessee should accept a lease or execute a counterpart in cases where he will have to embark a considerable capital, or where he will have to pay a *premium*, without being well assured that the lessor has good title to demise. It is not the *practice* to require an inspection of a landlord's title, and it is said that in case of leases of persons of known property, as of the Dukes of Bedford or Norfolk, it would be unreasonable to require it, *Browning v. Wright*, 2 Bos. & Pul. 23. But it should seem that any proposed lessee has a right to inspect the title *unless it has* been otherwise expressly stipulated; and in prudence he frequently should be previously well satisfied of the title, Sugd. V. & P. 8th ed. 306 to 314; *Keech v. Hall*, Dougl. 21. At least a lessor could not enforce specific performance of an agreement for a lease without producing his title, *Fildes v. Hooker*, 2 Meriv. 424; *Purvis v. Regner*, 9 Price, R. 488; Sug. V. & P. 308, n. (u), 311. But if the agreement for the lease exclude the right to inspect the title by any terms, then the intended lessee cannot object, see *Spratt v. Jeffery*, 10 Bar. & Cres. 249; *George v. Pritchard*, 1 Ry. & M. 417. The danger of taking a lease without due inquiry or sufficient covenants is illustrated by *Adams v. Gibney*, 6 Bing. 656; 4 Moore & P. 491, S. C.; *ante*, 345. The proposed lessee, when the

lessor is a termor, should also see that all rents and taxes have been satisfied.

(e) *Ante*, 457. It would be beyond the present object to introduce observations upon *political economy*. But I cannot refrain from observing, that much of the distress of the country, and of the depressed character of the labouring class, is attributable to the system of demising agricultural land in *too large farms*, and in requiring large capitals to pay for *in-coming valuations*. If landlords would adopt the old system and restore small farm-houses and corresponding outhouses, and subdivide their estates into *small farms* in varying dimensions, so as to enable industrious and careful workmen to occupy with a small capital, they would find their land better cultivated, and that the race of sturdy farmers and the former character of the labouring class would soon be restored.

(f) See instances of inconveniences resulting from the omission, *ante*, 118 to 120. As to when a custom may regulate in cases where the lease is silent, *ante*, 119 to 121; *Liebenrood v. Vines*, 1 Meriv. 15, *post*, 480 (k); and as to clauses of forfeiture, *ante*, 288; Adams on Ejectment, 3d ed.; Comyn's Landlord and Tenant, ably edited by Chillon; Woodfall's Landlord and Tenant, and Platt on Covenants.

on the part of a landlord or tenant that may relate to the description of property proposed to be let, so as not only to suggest every expedient engagement but to avoid the necessity for delay in writing out new stipulations, and merely to require pruning or reduction rather than addition; and which may at once be perfected at the meeting of the landlord and tenant, so that the stipulations in rough, when settled according to the ultimate agreement, may be *immediately* signed by the parties before they separate. If the landlord wish to exclude inquiry into his *title or right* to demise, (g) the agreement should expressly so stipulate, for otherwise it is not clear that he may not be required to produce his title. (h) This agreement may, if necessary, be stamped without paying a penalty within 21 days, on mere payment of the duty of 20s. on agreements. (i) If so stamped, of course it should not contain any words of *immediate demise*, which would amount to a lease and require a 30s. stamp or more, according to the amount of expressed rent, and which also could not after signature be imposed without paying that duty and 5l. penalty. A very concise form of such an *agreement* has been already given, but this will necessarily vary according to the nature of the property and the particular stipulations of the parties. (k) The agreement should always distinctly describe or specify the premises to be demised, the term, the rent and times of payment, (which would be otherwise only yearly); (l) what taxes and charges on the premises should be paid by the tenant, and it should particularly specify *all unusual* covenants, and then without further enumeration it may conclude, that all *usual* and *proper* covenants, clauses, provisoes and conditions shall be inserted, and all covenants that may reasonably be advised or required by any named conveyancer in case any doubt or dispute should arise. No honourable landlord, nor his solicitor, would attempt to impose terms which do not provide for and protect as well the proper interests of the tenant as of the landlord; and no such landlord would introduce into an agreement or lease any terms which might at any time, during a long course of years, be justly considered unfair on either side at the time it was entered into. It is a bargain in which the utmost reciprocal good faith is essential, and continued confidence and good feeling ought to endure;

(g) *Ante*, 472, note (d), and 293, 294.(h) *Ante*, 472, n. (d); as to what words might suffice, see *Spratt v. Jeffery*, 10 Bar. & Cres. 249; *Wilmot v. Wilkinson*, 6 Bar. & Cres. 506.(i) 23 Geo. 3, c. 38, s. 5; 55 Geo. 3, c. 184; *Bousfield v. Godfrey*, 5 Bing. 418, 419.(k) *Ante*, 300, n. (r).(l) *Bristow v. Wright*, 2 Dougl. 665.

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and hence every attempt to introduce oppressive terms would be as censurable as they would be unavailing, for unless the tenant can continue to make what is termed an adequate living profit, he could not long continue to pay his rent unless perhaps by exhausting and impoverishing the land. Between sensible landlords and tenants this is and ever will be a *regulating principle*.

What is only an agreement for a lease and what a lease.

Whether an instrument shall be deemed only an *agreement* for a lease or an *immediate lease* or demise, though with a stipulation for a *more formal* lease, has in many cases been the subject of much controversy and difficulty as well at common law as under the Stamp Act. It should seem that one *general rule* to be relied upon, when the words are ambiguous or contradictory, is, that *when the instrument, in whatever form, contains in itself immediate stipulations to perform acts which would be inconsistent with a mere tenancy from year to year*, (as to paint once in *three* years,) and so that the tenant might be sued *upon that instrument* for not performing that act, then although no lease were afterwards executed, the instrument is to be considered as in itself an *immediate demise*, though it also contain a clause that there shall be a formal lease. (m) But when the instrument merely stipulates that *a lease shall be granted upon certain specified terms* (*without*, as in some cases, also adding, "that in the *meantime* and until such lease shall have been made and executed, the party shall pay the rent as aforesaid, and hold the premises subject to the covenants above-mentioned,") then the instrument is merely an agreement and not an immediate demise. (n) The distinction between a mere prospective agreement and an immediate demise is very material, for if there be no lease or demise then, at least during the *first year* or until rent has been paid so as to afford evidence of a collateral *demise* from year to year, the landlord cannot distrain for the rent; but can only sue, (o) though a Court of Equity would compel the occupier to accept a lease and execute a counterpart pursuant to the agreement. However, until the lease has been executed, the tenant is considered to be impliedly bound to observe and liable to be sued in assumpsit for not observing the terms that he would have covenanted to perform in case the lease had been executed. And this rule prevails so strongly, that if the agreement refer to a lease, which, if it had

(m) Per Cur. in *Pinero v. Judson*, 6 Bing. 206, and other cases Adam's Eject. 3d edit. 113 to 119; and *ante*, 254, 255.

(n) *Dunk v. Hunter*, 5 Bar. & Ald. 322.
 (o) *Id. ib.*; *Hagan v. Johnson*, 2 Taunt. 148.

been executed, would have contained a clause of re-entry for breach of stipulations, then for the breach of any such stipulations, even before a lease has been executed, ejectment might be sustained against the tenant without waiting for any notice to determine the tenancy from year to year. (p)

When the property to be occupied is considerable or the term for many years, then the *preliminary agreement* as well as the *formal lease* should fully state all particular and unusual covenants, and it would avoid contest, if it concisely and without the accumulation of synonymous or unnecessary words, (improperly increasing the *amount* of the stamp duty when the words exceed 1080,) expressly state all usual covenants and provide for every possible contingency. The *premises* should be accurately described and demised, and not only with all commons, ways, and other easements and privileges *appendant or appurtenant* to the premises, but also then or heretofore therewith *used, occupied or enjoyed* as part or parcel thereof, or for the more convenient occupation or enjoyment thereof. (q) The *exceptions* or reservations of timber, mines, &c. powers to hunt, course, shoot, fowl, fish, &c. with or without others, should then be clearly specified. Then the *term*, with the power for either party, whether landlord or tenant, to determine the same on giving a specified notice. The annual *rent* and increased rents per *acre*, if any. Then who to pay *taxes, sewers' rate, and other out-goings*, as well in the present state of the premises as in case of improvements, an increase of

Suggested terms
of a lease.

(p) *Doe dem. Oldershaw v. Breach*, 6 Esp. 106; *Doe d. Broomfield v. Smith*, 6 East. R. 535; *Doe dem. Henniker v. Watt*, 8 Bar. & Cres. 308; *Adam's Eject.* 3d edit. 188, 189. But when not, see *Doe dem. Wilson v. Phillips*, 2 Bing. 13.

(q) *Ante*, 156 to 159, 210, 211, 214. See the following case to establish the necessity for such words:—*Barlow v. Rhodes*. Court of Exchequer, 12th January, 1833, cor. Lord Lyndhurst, Ch. B., Bayley, Bolland and Gurney, Barons; Mr. Colman showed cause against a rule of Mr. F. Pollock for setting aside the verdict obtained for the plaintiff in this action, which was tried before Mr. Baron Bolland at the last Yorkshire assizes, and was for breaking and entering a passage of the plaintiff, which the defendant justified under a right of way. The Duke of Devonshire, in May, 1825, put up to sale by auction, in separate lots, certain property, including the *locus in quo*, in the town of Wetherby, whereof he was the owner, and lot 20 was purchased by the plaintiff, and lot 24 by the defendant. The conveyance to the defendant, after describing the premises purchased by him as bounded on the north by lot 20, con-

tained the usual words "together with all ways, paths, passages, &c. thereunto appurtenant or belonging." Lots 20 and 24 had been formerly in the occupation of the same person, and the passage in question, which had been previously used with lot 24, although now comprised in the conveyance of lot 20, led from the defendant's house to an ash-hole. For the defendant, it was urged at the trial, that the way having been *formerly* used with the same premises, the right of it now passed under the general words "appurtenant or belonging," but the learned judge who tried the cause being of a different opinion, the plaintiff obtained a verdict. It was now contended for the defendant, on the case of *Morris v. Edginton*, in the Common Pleas, that the defendant was entitled to a verdict, for that the word "belonging" clearly gave the right of way in question. But the Court held, that neither the words "appurtenant" nor "belonging," which they treated as synonymous, were sufficient to pass the right of way, unless, indeed, it were a way of necessity, which was the case in *Morris v. Edginton*, 2 Bing. 76; and therefore they held the plaintiff entitled to judgment, and discharged the rule.

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taxation in respect of which ought to be borne by the tenant, and with power to the lessor to determine the lease or increase the rent in case of any future new tax that would otherwise fall upon him in respect of the premises. Then it should be provided who should make *substantial repairs* or *rebuild*, and who those essential only to keep the premises *wind and water tight*, and to perform *external* painting or ornamental repairs; with a stipulation that all repairs to be done by the tenant should be completed upwards of *three* months, or other specified time, before the expiration of the term, for otherwise the landlord might lose a quarter's rent or more whilst repairing after the expiration of the tenancy so as to render the premises fit for the reception of a new tenant. Then whether the tenant should be at liberty and when to remove any and what *trees, plants, buildings, fixtures*, or *improvements*, or absolutely that the landlord or in-coming tenant should pay a fixed price for the same, or a certain proportion of the improved value.—Who to *insure* and *produce receipts* for premiums.—*Suspension of the rent* and for what time, in case of destruction by tempest or by act of incendiaries, or by fire originating on other premises, or not attributable to the want of due care of the tenant or others employed by him.—Stipulations on the part of the tenant when required to dig holes of prescribed dimensions for *fresh fruit trees* to be provided by the lessor, and carefully to plant and *preserve* the same and *all other fruit* and *other trees*, in gardens as well as orchards and elsewhere, and whether demised or excepted. Then should follow the *tenant's covenants* to pay rent and to keep the premises wind and water tight, and at stipulated periods to paint outside wood and iron-work, and perform all occasional *small* repairs, to prevent the increase of dilapidation that might ensue from neglect of timely small reparation. But the lessor to perform all *substantial* or permanent repairs, and to *provide timber and materials* essential as well for his as for his tenant's keeping the premises in tenantable condition during the term, should any such become necessary; and to *rebuild* within a specified time in case of destruction by tempest or fire, as may be particularly provided for according to the agreement of the parties. Then should follow *in all leases the tenant's general covenant* to use and manage, and cause and procure to be used and managed, the premises in a tenant-like and proper manner, and according to the best and most approved mode and course of husbandry, and neither to do nor suffer or permit to be done any waste or other act that might impoverish or injure the same or any part thereof; and that at the expiration of the

tenancy and at all times during the same, the said premises and the trees and plants, hedges and fences thereon growing or being, shall be in *as good heart, cultivation, order and condition, and as valuable* to the landlord and to any future occupier as the same were at the commencement of the said tenancy. This stipulation would suffice, but where the property demised is very considerable, and the lessor would wish to have more *precise covenants particularly* regulating the course of husbandry, they may be introduced with a *fixed penalty or stipulated damages*, as at £10 per acre or otherwise, for breach of each covenant, so as to prevent a jury from not giving due effect to the general covenant, and to compel them to give the prescribed damages however reluctantly. (r) These express covenants usually relate to and specify the approved or supposed best course of husbandry and of sowing and cropping in the neighbourhood, and usually prohibit the removal of hay or straw or manure off the premises, or at least without an equivalent in lieu; also the times of cutting underwoods and hedges, and the modes of performing the latter; with particular covenants applicable to the last year of the term, and enabling the landlord or in-coming tenant previously to enter and occupy certain parts of the buildings and land; and as to the remuneration to the out-going tenant for ploughing and growing crops, manure, &c. to be paid for by fair valuation or deducted from the rent, or any just claim for dilapidations or breaches of covenant, the damages in respect of which to be valued in like manner. Then should follow a *clause of re-entry*, specifying and limiting what breaches of covenant shall constitute a cause of forfeiture. In modern leases this clause is frequently much too general, and ought justly to be limited to cases of *considerable* damage. Then should follow a proviso for the protection of the tenant and to prevent vexatious litigation, viz. that (excepting as respects the punctual payment of rent) no action shall be brought for any breach of covenant before the expiration of the tenancy, unless three months previous specific notice in writing of the breach complained of has been given, and default made in repairing or performing any other covenant to the extent of 20% damages or other named sum, and that it shall be lawful for the tenant to *tender* the amount of the damages or pay the same into Court; and in case the same should be sufficient, then the lessor should covenant to accept the same with costs, and to

(r) *Farrant v. Olmeus*, 3 Bar. & Ald. 692.

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Other terms.

Provisoes of re-
entry.

discontinue any pending action. This would prevent a repetition of trifling or vexatious actions so justly complained of.

This is a mere outline of the proper terms of a lease. But the landlord having the *jus disponendi* may annex any terms or conditions to his demise that he may think fit, provided it be not contrary to law; (r) and it would be impracticable here to state all the stipulations that may be required. The lessor may and ought, in demises of mines, or even of land, to require the tenant to covenant, (subject to the payment of an annual sum as stipulated increased rent for each servant,) not to hire any labourers who have not already acquired a settlement in the parish, for an *entire year*, or otherwise than by an exceptive hiring, so as to prevent them from acquiring a settlement there, and which might increase the poor-rates, and consequently deteriorate other property of the landlord; (s) or the covenant may be to indemnify the parish against the consequence.(s) And in this and in all other cases where such covenant would not run with the land, so as to subject an assignee of the lessee to liability, there should be a reserved power to vacate the lease. (t)

The clause of re-entry requires more particular consideration. If the lessor wish to reserve to himself, at all times during the term, his choice of the person who shall either have the term or the occupation of the premises, great care must be observed in expressly providing accordingly; for otherwise we have seen that the lessee, and all others claiming under him, has the general power of alienation to any one; (u) and as any restraint of this power is construed strictly, (x) great care must be observed in using most extensive terms prohibiting alienation or demising or parting with the interest or the possession of the premises, or any part thereof, or of the lease for the whole or any part of the term; (y) and against parting with or depositing the lease, (z) or receiving lodgers, (a) and this not only by the act of the lessee, or his executor, administrator, or assign, but also by proceedings technically termed *in invitum*, or by

(r) *Roe v. Galliers*, 2 Term R. 133; Adams's Eject. 3 ed. 158, 159.

(s) *Congleton v. Patterson*, 10 East, 130; *Collison v. Lettson*, 2 Marsh. 1; 6 Taunt. 224, S. C.; *Rex v. Mursley*, 1 T. R. 694; *Rex v. Haughton*, 1 Stra. 83; Buin's J. Poor, 356, 357, 26th ed. This would be particularly expedient in demises of all mines, excepting coal mines, because the lessees of such other mines are not in respect of them liable to the poor's-rate, and yet usually bring a great many workmen into the parish, some of whom become paupers there, and increase the rate to the

injury of other property of the landlord in the same parish.

(t) Same cases.

(u) *Ante*, 242, 243.

(x) *Ante*, 288; Adams's Eject. 3 ed. 175, 176.

(y) Adams's Eject. 3 ed. 175 to 194; *Crusoe v. Bugby*, 3 Wils. 234; 2 W. Bla. 766, S. C.; *Roe v. Harrison*, 2 T. R. 425; *Doe v. Worseley*, 1 Campb. 20; *Doe v. Laining*, 1 Ry. & M. 56; *Roe v. Sales*, 1 M. & S. 297.

(z) *Doe v. Laining*, 1 Ry. & M. 36.

(a) *Id. ibid.*; 4 Campb. 77.

operation of law, as by bankruptcy, insolvency, execution, or other process or proceeding whatever; (b) or by the mere fact of an act of bankruptcy, declaration of insolvency, issuing of a commission, petitioning for discharge under the Insolvent Act, signing any judgment, issuing any execution, or the commencement of any proceeding that might terminate in any execution or process against the estate. (b)

So, if it be intended to take advantage of a *breach of covenant* as a cause of forfeiture, the clause of re-entry must be cautiously and *extensively* framed; accordingly it should provide as well for enumerated *omissions* as well as for acts *wrongfully done* or to be done, (c) and as well for those *here-inbefore* as *hereinafter* mentioned, or it will not operate. (d) However, a proviso for re-entry, "unless the lessee at all times during the term actually and *exclusively occupy, manage, and cultivate the premises without the control or interference of any other person or persons whatsoever*," extends to all these cases, and seems one of the best stipulations to secure the landlord's object, to prevent his buildings or land being occupied by others. (e) And where the lease contained a covenant among others that the tenant should not carry hay off the premises under a penalty of £5 per ton, and then a clause followed which enumerated all the covenants *except the above*, but provided that upon breach of *any of the covenants* the lessor might re-enter, it was held that neither that circumstance nor the stipulation for the penalty of 5*l.* did prevent the clause from applying to the covenant not to carry off the hay, &c. because the words of the proviso were large enough to comprehend it. (f) But the safest course is in the clause of forfeiture or re-entry expressly and distinctly to enumerate every act or omission in respect of which it is proposed that the lease shall be forfeited. We have seen that there is no substantial distinction between a clause of forfeiture or a mere proviso for re-entry. (g) In each case the landlord, and not the tenant or his surety, can avail himself of the option of treating the lease as void or continuing. (h)

In some tenancies, to avoid the delay and expense of actions

Securing possession by warrant of attorney without action of ejectment.

(b) Unless these be expressly provided against, they are not considered contraventions of a covenant or proviso not to assign, *Doe v. Bevan*, 3 M. & S. 553; *Roe v. Galliers*, 2 T. R. 133; *Doe v. Carter*, 8 T. R. 57, 300; unless fraudulently or purposely contrived to evade the covenant, *Doe v. Carter*, 8 T. R. 300.

(c) *Doe v. Stevens*, 3 Bar. & Adolp. 299; *Doe v. Marchett*, 1 Bar. & Adolp. 715.

(d) *Doe v. Godwin*, 4 M. & S. 265; approved in *Doe v. Stevens*, 3 Bar. & Adolp. 303.

(e) *Doe v. Clark*, 8 East, 185. Most of the cases upon clauses of re-entry are ably collected and observed upon in *Adams on Ejectment*, 175 to 198.

(f) *Doe v. Jepson*, 3 B. & Adolp. 402.

(g) *Ants*, 289, 290; *Adams's Eject.* 3 ed. 157, 158.

(h) *Ants*, 290.

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Precautions by
landlords after
the lease has
been executed.

of ejectment for recovery of possession, it might be advisable to require from the tenant a warrant of attorney in ejectment, with a special defeazance enabling immediate judgment and execution in certain specified events. (i)

When a lease or agreement has been made with a tenant that he shall manage a farm as a former tenant did, it has been held that he is not bound in equity to pursue the conduct observed by the former tenant without express notice of such terms, (k) and consequently the landlord in such a case should give the new tenant an explicit notice in writing of the course of husbandry pursued by the former tenant, and which the new occupier is required to observe; (k) and though if the agreement were that the tenant should farm according to the custom of the country, he would in strictness be bound to take notice of all particulars, or inform himself thereof; (l) yet the safest course would be for the landlord to give him a similar notice of the particulars. Every prudent landlord should also *secure evidence* that probably will endure for more than the intended new term, of the state of buildings and fences and cultivation of every part of a farm, and of the condition of the land, growth of timber, underwood, &c. at the inception of the new term.

How to com-
plete a for-
feiture.

When a lessor is desirous of *completing a forfeiture* of a lease for nonpayment of *rent*, at *common law*, (and which is frequently preferable to a proceeding for a forfeiture under the statute 4 Geo. 2, c. 28, s. 2, which only applies when half a year's rent is in arrear, and there is no sufficient distress on the premises, (m)) the strict observance of certain forms is essential. (n)

First. There must be a demand in fact of the rent, (o) but which may be made by an agent, and without showing his authority unless required. (p)

Secondly. The demand must be of the precise rent due, for if the demand be of a penny more or less, it will be insufficient; (q) and Lord Tenterden said it should not be generally of *the arrear*, but of the quarter's rent by name, and specifying the amount. (r)

(i) Probably also *one* warrant of attorney with one stamp from *several* tenants would suffice, provided there be some *bond fide* community of interest or agreement to be responsible for each other, but otherwise not, *Doe v. Day*, 13 East, 241; *Bouse v. Jackson*, 3 Brod. & Bing. 185; and see *Tolput v. Wells*, 1 M. & S. 393, overruling dictum of Lawrence in *Meus v. Howell*, 4 East's Rep. 9.

(k) *Liebenrood v. Vinas*, 1 Meriv. 15.

(l) Com. Dig. Pleader, Notice.

(m) *Doe v. Wandlass*, 7 T. R. 117; *Doe v. Fachan*, 15 East, 286; *Rees v. King*, For. Rep. 19.

(n) See a valuable note, 1 Saund. Rep. 287, note 16.

(o) 1 Saund. 286, note 16; Bro. De-
maunde, 19 (j).

(p) *Roe v. Davis*, 7 East, 363.

(q) *Fabian v. Winston*, 1 Leon. 305; Cro. Eliz. 209, S. C.

(r) *Doe v. Paul*, 3 Car. & P. 613.

Thirdly. It must be made precisely upon the day when the rent is due and payable by the lease, to save the forfeiture. As when the proviso is, "that if the rent shall be behind or unpaid by the space of *thirty* (or any other number of days) after the days of payment, it shall be lawful for the lessor to re-enter." A demand must be made on the thirtieth or other last day. (s)

Fourthly. It must be made a convenient time before sunset, and the party demanding should wait at the same place upon the premises from the time of the demand until after sunset. (t)

Fifthly. It must be made upon the land, and at the most notorious or public part of it; therefore if there be a dwelling-house upon the land, the demand must be at the front or fore-door, though it is not necessary to enter the house, notwithstanding the door be open. But if the tenant meet the lessor, either on or off the land, at any time of the last day of payment, and tender the rent, it is sufficient to save a forfeiture. (u)

Sixthly. Unless another place is appointed where the rent is to be paid, in which case the demand must be made at such place. (x)

Seventhly. A demand of the rent must be made *in fact*, and so averred in pleading, although there should be no person on the land ready to pay it. (y) And the best course is audibly to say, "I, *A. B.* the landlord of these premises, (or I, *G. H.* agent for *A. B.* the landlord of these premises, and duly authorized by him on his behalf, do now here demand of and from *C. D.* the tenant thereof, the payment of £——, now due for one quarter's (or half year's) rent of these premises, and which became due on, &c. last past; and in default of immediate payment thereof, I do now declare that the lease and term, estate and interest of the said *C. D.* of and in these premises will be forfeited, ended, and determined."

Eighthly. If after these requisites have been performed by the landlord the tenant neglects or refuses to pay the rent, then the landlord is entitled to re-enter.

Ninthly. It is to be observed that no subsequent actual entry

(s) Co. Lit. 202 (a), and Hargrave's note 3; *Hill v. Grange*, Plowd. 172 (b), 173 (a); *Clune's Case*, 10 Rep. 129 (a); *Kidwelly v. Brand*, Plowd. 70 (a), (b); *Cropp v. Hambledon*, Cro. Eliz. 48; *Wood v. Chivers's Case*, 4 Leon. 180; *Smith v. Bustard*, 1 Leon. 142; *Kirby v. Green*, 2 Lutw. 1139.

(t) *Ibid.*; *Tinkler v. Prentice*, 4 Taunt. 555; and see *Fabian v. Rewmston*, 1 Anders.

252; *Kirby v. Green*, 2 Lutw. 1139; *Fabian v. Winston*, Cro. Eliz. 209.

(u) Co. Lit. 201 (b), 202 (a); *Mmund's Case*, 7 Rep. 28; *Kidwelly v. Brand*, Plow. 70 (a), (b); *Scott v. Scott*, Cro. Eliz. 73; *Wood v. Chivers*, 4 Leon. 180; *Dee v. Wandless*, 7 T. R. 117.

(x) Co. Lit. 202 (a).

(y) *Kidwelly v. Brand*, Plow. 70 (a), (b); 1 Roll. Abr. 458.

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is necessary to be made by the landlord into the land, although the proviso is that the lessor *may re-enter*; but it is sufficient to bring an action of ejectment. (s)

Tenthly. A demand made *after* or *before* the last day which the lessee had to pay the rent, in order to prevent a forfeiture, or off the land, will not be sufficient to defeat the estate. (a)

Eleventhly. If the clause of re-entry for nonpayment of rent be only *in case no sufficient distress be found upon the premises*, then at common law the landlord is bound to search every part of the premises. (b)

The *statute* 4 Geo. 2, c. 28, sect. 2, only applies where there is a clause of re-entry for non-payment of rent, and at least half a year's rent is in arrear and no sufficient distress for rent upon the premises, (c) and unless all those three circumstances concur, the landlord can only proceed for forfeiture at *common law*, as above. (c) But when they do concur, no demand is necessary, although required by the terms of the proviso; (d) and the advantage of proceeding under the statute is, that after a lapse of six calendar months from the time of execution executed, a Court of Equity cannot relieve the tenant, which, if the forfeiture has been at *common law*, such court might do at any time. (e)

Of obtaining a disclaimer.

Whenever it is doubtful whether a party in possession of an estate is so under a lease or hiring, which it may be difficult to prove affirmatively has expired or been determined, it is expedient either to obtain a complete immediate and unconditional *disclaimer*, so as by the occupier's *own act* to constitute his holding *adversely*, and enable the claimant immediately to adopt legal measures for the recovery of the possession; or if that cannot be effected, then without loss of time to serve a sufficient notice to quit.

To obtain and be able to prove a complete *disclaimer*, (f) the claimant, unless the occupier in the first instance absolutely disputes his title without qualification, should serve him with a notice of his claim and of his title, and requiring him to give up possession; or if he can establish any subsisting tenancy, then to produce his lease or agreement, or to state the particulars of

(s) *Anon.* 1 Vent. 248; *Little v. Heaton*, 2 Ld. Raym. 750; *Clarke v. Pywell*, 1 Salk. 259, S. C.; *Oates v. Brydon*, 3 Burr. 1896, 1897 (b).

(a) *Doe v. Wandlass*, 7 T. R. 117.

(b) *Ross v. King*, For. Rep. 19.

(c) *Doe v. Wandlass*, 7 T. R. 117; 1 Saund. 287 a, note 16.

(d) *Doe v. Alexander*, 2 Maule & S. 525; Lord Ellenborough, *diss.*

(e) Comyn's Landlord and Tenant, 493; *Doe v. Whitfield*, 3 Taunt. 402; *Bracebridge v. Buckley*, 2 Price's R. 200.

(f) What is or not a disclaimer, see ante, 287; *Doe v. Frowd*, 4 Bing. 557.

his holding, and to pay the arrear of rent. Supposing the occupier should thereupon set up a title in himself or a third person, and refuse to admit any right in the claimant, the disclaimer will be complete. (g) But if the occupier, without insisting on any adverse right in himself, say that the title is doubtful, and that he is willing to pay rent to the rightful owner, that is no disclaimer, (h) and the claimant should then file a bill to discover whether there is any subsisting lease, or should at once serve a proper notice to quit.

When the time of the year when the supposed tenancy commenced can be accurately ascertained, or the occupier himself has stated it, (i) then a notice to quit on that precise day, and served half a year before it, will suffice. But otherwise, what is termed a *current notice* should be *signed* by all parties who may be supposed to be landlord, or legally interested, and be *addressed* to and served upon the tenant and occupiers, and no legal proceedings should be commenced until at all events any supposed tenancy has thereby been determined. We have seen that a notice to quit, signed by one of several joint-tenants for himself and co-owners, is sufficient to determine the entire tenancy. (j) If there be a subscribing witness, he must afterwards be called to prove it, and therefore if the handwriting of the landlord be well known to the *two* persons, (who in prudence should serve the notice, for fear of the death of one,) it will be better not to have any subscribing witness, and it would suffice for the persons serving one original, at the same time to write their names on the duplicate original notice, and which might be produced and proved by either on the trial. Service of the notice at the residence of the immediate tenant, even on the very last day when the same ought to be served, and although he be absent, would suffice. (k) The forms of notices advisable to be given by a landlord or a tenant are subscribed. (l)

The rules governing notices to quit, in regard to the time when they should expire, have been considered on principle as applicable to notices to put an end to an agreement to let

Of notices to quit.
Notice to determine a composition for tithe.

(g) *Ante*, 482, note (f); *Doe dem. Calvert v. Frowd*, 4 Bing. 557.

(h) *Doe dem. Williams v. Pasquali*, Peak's R. 196.

(i) *Doe d. Digby*, 3 Campb. 215.

(j) *Ante*, 270; *Doe v. Summersett*, 1 B. & Adolph. 135, contra to *Doe dem. Fisher v. Cuthell*, 2 Smith's R. 83.

(k) *Doe dem. Neville v. Dunbar*, 1 Mood & M. 10.

(l) *Forms—Notices to Quit.*

Sir,—I hereby give you notice, and require you to quit and deliver up to me or my assigns, on the — day of — next, the possession of the messuage or dwelling-house, ("or rooms and apartments," or, "farm, lands and premises,") with the appurtenances, which you now hold, or claim to hold, of me, situate in the parish of —, in the county of —, [but without prejudice to any previous notice to quit, or to my im-

Notice to quit by a landlord to a tenant from year to year.

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the occupier of land retain and pay a composition for tithe instead of setting it out. (m) But the form of the notice given in the notes necessarily varies in some respects from the former. (n)

(m) *Wyburd v. Tuck*, 1 Bos. & Pul. 458. (n) See form, *infra*.

mediate right to recover the possession of the said premises.* Dated the — day of —, in the year of our Lord —.

Your's, &c. A. B.

To Mr. C. D., (*the occupier in possession, as a principal on his own account, or if it be doubtful who is tenant, "To Mr. C. D., or whom else it may concern."*)

The like, by an agent for the landlord.

Sir,—I do hereby, as the agent for and on behalf of your landlord, A. B., of —, give you notice and require you to quit and deliver up on the — day of — next, the possession of the messuage, &c. (as in last,) which you now hold, or claim to hold of the said A. B., situate, &c. (as above). Dated, &c., (as above.)

Your's, &c. E. F.,

Agent for the said A. B.

To Mr. C. D., &c. (as above.)

The like, by the landlord, where the commencement of the tenancy is doubtful.

Sir,—I hereby give you notice, and require you on the [*ut supra* on a named day] provided your supposed tenancy originally commenced at that time of the year, and if not then, that you quit and deliver up the possession of the said messuage, &c. (as above) at the end of the year of your supposed tenancy, which will expire next after the end of half a year from your being served with this notice; and at all events at the earliest time that I am by law entitled to require you to quit the same. Dated, &c. (as above.)

Your's, A. B.

To Mr. C. D., &c. (as above.)

The like, more general.

Sir,—I hereby give you notice to quit and deliver up the possession, &c. which you now hold, or claim to hold of me, situate, &c. at the end of the year of your supposed tenancy, which will expire next after the end of half a year from the time of your being served with this notice. Dated, &c.

Your's, &c. A. B.

To Mr. C. D., &c. (as above.)

Notice by a joint-tenant, to determine tenancy of a moiety.

Sir,—I hereby give you notice of my intention to determine on the — day of — next, the tenancy, or supposed tenancy, under which you now hold or claim to hold of me, one undivided moiety or half part, and whatever interest or share I have, or may have, of and in a certain messuage, &c. (as ante,) situate, &c. and at all events at the earliest time that I am entitled by law to determine your said tenancy, if any. Dated, &c.

Your's, &c., A. B.

To Mr. C. D., &c. (as *supra*.)

The like, by a tenant from year to year, of his intention to quit.

Sir,—I hereby give you notice of my intention to quit, and that I shall, on the — day of — next, quit and deliver up the possession of the messuage, &c., (as *supra*,) which I now occupy, or which you may insist I hold of you, situate, &c. (*id.*) Dated, &c.

To Mr. A. B.

Your's, &c. C. D.

The like, by an agent, to determine a composition for tithes.

Sir,—I hereby, as agent for and on behalf of A. B., of —, give you notice of his intention to determine, and that he will accordingly determine, and that he doth hereby determine, on the — day of — next, the agreement or understanding under which you hold and enjoy, or claim to hold and enjoy, or to take or to retain to your own use, (*or, "the composition payable by you for and in respect of,"*) all and singular the tithes of corn, &c. (*describing them,*) arising, growing, increasing, renewing, and happening in, upon, from, and out of all and every the several and respective farms, lands and premises, (*or, "in, upon, from and out of certain lands and premises in your occupation,"*) situate in the parish of — in the county of —, and within the bounds, limits, and titheable places thereof; and that the said tithes will, from and after the said — day of — next, be taken in kind: and you are hereby required, after that day, to set out and divide and render the same according to law, in cases when there is no subsisting agreement or composition relating to the same. Dated, &c.

To Mr. C. D.

Your's, &c. E. F.

* If the tenant's right to hold until the appointed day be certain, the words within the brackets are to be omitted.

We have shown the prudence, in some cases; of ascertaining the lessor's title, (o) and that all rent to a ground landlord and all taxes have been paid; and these precautions are still more necessary in taking lodgings, although furnished; though, if the tenant's goods be distrained for rent due to a landlord, the tenant may set off or deduct the amount, or sue his immediate lessor; (p) and unless the lease contain a clause that the rent shall cease in case the premises be consumed by fire, the tenant, although he may not be liable to rebuild, should

Sir,

Whereas you hold or occupy a certain messuage or tenement and premises, with the appurtenances, called or known by the name or sign of the —, situate, &c. under and by virtue of a memorandum of agreement, dated, &c., and whereby you agreed to quit and deliver up the said premises at any time thereafter, upon three months' notice for that purpose being given or left for you at the said premises, without any reference to the time of entry, and also to assign and deliver up to such person as your then landlords, A. B., C. D., and E. F., therein mentioned, should appoint, upon demand for that purpose (or otherwise upon your quitting the said premises,) all and every the licenses for carrying on the trade of a victualler on the same premises, upon being paid, or offered to be paid, for the time then to come therein respectively; and whereas the said A. B. is now deceased, and the subscribed parties are now entitled to and interested in the said premises; now therefore, we whose names are hereunto subscribed do hereby jointly and severally, according to our respective estates and interests of and in the said messuage or tenements and premises, hereby give you notice, and require you, in pursuance of your said agreement, to quit and deliver up the said premises to us, and each and every of us, and especially to the said I. K. (to whom the said premises have been duly demised for a long term of years, now subsisting, and whom we hereby appoint to receive possession of the said premises,) upon the 29th day of September now next ensuing, being upwards of three months from the time of your being served herewith, or in case, from any unforeseen circumstance, we are not authorized to require you to quit the said premises on that day, then we hereby give you notice and require you to quit the same at the earliest time that we or any or either of us can or may by law require you to quit the same; and we hereby further give you notice that the said I. K. will, at the time aforesaid, pay to you for the time to come in all and every the licenses for carrying on the trade of a victualler on the said premises, and that we hereby demand and require you, at the time aforesaid, to assign and deliver to the said I. K. all and every the said licenses for carrying on the trade of a victualler on the said premises. In witness whereof we have hereunto subscribed our respective hands this — day of —, A. D. 1833.

Witness to the signatures }
of the said }
Witness to the signature }
of the said }
Sir,

(Signatures here in due order.)

Whereas by a certain indenture of lease, bearing date the — day of —, which was in the year of our Lord —, and made or mentioned to be made between me, A. B. of —, of the one part, and you, C. D. of —, of the other part, I, the said A. B., for the considerations therein mentioned, did demise and lease to you the said C. D., your executors, administrators, and assigns, a certain messuage, tenement and premises, to hold the same to you the said C. D., your executors, administrators, and assigns, from thenceforth for and during and unto the full end and term of — years from thence next ensuing, and determinable, nevertheless, as therein and hereinafter is mentioned, and in which said indenture of lease is contained a proviso or condition that if, &c. (reciting the proviso); now I, the said A. B., in pursuance of the power given me by the aforesaid proviso or condition, do hereby give you notice, that it is my mind and intention to avoid, and I hereby give notice that I do hereby avoid, the said recited indenture of lease, at the end of the first seven years of the said term of — years thereby granted. Dated, &c.

Notice by a
landlord to de-
termine a lease
at the end of the
first seven years.

To Mr. C. D.

Your's, &c. A. B.

(o) *Ante*, 472, n. (d).
(p) *Sapsford v. Fletcher*, 4 Term Rep. 511; *Exall v. Partridge*, 8 T. R. 308;

Moore v. Pyke, 11 East, 52; *Burnett v. Lynch*, 5 Bar. & Cres. 589, 789.

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nevertheless insure a sum sufficient to form a fund out of which to pay the rent, which even in equity he will continue liable to pay, although the lessor neglect to rebuild.(*r*) We have also suggested the covenants and qualifications it is expedient for the tenant to require in the lease. If his landlord be vexatiously disposed to distrain the instant rent has become due, the law allows him a particular protection, that of producing the amount of rent in cash (not exceeding 40*s.* in silver) on the day the rent is payable, just before sunset, in the presence of one or more witnesses, and declaring to them that he is ready to pay so much for rent then due, and they should count the money; and this, although neither the landlord nor any one on his behalf be present, and though in general a tender must be to the creditor in person, will be a *sufficient tender*, and be a bar to any distress or action, unless subsequently the landlord demand the amount, and the tenant then neglect or refuse to pay. In all other respects the tenant must at all times strictly observe the covenants, or, unless it be expressly otherwise provided, he may be incessantly harassed with vexatious actions for trifling breaches. He must also observe the directions of the Game Act, and unless he have express permission, must not sport or allow others to do so.(*s*) The *precautionary measures* to be observed by a tenant, in case he should be threatened with proceedings to recover the estate by an adverse claimant, will be considered in the next chapter.(*t*)

5. Precaution-
ary measures
relating to Car-
riers.

5. Another precautionary measure is that by *Carriers*, who, it has been long held, may, by giving a *proper notice*, *qualify* their contract, and limit or entirely get rid of their general liability for losses unless paid a reasonable compensation for trouble and risk.(*a*) Since the late act, 11 Geo. 4 and 1 Will. 4. c. 68, the liability of carriers is however regulated by that act, though we will shortly notice the *previous decisions*. It was held that a carrier's notice will not protect him from *his own individual misfeasance, gross negligence, or contravention* of an act of parliament, as of the portage act, (*b*) and by a

(*r*) *Leeds v. Choetham*, 1 Simons, 146.

(*s*) 1 & 2 W. 4, c. 32, sect. 12.

(*t*) 3 Bar. & Adolp. 408, 409, as to *Notice of Proceedings*.

(*a*) Carriers were allowed by law power to limit or entirely determine; *Cloy v. Willan*, 1 H. Bla. 298; *Isell v. Mountain*, 4 East, 374; *Nicholson v. Willan*, 5 East, 507; *Wynne v. Raikes*, 2 Smith, 102; *Richardson v. Sewell*, Id. 205; *Clarke v. Gray*, Id. 623; *Moving v. Todd*, 1 Stark. R. 72; 4 Campb. 225, S. C.

(*b*) See instances of such misfeasance or gross negligence, *Birkett v. Willan*, 2 Bar. & Ald. 356; *Duff and others v. Budd*, 6 Moore, 469; *Rowe v. Young*, 2 Bro. & Bing. 177; *Batson v. Donovan*, 4 B. & Ald. 21; *Garnett v. Willan*, 5 Bar. & Ald. 53; *Sleat v. Fagg*, Id. 343; *Wright v. Snell*, Id. 350; *Boddenham v. Bennett*, 4 Price, 31; *Lowe v. Booth*, 13 Price, 329; *Smith v. Horne*, 2 J. B. Moore, 18; 8 Taunt. 144, S. C.

clause in the recent act the same rule is enforced and extended to loss by felonious acts of the carrier's servants.(c)

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Where a carrier gave notice by printed proposals that he would not be answerable for certain valuable goods, if lost, "of *more than the value of a specified sum*, unless entered and paid for as such," and goods of that description were delivered to him by *A.*, who knew the conditions but concealed the value, and paid no more than the ordinary price of carriage and booking; it was held that the carrier was neither liable to the extent of the sum specified, nor to repay the price actually paid for the carriage or booking. (d)

It was held that the *notice* must be *expressly or impliedly* communicated to every individual to be affected by it; but when a notice is given under the recent act, it is expressly provided, that all persons shall be affected by the same, without proof of actual knowledge. (e) One usual mode was, to stick up boards with the notice printed upon them, in large characters, at the coach offices and warehouses, or places where the goods were received for carriage, and at each *termini* of the journey. But it was held that this alone would not suffice, without proof that the party sending or to receive the goods, or his agent, had actually read such notice, or that it has been pointed out or its terms stated to him. The notice must have been brought home to such party, or the carrier would continue liable, as if no notice had been given. (f) However, the notice to a vendor or a principal was considered equivalent to a notice to the vendee or agent, and *vice versa*. (g) It was not sufficient to show that a notice was exhibited in the carrier's office, where

(c) 11 Geo. 4 and 1 W. 4, c. 68, s. 8, *post*, 488, 489, in notes.

(d) *Clay v. Willan and others*, 1 H. Bla. 298. The notice was thus: "Willan and Co. humbly beg leave to inform their friends and the public that cash, plate, jewels, writings, or any such kind of valuable articles, they will not be accountable for if lost of more than 5*l.* value, unless entered as such, and a penny insurance paid for each pound value, when delivered to the book-keeper or other person in trust to be conveyed by any carriage that runs at the above inn."

Form of carrier's notice before the stat. 11 Geo. 4 and 1 Wm. 4, c. 68.

The same rule was established in *Nicholson v. Willan*, 5 East's R. 507, where the notice was as follows:

"Take notice, that the proprietors of coaches transacting business at this office will not be accountable for any passenger's luggage, money, plate, jewels, watches, writings, goods, or any package whatever (if lost or damaged), above the value of 5*l.*, unless insured and paid for at the time of delivery, and demanded in one month after such damage was sustained." See also a similar decision on a carrier's notice of this description, *Tyell v. Mountain*, 4 East's R. 370; and see a *wharfinger's* notice that he would not be responsible for loss by fire, *Maving v. Todd*, 4 Campb. 225; 1 Stark. R. 72, S. C.; but which seemed unnecessary, as *wharfingers* and carriers are not in general liable for loss occasioned by accidental fire after they have arrived, and are in their possession rather as *warehousemen* than carriers; *Garride v. The Trent Navigation*, 4 Term R. 581.

Another form of carrier's notice.

(e) 11 Geo. 4 and 1 Wm. 4, c. 68, *Mayhew v. Eames*, 3 B. & Cres. 601. s. 2. *post*, 489, in notes.

(g) *Maving v. Todd*, 1 Stark. R. 72;

(f) *Davis v. Willan*, 2 Stark. R. 279; 4 Campb. 225, S. C.

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the goods were delivered by a porter, although the porter could read and had seen the notice, if in fact he never did read it; for the carrier should have requested the porter to read it, or state the contents or purport to him. (h) The notice must always have been large and easily legible, especially in the important parts. (i) Still less would notices given at the *termini* of a journey be sufficient, when the goods were delivered at an intermediate place. (k) It was held that notices in the *Gazette* might be read in evidence on the behalf of a carrier, but that they were very weak and inadequate notices, unless it were shown that the consignor or consignee was in the constant habit of reading the same. (l) With respect to notice in a newspaper, that was considered no evidence of notice, unless it were shown that the party was in the habit of reading that paper; (m) and even proof that he had for three years taken in a newspaper in which once a week the notice was advertised, would not always satisfy a jury that the party was aware of the notice, because, as was observed, few people read all the advertisements in a newspaper. (n) And it was held, that evidence of the general notoriety of the fact of notice having been given, and still less that all carriers usually had given notice, would not be sufficient where there was no other reasonable ground upon which to infer that a particular party had seen or heard of the particular notice. (o) And if a carrier had given two notices, limiting his responsibility, but varying in their terms, he was bound by that which was the least beneficial to himself. (p)

The present mode of limiting a carrier's liability under 11 G. 4 and 1 W. 4, c. 68. (q)

But now the law regulating and limiting the common law liability of carriers, is fixed by the recent act 11 Geo. 4 and 1 Wm. 4, c. 68, which protects carriers from liability in case of the loss of certain specified articles, exceeding the value of *ten pounds*, (excepting loss by the felony of the carrier's servants, or his own personal default,) *unless the party delivering the*

(h) *Jones v. Williams*, 2 Stark. 52; *Davis v. Willan*, Id. 279.

(i) *Clayton v. Hunt*, 3 Campb. 27; *Butler v. Hearne*, 2 Campb. 415.

(k) *Gouger v. Jolly*, Holt's C. N. P. 317.

(l) *Leeson v. Holt*, 1 Stark. R. 186; *Jenkins v. Blizzard*, Id. 418; *Milner v. Baker*, 2 Stark. 255; *Rowley v. Horne*, 3 Bing. 3.

(m) Id. *ibid.*

(n) *Rowley v. Horne*, 3 Bing. 2.

(o) *Semble*, *Gorham v. Thompson*, Peake's Rep. 42.

(p) *Munn v. Baker*, 2 Stark. R. 255.

(q) The statute 11 Geo. 4 and 1 Wm. 4, c. 68. s. 1, enacts, "that no mail contractor, stage coach proprietor, or other common carrier by land, for hire, shall be liable for the loss of or injury to any arti-

cle of property of the descriptions following; that is to say, gold or silver coin, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, English, Scotch or Irish bank bills or notes, or of any other bank; orders, notes or securities for payment of money; English or foreign stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials; furs or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the per-

goods declare the value and offer to pay, if required, an extra charge for carriage, but requires that the notice of the in-

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son of any passenger in any mail or stage coach, or other public conveyance, *when the value of such article or articles, or property aforesaid, contained in such parcel or package, shall exceed the sum of ten pounds, unless at the time of delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her or their book-keeper, coachman or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles, or property, shall have been declared by the person or persons sending or delivering the same, and such increased charge as herein-after mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.*

Sect. 2 enacts, that when any parcel containing any of the said articles shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be *lawful* for such mail contractors, stage coach proprietors, and other common carriers, to demand and receive an increased rate of charge, *to be notified by some notice affixed, in legible characters, in some public and conspicuous part of the office, warehouse or other receiving house, where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid, at such office, shall be bound by such notice, without further proof of the same having come to their knowledge.*

Sect. 3 enacts, that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the persons receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, *sign a receipt* for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge.

Sect. 4 enacts, that *no public notice or declaration heretofore made or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage coach proprietors, and other common carriers as aforesaid, shall, from and after 1st Sept. A.D. 1831, be liable as at the common law, to answer for the loss of any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability notwithstanding.*

Sect. 5 enacts, that for the purposes of this act, every office, warehouse or receiving house, which shall be used or appointed by any mail contractor or stage coach proprietor, or other *such common carrier* as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse or office of such mail contractor, stage coach proprietor or other common carrier, and that *any one or more of such mail contractors, stage coach proprietors or common carrier, shall be liable to be sued by his, her or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package or person, shall abate for the want of joining any coproprietor or copartner in such mail, stage coach, or other public conveyance by land, for hire as aforesaid.*

Sect. 6 provides, that nothing in this act contained shall extend or be construed to annul, or in anywise affect any *special contract* between such mail contractor, stage coach proprietor or common carrier, and any other parties, for the conveyance of goods and merchandizes.

Sect. 7 provides, that where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage, shall also be entitled to recover back *such increased charges* so paid as aforesaid, in addition to the value of such parcel or package.

Sect. 8 provides, that nothing in this act shall be deemed to protect any mail contractor, stage coach proprietor or other common carrier for hire, from liability to

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creased charges that may be required shall be affixed in the office, and of which, when so affixed, every person is bound to take notice, but it provides that the act shall not affect *special contracts*. It then declares that all *other notices* then already or thereafter to be given shall not protect a carrier from liability, excepting when so given under the terms of the act, viz. when certain specified articles exceed the value of 10*l.* and when such notice has been duly affixed; but as to any *other goods*, or even the specified articles, when *under* the value of 10*l.*, *carriers cannot by any notice protect themselves from the ancient common law liability*. The act however allows effect to any *express special contract* made with a carrier, and according to the terms of that contract. The statute then authorizes an action for loss against any one proprietor, and excludes a plea in abatement of nonjoinder, and provides that if loss ensue, then not only the declared value, but also the money paid for extra insurance shall be recoverable; but entitles the carrier to require proof of the value of the package lost, and authorizes him to pay money into Court.

Since this act, carriers requiring an increased charge usually affix in their offices and circulate cards giving notice as in the forms in the notes.(s) It is settled by prior decisions that no

answer for the loss or injury to any goods or articles whatsoever, arising from the *felonious acts* of any coachman, guard, book-keeper, porter or other servant, in his or their employ, nor to protect any such coachman, guard, book-keeper or other servant, from liability from any loss or injury occasioned by his or their *own personal neglect* or misconduct.

Sect. 9 provides and enacts, that such mail contractors, stage coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require from the party suing, in respect of any loss or injury, *proof of the actual value* of the contents by the ordinary legal evi-

dence, and that the mail contractors, stage coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges, as before mentioned.

Sect. 10 enacts, that in all actions to be brought against any such mail contractor, stage coach proprietor, or other common carrier as aforesaid, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into Court, in the same manner and with the same effect as money may be paid into Court in any other action.

Sect. 11 declares the act to be public.

Form of public notice at a wagon office, stating what extra charges are required when certain articles sent are of more than 10*l.* value.

(s) In pursuance of an Act of Parliament passed in the first year of the reign of William the Fourth, cap. 68, intituled, "An Act for the more effectual protection of Mail Contractors, Stage Coach Proprietors, and other Common Carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof,"

Notice is hereby given, That for any package to be conveyed for hire, or to accompany the person of any passenger, containing gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the Bank of England, Scotland, and Ireland, respectively, or of any other bank in Great Britain or Ireland; orders, notes, or securities for payment of money, English or Foreign; stamps, maps, writings, title-deeds, paintings, engravings, pictures; gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured

action can be supported against the postmaster-general for the loss of bills or bank-notes stolen out of letters put into the post-office; (t) and therefore it is a proper precaution to remit such documents in halves by different conveyances. (u)

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6. Carriers have not a *general lien* for the carriage of successive packages, unless they expressly so stipulate, and communicate the same to each customer, and he acquiesce; consequently

6. Stipulations respecting liens and powers of sale.

state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, to a greater amount in value than Ten Pounds, the increased charge over and above the common and ordinary charge for carriage is as follows:—

| For any distance not exceeding | For each Pound Sterling in value, |
|--------------------------------|-----------------------------------|
| 50 miles | the sum of One Halfpenny. |
| 75 miles | Three Farthings. |
| 100 miles | One Penny. |
| 150 miles | Three Halfpence. |
| 200 miles | Seven Farthings. |
| 250 miles | Two Pence. |

NOTICE.—In pursuance of an Act of Parliament passed in the first year of the reign of his Majesty King William the Fourth, cap. 68, intituled, “An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other Common Carriers for hire, against the loss of or injury to Parcels or Packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the Owners thereof,”—

Another form of waggon carrier's notice on a card.

Notice is hereby given, That for any package or luggage containing gold or silver coin of this realm, or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the Banks of England, Scotland, and Ireland, respectively, or of any other Bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or Foreign stamps, maps, writings, title-deeds, engravings, gold or silver plate, or plated articles, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, to a greater amount in value than Ten Pounds, the increased charge, over and above the common and ordinary charge for carriage, is after the rate of 12s. 6d. for every hundred pounds declared value: for any package, containing china, pictures, or paintings, an increased charge, after the rate of 1l. for every 100l. declared value: for any package, containing glass, an increased charge, after the rate of 15l. for every 100l. declared value: and the glass to be packed in the presence of the clerk, agent, or other servant of the carrier.

Notice is also hereby given, That any person or persons sending *aqua fortis*, spirit of vitriol, or any other ardent spirits, must write on the direction the contents, and make the same known to the book-keeper at the time of delivery; otherwise, if any damage shall arise therefrom, the proprietors of the waggons will look to the person sending the same for indemnification.—All goods which shall be delivered for the purpose of being carried, will be considered as general liens, and subject not only to the money due for the carriage of such particular goods, but also to the general balance due from the respective owners to the proprietor of the waggons.—Goods suffered to remain in either of his warehouses more than forty-eight hours after their arrival, will be at the sole risk of the respective owners thereof.—All goods directed to be left till called for, will be sold at the expiration of One Year, to defray the expenses chargeable thereon.—Claims for damage must be made within Three Days after the delivery of the goods, or the proprietor will not be answerable for the same.—Loss by leakage of casks will not be accounted for.—The proprietor will not be accountable for damage sustained by carriages of any description, nor will he undertake the conveyance of any horse or other animal; and should any horse or other animal be entrusted to the drivers of his waggons, it must be at the risk of the persons entrusting it.

[N. B.—The other side of the card related to the carriage of other goods without extra charge.]

(t) *Lane v. Cotton*, 1 Salk. 17; *Whitfield v. Lord Le Despencer*, Cowp. 754.

(u) See the consequences of loss, and

of different parties being in possession of the halves, *Chitty on Bills*, 8 ed. 285, 286.

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it is advisable not only to advertise a public notice stipulating for such a lien, but also to make an express and particular contract to secure such lien. (x) So in any other case, where the established law or usage of trade will not clearly give a *general lien*, it is advisable not only to give a *public notice* in print or writing "that the goods of all persons dealing with the party in his trade, and whether belonging to the customer or to any other person or persons, (y) or in which he is in any respect interested, whether for a lien or otherwise, or which may be in the possession of the advertiser, or whether going to or from his manufactory or premises, must be understood to be and will be subject to a general lien for all monies due to the advertiser, as well from the customer as from any person or persons entitled to or interested in such goods." (z) It has been held that any person afterwards dealing with a party who has given such public notice, and having knowledge of the same, must be taken to have assented to the terms and *impliedly* to have entered into an agreement to the same effect. (a) But the most prudent course is for a trader always to have evidence of an express contract with each customer to the above effect. In general a lien cannot be *sold* (except perhaps in cases of an *advance of money on the deposit of perishable commodities* (b)). Therefore carriers and all persons entitled to a general or even a particular lien, should *expressly stipulate* for a power to sell the same, and prescribe the terms of sale, in case the lien be not satisfied. (c) For without such express power the party

(x) *Wright v. Snell*, 5 Bar. & Ald. 350; *Rushford v. Hadfield*, 16 East, 519; 2 Smith, 634; 7 East, 224; 3 Smith, 221. See *id.* the form of a carrier's notice to subject goods to a general lien; and see a form in *Kirkman v. Shawcross*, 6 T. R. 14, which may be readily applied.

(y) It was held that because the notice did not extend to "*goods to whomsoever belonging*," the lien did not extend to affect goods addressed to a person as *factor*, which evinces the expediency of introducing words to that effect, *Wright v. Snell*, 5 B. & Ald. 350.

(z) See a form, *infra*, note (c), and in *Kirkman v. Shawcross*, 6 T. R. 14; and

see *Wright v. Snell*, 5 Bar. & Ald. 350, as to the proper contents of such a notice.

(a) *Kirkman v. Shawcross*, 6 T. R. 14.

(b) *Pothonier v. Dawson*, Holt's C.N.P. 383. The local customs of London and Exeter authorizing an innkeeper to sell a horse for his keep constitute an exception to this rule, *Jones v. Thurlow*, 8 Mod. 172; Bac. Ab. Inns, and Burn's J. Alehouses, XVII. But that custom only prevails in those places, and not elsewhere, *Id. ibid.*; *Jones v. Pearle*, 1 Stra. 557. It is submitted that a *general power of selling liens* under prescribed rules, or by permission of some constituted authority, ought to be enacted.

Suggested form of agreement stipulating for a lien and for a power of sale.

(c) Memorandum.—That it is this day agreed between A. B. of, &c. and C. D. of, &c. that certain goods [naming or describing them] deposited by the said C. D. with A. B. as a security for the repayment of £—— and interest on, &c. shall be held by the said A. B. as a lien and security for such repayment; and that unless the said money and interest be repaid by the said C. D. on that day, the said A. B. may, after ten days' notice in writing of his intention so to do, sell the said goods or any part thereof, either by public auction or private sale, for the best price that may be bid for the same, either in one or several lots; and thereout pay and satisfy the said money and interest, and all charges for warehouse-room, insurance, and other reasonable ex-

holding the lien has no right, either at law or in equity, to sell the commodity, (d) though we hear every day of public notices of such sales. If the commodity be of considerable value, especially if it be of a perishable nature, and the debt be also considerable, then if express authority for a sale has not been, nor can be obtained, it may be expedient, even at the risk of an action of trover, after notice of the intention to do so, to sell; and in case the party be sued for that conversion, then to bring a cross action, and move to set off one judgment against the other; but still the party so proceeding will have to pay the costs of the action against him. (e)

In cases of express or implied *contracts* it frequently occurs that, in order to *perfect* the right, it is incumbent on the party who claims the benefit of the contract to secure legal evidence of his having taken certain *preliminary steps*.

Precautionary proceedings in other cases of contract.

7. Whenever a complete right to claim the payment of a sum of money or the delivery of goods, or the performance of some other act, which another engaged to pay, deliver, or perform, depends on the *previous* or *concurrent* performance of another act by the person in whose favour the contract was made, he must be prepared to prove his compliance or performance, or some excuse for his omission, before he can call on the other party to perform his engagement, or sue for the breach. The thing to be

7. The mode of performing a condition precedent.

penses; or the said A. B. may mortgage or deposit the said goods or any part thereof to or with any person or persons whatever, in order to obtain a sum sufficient to repay the said money and interest and all reasonable charges and expenses; and in the meantime the said C. D. is to incur all risk of fire or loss, neither of which are to prejudice or suspend the said A. B.'s right to sue for or recover the said money and interest of the said, &c. Dated this — day of —, A.D. 1833.

A. B.
C. D.

[N. B.—If the object of the agreement be of 20*l.* value, or upwards, and not relating to the sale of goods, it must be stamped with an agreement stamp.]

Memorandum.—It is agreed between A. B. of, &c., calico printer, &c., and C. D. of, &c. that the said A. B. shall at all times hereafter have a general lien upon and right to all goods and property whatsoever that shall or may be in the possession of the said A. B., or be coming to or going from him or his premises, for or on the account of the said C. D., when such goods shall belong or shall have belonged to the said C. D. or to him or any other person or persons, or when he has or hath had any right, interest, authority, or claim to or lien upon or in relation to such goods or property; and that such *general lien* shall at all times constitute and be a security to the said A. B. and his representatives and assigns, and to any new partner or partners, for all monies that may be due or become due from the said C. D. to the said A. B. or to him and such other parties in any way respecting the trade or business of the said A. B. or the said C. D. or on any other account whatever; and that if at any time the sum of £—, or upwards, shall be due or growing due from the said C. D. to the said A. B. it shall and may be lawful for the said A. B. after — days' notice, &c. [power to sell, as in the last form.]

The like, for a general lien and power of sale.

(d) *Ante*, 492, note (b).

(e) But this proceeding will require particular consideration in each case be-

fore a party holding a lien should thus expose himself to an action.

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first done is termed in law a *condition precedent*, and which are as various as contracts themselves, and always are *substantially* governed by the bargain and intention between the parties, though there are certain technical rules which *assist* in their construction. (f) Good sense and a little consideration of what properly in each transaction *ought* to be *first* done by each party in any case, according to the *intention* of the parties, will enable almost any person, without any knowledge of technical rules of law, to decide what it is incumbent on him to do, and if he be wisely disposed to avoid litigation, he will do rather more than the strict law would require. It very generally occurs that the party ultimately to be the plaintiff in an action on the contract *must be prepared to show* that he has actually *performed* or observed the act to be first done or omitted by him, or at least done all that it was incumbent on him to execute *towards* the completion of that act, and that the other party has by his conduct *discharged* him from doing more, or *dispensed* with and *excused* any further performance. (g)

The familiar instances of the former are—if *B.* promise *A.* to pay him a sum of money, or to do any other act “*provided*” or “*on condition*” that *A.* first perform another act, *A.* cannot sue *B.* without averring and proving that he did or offered to do the act first to be performed. As if *B.* promise to deliver goods to *A.* for such a price, *A.* cannot sue *B.* for the nondelivery without showing that he *offered*, or at least was ready to pay, and that *B.* had *notice* of such readiness, and was *requested* by *A.* to deliver the goods, it being incumbent in such case on *A.* to show his readiness to pay, and to go to *B.* and demand the delivery, and not on *B.* to carry the goods and tender them to *A.* (h) So if the promise were to pay money in consideration that the plaintiff would execute a release, it must be shown that such a release was executed or acceptance of it refused; (i) or rather that a draft was sent to the defendant for his approval or alteration, and that he refused to return it to be engrossed, or declared he would not receive it, or do what he engaged to perform. (k) It has been supposed that where a vendor has delivered an abstract showing a proper title, and such title has been made out by proper deeds and documents, it is incumbent on the

(f) See the *older* rules and decisions collected in Comyn's Digest, tit. Pleader, and the *more modern* cases, 1 Chitty on Pleading, 361 to 365.

(g) *Jones v. Barclay*, 2 Dougl. 684.

(h) *Rawson v. Johnson*, 1 East, 203;

Back v. Owen, 5 T. R. 409.

(i) *Collins v. Gibbs*, 2 Burr. 899; *Smith v. Wilson*, 8 East, 437.

(k) *Jones v. Barclay*, Dougl. 684; *Phillips v. Fielding*, 2 H. Bla. 125; *Smith v. Wilson*, 8 East, 443.

purchaser to tender a *conveyance* to the vendor; but this is not essential, and it would suffice to tender and deliver a *draft* of a proper conveyance to the vendor for his approbation previous to engrossment; and then, if he refuse to approve and return it for engrossment, it will be unnecessary to incur the expense of engrossment. (l)

It is essential, independently of litigation, well to consider what must be done by a party when his opponent refuses to complete the contract, and dispenses with the necessity for the intended plaintiff doing any more on his part; for in practice frequently much unnecessary and useless trouble and expense are incurred. Thus, if immediately after a person has agreed to purchase an estate, he should explicitly declare that he will not complete his contract, it will be quite unnecessary for the vendor even to send an abstract of his title, and still less to tender a formal conveyance executed, or ready to be, or even a draft executed by him. (m) But if the evidence of such positive declaration be doubtful, then an abstract should be delivered within a reasonable time; and then, in case it be returned, or if the draft of a conveyance be not sent by the purchaser to the vendor for his approbation, it will suffice for the vendor to serve a notice of his readiness to convey, and to appoint a named day for that purpose; and if such notice be not attended to, then the vendor has a perfect right of action or to file a bill for specific performance without executing any conveyance. So where a vendor or party has to execute a deed as a condition precedent, it is not absolutely necessary to execute it, but it suffices to send a draft purporting that all proper persons will be parties, (n) and accompanied with a request for the other party to peruse and approve it by a named day: and if the latter neglect to return it, there will be no legal necessity for engrossing or executing a stamped copy, especially if the party declare he will not complete or pay. (o) But in all these cases, where the complainant stops short in the actual full performance of the condition precedent, he must be well assured that he can prove that the other party either *prevented* his performance or *rendered it unnecessary* by his neglect, or that, in

(l) Sugden's V. & P. 8th ed. 231.

(m) *Seward v. Willock*, 5 East, 198; *Lowndes v. Bray*, Sittings after T. T. 1810, 1 Esp. R. 189; *Duke of St. Alban's v. Shore*, 1 H. Bla. 270; Sugd. V. & P. 8 ed. 233.

(n) When it is essential to show, in an

action for not accepting a lease, that all persons having any interest were parties in the lease or deed tendered, see *Rumball v. Wright*, 1 Car. & P. 589.

(o) *Jones v. Barclay*, Dougl. 684, 688; 1 Saund. 320, note 4; *Smith v. Wilson*, 8 East, 443.

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the language of the law, he *discharged* the plaintiff from performance on his part of the condition precedent. (p)

8. When a notice is requisite or expedient in cases of contract.

8. With respect to the necessity for giving a *Notice* or making a *request*, the rules of law are most evidently founded on good sense and so as to accord with the intention of the parties. The giving notice in certain cases obviously is in the nature of a condition precedent to the right to call on the other party for the performance of his engagement, whether his contract were express or implied. Thus in the familiar instance of bills of exchange and promissory notes, the implied contract of an indorser is, that he will pay the bill or note provided it be not paid on presentment at maturity by the acceptor or maker, (being the party *primarily* liable,) and provided that he (the indorser) has due *notice* of the dishonour, and without which he is discharged from all liability; consequently, it is essential for the holder to be prepared to prove affirmatively that *such notice was given*, (q) or some facts dispensing with such notice. (r). Whenever the defendant's liability to perform an act depends on another occurrence which is *best known* to the *plaintiff*, and of which the defendant is not legally bound to take notice, the plaintiff must prove that due notice was in fact given. (s) So in cases of insurances on ships, a *notice of abandonment* is frequently necessary to enable the assured plaintiff to proceed as for a total loss when something remains to be saved, in relation to which, upon notice, the insurers might themselves take their own measures. To avoid doubt or ambiguity in the terms of the notice, it may be advisable to give it *in writing*, (q) and to preserve evidence of its delivery, as in the case of notices

(p) *Hotham v. E. I. Company*, 1 T. R. 5 Taunt. 30; *Ferry v. Williams*, 8 Taunt. 638; *Jones v. Barclay*, Dougl. 684, 687, 70; *Smith v. Wilson*, 8 East, 443. 688; Co. Lit. 206 (b); *Bowes v. Howe*,

Notice that corn bought is ready for delivery, and request to take away the same, or that it will be resold.*

(q) Sir, Chingford, Essex.
Whereas on the — day of —, A. D. — last, you agreed with me to purchase and to fetch away from my farm, situate at —, twenty quarters of certain wheat, as soon as the same should have been threshed and dressed and ready for delivery, and to pay for the same £ — per quarter; now I hereby give you notice that the said quantity of wheat has been threshed and dressed, and hath been and is ready for delivery to you pursuant to such bargain, and I hereby request you on or before the — day of — instant, to send for and fetch away the said quantity of wheat and to pay for the same, or I shall immediately afterwards re-sell the same and commence an action against you to recover the loss, if any, upon such re-sale, and all expenses and damages for your breach of contract. Dated this — day of —, A. D.
To Mr. C. D. at —. Your's, &c. A. B."

(r) *Rushton v. Aspinall*, Dougl. 679.

(s) *Lundie v. Robertson*, 7 East, 231.

* *Langfort v. Administrators of Tiler*, 1 Salk. 113; but see *Greaves v. Ashlin*, 3 Campb. 426.

of the dishonour of a bill. The form of the notice may be as subscribed, but it must necessarily vary in its terms according to the circumstances of each case. (t) So, in order to entitle a party to insist upon a strict and exact performance of a contract on the fixed day for completing it, and *a fortiori* to retain a deposit as forfeited, a reasonable notice must be given of the intention to insist on precise performance, or he will be considered as having waived such strict right. (u) So if a lessee or a purchaser be sued for the recovery of the estate, and he have a remedy over against a third person, upon a covenant for quiet enjoyment, it is expedient (although not absolutely necessary) to give the latter notice of the proceeding, referring to such covenant; but that proceeding will be more properly considered in the next chapter. (x)

9. So with respect to the necessity for a *Request*, it depends on the express or implied stipulation of the parties; thus if *B.* sell to *A.* a horse, to be paid for on delivery, *A.*, in an action for the non-delivery of the horse, must aver and prove a *previous request* to *B.* to deliver the same; (y) or it must be shown that *B.* has incapacitated himself from performing his contract, as that he has resold and delivered the horse to another person. (z) So on a general promise to marry, it is necessary to show a request to marry, or a dispensation by the parties marrying another person, or absolutely refusing to marry at any time. (a)

9. When a request or demand is necessary or advisable in case of contracts.

In general when a debt exists payable immediately, the law does not require any demand or request to pay it before the commencement of an action, (b) and it is the legal duty of the debtor to find out and pay his creditor; and this doctrine extends even to a negotiable bill of exchange, though the acceptor may not know who is the holder, and, consequently, an action may be commenced against him without even tendering the bill for payment. (c) But when, by the express terms of the contract, a *previous demand* is necessary, it must be made; and at all events, unless the debtor be about to abscond, the

(t) See the form, *ante*, 496, note (q); *Bushon v. Aspinall*, Dougl. 679, 680; *Cutler v. Southern*, 1 Saund. 117; Com. Dig. Pleader, C. 73; 1 Chitty's Pleading, 360 to 362.

(u) *Carpenter v. Blandford*, 8 Bar. & Green. 575.

(x) *Smith v. Compton*, 3 Bar. & Adolp. 407; and see 3 Term R. 374.

(y) *Back v. Owen*, 5 T. R. 409; *Rawson*

v. Johnson, 1 East, 204.

(z) *Bowdell v. Parsons*, 10 East, 359; *Amory v. Brodrick*, 5 Bar. & Ald. 712.

(a) *Seymour v. Gartside*, 2 Dow. & Ry. 55; *ante*, 57, note (n), and 438, note (e).

(b) *Birks v. Trippett*, 1 Saund. 33; *Capp v. Lancaster*, Cro. Eliz. 548.

(c) *Id. ib.*; *Wegersloffe v. Keene*, 1 Stra. 222; Chitty on Bills, 8th edit. 391, 392; *sed quare*, see suggestions, *id. ib.*

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courts would censure the commencement of an action without previous request.

A *request*, like a notice, may as well be *in writing* and in the subscribed form, varying, however, necessarily according to the circumstances of each case. (*d*)

Demand or re-
quest to *account*
or to pay, &c.

Before the commencement of an action at law or filing a bill in equity *for an account* against a partner, or a factor, or agent, it is expedient, if not necessary, to demand *an account*; such a previous demand is essential with regard to costs in equity. In general, upon a bill in equity praying nothing but a discovery, it has been held that the defendant is entitled to costs, and those as between attorney and client. (*e*) But Mr. Justice Buller thought the rule thus laid down was too general, and was of opinion that if the plaintiff is entitled to the prayed discovery, and goes *first* to the defendant to ask for the accounts he has in justice a right to, if the defendant refuse, and the plaintiff is thereby compelled to file a bill for a discovery, he ought not to have the costs thus vexatiously occasioned by his own obstinate resistance of just disclosure; but that if the plaintiff *first* files his bill without trying to get the discovery in that way in which men acting with each other *ought* first to ask their rights, he ought to pay costs. (*f*) In a case at law, the counsel complained of the hardship of the rule, that a plaintiff in equity should be obliged to pay the costs of a discovery, upon which Lord Kenyon observed that he had once

1 May, 1833.

Suggested form
of a request to
execute a
counterpart of a
lease, &c.

(*d*) Sir,—I beg to refer you to the agreement between us of the — day of — last, by which you agreed to accept from me a lease of the farm therein mentioned, upon certain terms therein specified. You will herewith receive the *draft* of a proper lease prepared by Mr. —, my solicitor, in conformity, as I am advised, in all respects with the terms of the said agreement, and I request your immediate perusal and approbation, or if you should think that the terms of the draft ought to be altered in any respect, then I request you immediately to introduce such alterations in the draft, and if they should be proper or reasonable I will forthwith adopt the same or otherwise correspond further with you. But I positively require you to return the draft approved or altered on or before the — day of —, so that the same may be engrossed and the lease and counterpart executed on the — day of — next, or I shall be under the necessity of immediately commencing legal proceedings against you.

To Mr. &c.

Your's, &c.

Dated, &c.

Form of de-
mand of pay-
ment.

Sir,—My claim upon you for £— upon, &c. (here state the nature of the claim generally,) has long been due and unsatisfied; and as there can be no well-founded objection to the claim, I request you to pay the amount to me on or before the — day of —, or without any further communication either from me or my attorney (the expense of whose letter would only increase the costs) legal proceedings will be issued on the day following. I am, Sir, your's, &c.

(*e*) *Simmonds v. Lord Kinnaird*, 4 Ves. jun. 716; *Cartright v. Hately*, 1 Ves. jun. 293; and see *ante*, 438, 439.

(*f*) *Weymouth v. Boyer*, 1 Ves. jun.

416; Lord Eldon approved that doctrine, 1 Madd. Ch. Pr. 217, note (*y*); and see *ante*, 438, 439.

heard Lord Mansfield say, he thought the court of law ought to allow the costs paid to the defendant in equity as costs at law; and that he was struck with the propriety of the observation, and thought it would be a good rule to be adopted. (g) If an agent do not render his accounts within a reasonable time after request, he must bear the costs of a suit instituted to have the accounts taken; and it will not be any excuse for him that he offered to pay a gross sum which it turns out would have covered all that was due from him. (h)

10. As of great practical importance, it is advisable here more particularly to observe upon the necessity for a *notice to perfect* a right and prevent loss in case of the non-payment of a *bill of exchange or promissory note*. It is a general rule, that if the acceptor of a bill or maker of a note neglect on due presentment to pay it on the day it falls due, a *proper notice of such nonpayment* must, within a *reasonable* time, be given to or forwarded towards the drawer and indorsers of the bill and the indorsers of the note, and to *all parties* to those instruments, and even to the mere transferer of a check. (i) This time is now fixed by law. The notice *may* be given upon the day of refusal, especially after an express refusal; it *must* be given or forwarded *on the day after the dishonour* to all parties, or to such of them to whom it is intended to resort for payment, or at least to the last indorser, and each indorser in his turn must, *on the day after he receives notice*, give or forward to his immediate indorser notice of such dishonour. Each indorser, without regard to the number of them or the nearness of their residence, is, for the sake of certainty, allowed a day, or in other words *his day*, that is, until the day after that on which he received notice, to communicate or forward the intelligence to others. (k) If a party receive notice of the dishonour on one day, he must, if the next indorser reside in the *same* town, or in London within limits of the three-penny post, give the notice or put the letter containing it into the post soon enough on the day after, that it may be actually received and read *on that day*. (l) Where the next indorser does not reside in the same town, then the notice is to be sent by the general post, or if none, by a special messenger or next best conveyance, and it

10. Notices of nonpayment of bills or notes.

(g) *Grant v. Jackson*, 1 Peake's R. 203; Mad. Ch. Pr. 217.

(h) *Collyer v. Dudley*, 1 Turn. & Russ. R. 421; *post*, 509, n. (s).

(i) *Smith v. Mullett*, 2 Camp. 208; *Scott v. Lifford*, 9 East, 347; *Williams*

v. Smith, 2 Bar. & Ald. 496; *Geill v. Jeremy*, Mood. & M. 61; *Chitty on Bills*, 8th edit. 515 to 525.

(k) *Id. ibid.*

(l) *Dobree v. Eastwood*, 3 Car. & P. 250; *Smith v. Mullett*, 2 Camp. 208.

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suffices to put the letter giving it into the post-office *on the day after* the party so doing has himself had knowledge of the dishonour of the bill or note; and it is not necessary to forward notice on the *same* day as that on which he received notice, although there might be abundant time to have done so; (*m*) and if there be no post on the day after, then it suffices to put the letter into the post-office on the second day. (*n*)

If these rules be not strictly observed, the person guilty of the neglect will lose his remedy against the party, who would otherwise be liable to pay the bill or note, not only on the bill but for the debt or consideration on which it was founded, (*o*) unless he can excuse the neglect by the proof of some accident or particular circumstance not attributable to his own or his agent's neglect, or can show that the party to whom notice was not given in due time has no right to object to the want of it, because he had no effects and had given no value, and that the notice would have been of no utility to him; circumstances which sometimes occur, but which are mere accidents not to be calculated or relied upon by a prudent holder. (*p*)

Requisites in
 form of notice
 of nonpayment.

With respect to the *form* of the notice of nonpayment, though no technical words are prescribed, yet it must be explicit, and sufficiently apprise the party to whom the notice is addressed. 1st. To what particular bill or note it alludes, and how the latter was a party to it, whether as drawer or indorser, so that he may not mistake it for some other bill. 2dly. It must state or describe that the instrument has actually been presented for payment; and 3dly, that it has been refused payment or dishonoured; and it would be as well if a copy of the bill be forwarded with a statement of the terms of the refusal to pay. It has been recently decided that a letter from the attorney of an indorsee to a drawee, dated the day the bill fell due, merely containing a demand of payment, without stating that the bill had been presented and refused payment, is not sufficient. (*q*) Nor is a notice, stating the bill to have been

(*m*) *Williams v. Smith*, 2 Bar. & Ald. 496; *Darbishire v. Parker*, 6 East, 3; *Bray v. Hadwore*, 5 Maule & Sel. 68.

(*n*) *Geill v. Jeremy*, Mood. & M. 61; *Chitty on Bills*, 8th edit. 518, note (*a*); and *Hawkes v. Saller*, 4 Bing. 715.

(*o*) See all the above cases, and *Bridges v. Berry*, 3 Taunt. 130; *Reid v. Coates*, 6 Brown's Parl. C. 264.

(*p*) *Chitty on Bills*, 8th edit. 468.

(*q*) *Hartley v. Case the younger*, 4 Bar. & C. 339; 6 Dowl. & R. 505; 1 Car. & P. 555, S. C. The plaintiff, in order

to prove notice of the dishonour of the bill to the defendant, (*Case the younger*, and who was the drawer,) gave in evidence the following letter from the plaintiff, who was an indorsee, and dated the 16th August, 1824, *the very day on which the bill became due*: "I am desired to apply to you for the payment of the sum of 150*l.*, due to myself, on a draft drawn by Mr. Case on Mr. Case, which I hope you will, on receipt, discharge, to prevent the necessity of law proceedings, which otherwise will im-

drawn by the party to whom the notice was sent, when in fact he was only an indorser, sufficient, as it mistated the fact.^(r) So where the holder's attornies wrote to an indorser, "a bill for 688*l.* drawn by *K.* upon *J.* and bearing your indorsement, has been put into our hands by *A.* with directions to take legal measures for the recovery thereof, unless immediately paid to your's, &c." this was holden an insufficient notice of the dishonour, because it did not state expressly or by necessary implication that the bill had been dishonoured; and it is not sufficient merely to say that the holder looks to the indorser for

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diately take place." Abbott, C. J. at the trial, was of opinion, that as this letter did not apprise the party of the fact of dishonour, but contained a mere demand of payment, it was insufficient, and the plaintiff was nonsuited; and a rule for a new trial having been granted, Abbott, C. J. on discharging the rule, said, "There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the

party what the bill is, and that payment of it has been refused by the acceptor. Here the letter in question did not convey to the defendant any such notice, it does not even say that the bill was ever accepted, we therefore think the notice was insufficient."

The following comprehensive form is suggested as expedient to be adopted upon the dishonour of an inland bill, and it may be readily altered and adapted to every particular case:—

No. 5, Cornhill, London,
Dated 5th July, A. D. 1831.

Sir, (or Gentlemen,)

I hereby give you notice that the bill of exchange dated 1st May, 1831, last past, drawn by *A. B.* of —, in the county of —, on *C. D.* of No. —, — Street, London, and whereby the said *A. B.* requested the said *C. D.* two months after the date thereof, to pay to the said *A. B.* or his order, 50*l.*, and which was indorsed by the said *A. B.* to *E. F.* of, &c. and by the said *E. F.* to *G. H.* of, &c. and also by the said *G. H.* to you, and also by you, and whereof I am now the lawful holder, was on yesterday, the 4th day of July instant, duly presented to the said *C. D.* for payment thereof, but was and is unpaid and dishonoured, the said *C. D.* stating that, &c. [according to the answer given to the notary] and I request you immediately to pay the amount to me, to prevent the expense of litigation, which will otherwise be immediately incurred.

Suggested form
of notice.

I am, Sir,
Yrs. Oby,
L. M.

To *I. K.* Merchant, or Messrs. *I. K. & Co.* [according to the fact]
at —, in the county of —.

Although it is certainly unnecessary, and not the practice, to frame the notice thus formally, it may be expedient, when time and circumstances will allow, to state the residence of the drawer and prior indorsers to the party to whom the notice is given, and who may have forgotten the same, so as to enable him immediately to forward the like notice to, and sue them. A duplicate of such letter should be kept, and it will be prudent, for fear of the death of one, that at least two competent witnesses should examine the original letter with the duplicate, and both be able to swear that such original letter was put in the proper post, duly directed, and within the proper time; and it will be advisable to avoid the necessity for numerous witnesses and complication of proof,

which sometimes creates insurmountable difficulty, to let the very same two persons who saw the holder sign his name to the original and duplicate letter, put the same in the head or proper post-office, and not to employ any intervening person. See *Hetherington v. Kemp*, 4 Camp. 193, Chitty on Bills, tit. "Evidence."

(*r*) *Beauchamp v. Cash*, Dowl. & Ryd. Ca. Ni. Pri. 3. But in America, where a notice of dishonour calling the note Jotham Cushing's note, instead of Jotham Cushman's, and describing it as due 6th January, when it was due on the 3d January, the jury were directed to find for the plaintiff, unless they thought defendant was really misled. *Smith v. Whiting*, 12 Mass. Rep. 6. Bayl. 162, Amer. edit.

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payment.(s) But a letter from the holder to the payee, who was also the indorser of a note, in these terms;—"Mr. Ellis, (the maker) is unable to pay the note for a few days; he says, he shall be ready in a week, which will be in time for us," was held to be a sufficient notice.(t) And in America it has been considered that a trifling mistake in spelling a name or in stating a date is not material, and therefore where the notice of dishonour called the note, *Jotham Cushing's* note, instead of *Jotham Cushman's* note, and described it as due the 6th of January, when it was due on the 3d of January; the jury were directed to find for the plaintiff, unless they thought the defendant was really misled.(u)

In practice a very concise form of notice is given, and it might be inconvenient in mercantile affairs to require any unnecessary formal words.(x) But in cases of dishonoured bills or notes of any magnitude it would be advisable to adopt the fuller before referred to, (y) and to send and refer to a copy of the bill or note, and state, when well known to the writer, the residences of the drawer and indorsers, so as to enable the party to receive the notice, immediately to forward the like notice to such parties and sue them. Great care must

(s) *Solarte v. Palmer*, 7 Bing. 530; 5 364.

Moore & P. 475; 9 Law Journal, 121;
5 Car. & P. 473, S. C.

(u) *Smith v. Whiting*, 12 Mass. Rep.;
6 Bayl. on Bill, 162, Amer. ed.

(t) *Margeson v. Goble*, 2 Chit. Rep.

A short form of
notice of non-
payment of a
bill or note.

(x)

No. —, Milk Street, Cheapside, 2d May, 1833.

Sir,

The Bill on *A. B.* for 50*l.*, indorsed by you and which fell due yesterday, and whereof I am the holder, was yesterday duly presented for payment to the said *A. B.* and dishonoured by him, and lies in my hands unpaid. I request your immediate payment of the amount to avoid further expenses.

Yours obediently,

To Mr. *E. F.*

G. H.

No. —, Fenchurch Street, London.

(y) First copy at the top the bill or note, with the indorsements, then proceed as follows:—

Suggested full
form of notice
of non-payment
of a bill or note.

Sir, (or Gentlemen,)

5th January, 1833.

I hereby give you notice that the bill of exchange (a copy of which is superscribed) dated 1 Nov. 1832, last past, drawn by *A. B.* of, &c. [place of date of bill] on *C. D.* of No. —, Street, London, and whereby the said *A. B.* requested the said *C. D.* two months after the date thereof, to pay to the said *A. B.*, or his order, 50*l.* and which was indorsed by the said *A. B.* to *E. F.* of, &c., and by the said *E. F.* to *G. H.* of, &c., and also by the said *G. H.* to you, and also indorsed by you, and whereof I am now the lawful holder, was on yesterday, the 4th day of January inst., duly presented to the said *C. D.* for payment thereof, but was and is unpaid and dishonoured, the said *C. D.* stating that, &c. [according to the answer given to the notary] and I request you instantly to pay the amount to me to prevent the expense of litigation, which will otherwise immediately be incurred.

I am, Sir,

Yours obediently,

L. M.

To *I. K.*, Merchant, or Messrs *I. K. & Co.* (according to the fact) at No. —, Street, Cheapside, London, or at —, near —, in the county of —.

be observed correctly and fully to *address the letter* containing the notice to the proper intended party, for any mistake occasioning delay, and which might have been avoided by due care, will deprive the holder of all remedy against the party to whom the notice ought to have been given; and all the prior parties to whom he might in his turn have given notice unless the latter have direct notice from the holder. (z) If the party reside in a city or large town the direction should not be to him at that place generally, but state the particular street or part of the town where he resides, and his trade or occupation, so as to prevent the risk of misdelivery, which might at least occasion delay in the proper person receiving such notice; therefore it has been held that a notice to an *indorser* thus, "Mr. Haynes, Bristol," is too general and insufficient, without express evidence that the proper party received it in due time, because the place being so populous there may be many persons of the same name there. (a) And though a distinction has been taken as to a *drawer*, who himself dated his bill so generally as "Manchester," it was considered that a notice directed to him equally general sufficed; (b) every prudent holder should in all cases make active inquiries, and write the fullest description on a letter giving notice. (c) It has been suggested, that if it be proved that there was a directory for the place, where it is supposed the drawer or indorser resides, then that the adoption of the address, given in such directory, might perhaps be held sufficient. (d) It is not usual to advertise the dishonour of a bill or note in the public papers, but where the sum is considerable, and all other inquiries after the indorser have failed, it might be expedient to adopt that means of giving notice.

A duplicate of the letter containing the notice, and of the address or direction, should be made and examined with the original by the person or persons who will deliver or put the original in the post, and who must be and continue a competent witness to prove such facts; and it will be prudent, for fear of the death or absence of one, that at least two competent witnesses should adopt this precaution; and it will be expedient for each to mark on the duplicate the exact time the original was delivered or put in the post, for a doubt as to the time, as the witnesses swearing it was either the 1st or 2d day in the month, would be fatal; (e) and it would be advisable, to avoid

(z) *Esdaile v. Sowerby*, 11 East, 117.(a) *Walter v. Haynes, Ry. & Moody*, 149.(b) *Mann v. Ross, Ry. & Moody*, 249.

(c) Bayl. 5th ed. 230.

(d) Id. 231.

(e) *Lawson v. Sherwood*, 1 Stark. R. 314.

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the necessity for afterwards calling numerous witnesses, and complication in proof of every link in the chain of evidence, to let the very same two persons who saw the holder sign his name to the original and to the duplicate letter or notice, deliver the same or put the same into the head or proper post-office, and not to employ, as is generally the case, any intervening person; (f) for if several persons intervene, all must be called as witnesses in case of the trial of an action, and if any one be omitted the proof will be insufficient. (g)

If a *verbal* notice only is intended to be given or left, it must be in substance in the same terms as a written notice and afford the same information. It may be left at his counting-house or residence, or delivered to the party himself, or to any person at his counting-house or residence, and apparently there as a clerk or one of the family domiciled there; (h) and when during the usual hours of business, on the proper day, no person is found at the counting-house to receive the notice, it suffices to be prepared to prove that diligent inquiry *there* was made on that day for the purpose of giving notice, though ineffectual; (i) and where an ineffectual attempt to give notice has been made at the counting-house, it is not also necessary to attempt to give or leave a notice at the *residence* of the indorser. (i) However, the more prudent course, though not absolutely necessary, is to leave a written notice as well at the residence as at the count-

(f) *Hawkes v. Haller*, 4 Bing. 715; *Hagendon v. Reed*, 2 Campb. 479; *Hetherington v. Kemp*, 4 Campb. 193.

(g) *Toosey v. Williams*, Mood. & M. 129. In a case in December, 1827, G. H. K. B., Scarlett, Attorney-General, objected that the practice of a *private* office as to leaving letters in a box, was inadmissible, though according to a decision of Lord Ellenborough, when Garrow was Attorney-General, the practice of a *public* office is admissible. Scarlett objected that in a *private* office it should be otherwise, as the principal might purposely subtract the particular letter. Lord Tenterden said, "In this case there is a person intervenes between the copying clerk in the letter book and the person whose duty it is to take it to the post office. I therefore reject the evidence of the practice of the office."

Toosey v. Williams, Mood. & M. 129. Where the practice of the defendant's counting-house was, that the clerk, after copying a letter into the letter-book, returned it to the defendant to seal, and that he or another clerk carried all letters to the post-office, but there was no particular place of deposit in the office for

such letters, and neither of the clerks had any recollection of the particular letter offered in evidence, though they swore that they uniformly carried all letters given them to carry:—Held, that the entry in the clerk's writing in the letter-book of a letter to the plaintiff, could not be read as proof of such letter having been sent to the plaintiff. Lord Tenterden, C. J. :—"I have great reluctance to refuse this evidence, but am bound to do it. The practice here differs from that in most counting-houses. If the duty of the clerk had been to see the letters he copied carried to the post-office, it might have done; but here there is something else to be done afterwards, and that by the defendant. There is not enough shewn to render the letter admissible." Verdict for the plaintiff. *Hagendon v. Reed*, 3 Campb. 379. *Hetherington v. Kemp*, 4 Campb. 193.

(h) *Crosse v. Smith*, 1 Maule & Selwyn, 545.

(i) *Bancroft v. Hall*, Holt, C. N. P. 476; *Crosse v. Smith*, 1 Maule & S. 545; *Goldsmith v. Bland*, Bayl. 8th ed. 246; Chitty, 8th ed. 502, n. (e).

ing-house of every indorser, (k) so as to avoid the possibility of a defence that the parties have not in fact received in due time ample notice.

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11. Cases very frequently occur in which a party may in fact refuse to pay money or perform some other act on account of some actual or pretended risk he would thereby incur of being thereafter sued for the amount by some third person; in these cases it is sometimes necessary and always advisable to remove all pretence of objection by tendering *adequate indemnity*. With respect to lost bills, there is an express statute prescribing the nature of the indemnity in certain cases. (l) When a bill or note *continues lost* there is in general no remedy *at law*; but if adequate indemnity has been tendered and yet payment withheld, a court of equity will enforce payment, and subject the party to costs when the tendered indemnity has clearly been sufficient. (m) The same principle applies to other cases, and the offer of adequate indemnity will in general strongly incline a court and jury in favour of the party whose offer has been rejected. In these cases it suffices, first, to send a description of the proposed security and of the names and address of the proposed obligors; and if not expressly rejected then the draft of the proposed security should be sent for approbation, and if this be rejected or unattended to, it will not be necessary to tender either the proposed security already executed, or even engrossed, stamped, on parchment or paper. (n) We might here notice the right to retake goods obtained by false pretences, or under colour of a fraudulent purchase, or under colour of any other contract that has turned out to have been invalid, and the right to stop goods in *transitu* upon discovery of the insolvency of the purchaser before they have actually got into his possession. But precautionary measures of that nature it is apprehended will be more properly considered when we notice the preventive remedies by act of the parties after an injury has already been completed, or at least had inception, and which will be found in the seventh chapter.

(k) *Crosse v. Smith*, 1 Maule & S. 545;
Bancroft v. Hall, Holt, C. N. P. 476.

(l) 9 & 10 Wm. 3, c. 17, s. 3.

(m) *Walmsley v. Child*, 1 Ves. sen.

338, and other cases, Chitty on Bills, 8th ed. 290.

(n) *Jones v. Barclay*, 2 Dougl. 684;

ante, 494, 495.

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VI. Of precau-
tions by an ex-
pected defend-
ant.

Tender how
to be made.

VI. There are also many precautionary measures to be adopted on behalf of persons likely to become *defendants*, such as *tenders*, whether in cases of contract or in cases unconnected with contract, or in compensation for an *involuntary trespass*,^(o) or by *Justices* and others under the general act,^(p) or under particular acts allowing certain officers, as those of the *Customs*,^(q) or *Excise*,^(r) &c. to plead a tender or pay the amount of the supposed damages into court. So if a party likely to be sued in the Exchequer by bill for *an account* previously tender an adequate sum, he may then in some cases be excused the payment of costs.^(s)

In making a *Tender* in either of these cases errors frequently occur either in respect of the money not having been *sufficiently produced or offered* to be paid, or of some condition or qualification having improperly accompanied the offer, and

(o) 21 Jac. 1, c. 16, s. 5, enacts, "that in all actions of trespass *quare clausum fregit*, hereafter to be brought, wherein the defendant or defendants shall disclaim in his or their plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant or defendants shall be permitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought; whereupon or upon some of them the plaintiff or plaintiffs shall be enforced to join issue; and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suits concerning the same. But this act only applies to trespasses to *land*, and not to trespasses to personal property. *Bailees v. Vivash*, 1 Stra. 549; nor to trespasses committed by a defendant *himself*, *Id.* *ibid.*; 3 Lev. 37; Vin. Ab. Trespass, S. a. 542; see the pleadings on this statute, *Williams v. Price*, 3 Bar. & Adol. 695.

(p) 24 Geo. 2, c. 44, s. 2, enacts, "that it shall and may be lawful to and for such justice of the peace, at any time within one calendar month after such notice given as aforesaid, to tender amends to the party complaining, or to his or her agent or attorney, and in case the same is not accepted, to plead such tender in bar to any action to be brought against him, grounded on such writ or process, together with the plea of not guilty, and any other plea with leave of the Court; and if upon issue joined thereon the jury shall

find the amends so tendered to have been sufficient, then they shall give a verdict for the defendant; and in such case, or in case the plaintiff shall become nonsuit, or shall discontinue his or her action, or in case judgment shall be given for such defendant or defendants upon demurrer, such justice shall be entitled to the like costs as he would have been entitled unto in case he had pleaded the general issue only; and if upon issue so joined the jury shall find that no amends were tendered or that the same were not sufficient, and also against the defendant or defendants on such other plea or pleas, then they shall give a verdict for the plaintiff and such damages as they shall think proper, which he or she shall recover, together with his or her costs of suit."

Sect. 4, enacts, "that in case such justice shall neglect to tender any amends, or shall have tendered insufficient amends before the action brought, it shall and may be lawful for him, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of money as he shall see fit, whereupon such proceedings, orders and judgments shall be had, made and given, in and by such court, as in other actions where the defendant is allowed to pay money into Court; and see Chit. Coll. Stat. 648, 649.

(q) 6 Geo. 4, c. 108, s. 95, 96, *Customs*.

(r) 28 Geo. 3, c. 37; 7 & 8 Geo. 4, c. 53, s. 116, 117, *Excise*; and see 6 Geo. 4, c. 114, s. 66, as to officers in *British possessions abroad*.

(s) 2 Madd. Ch. Pr. 556, 557; but see *ante*, 499, and *post*, 509, n. (s); *Pearse v. Green*, 1 Jac. & W. 135.

which the law considers to vitiate the tender. Properly the exact amount of what is admitted to be recoverable should be produced and counted in English gold and silver, (the latter not exceeding *forty shillings*),(t) or in foreign coin made current by proclamation;(u) and the amount should be named to the party to whom the offer is to be made, and if possible the money laid down and counted in his presence;(x) though if he, after having been told that such a sum is about to be paid to him, declare he will not take it, because more is due, that dispenses with the actual production of the money;(y) but a mere dispute respecting the amount of the debt, without expressly dispensing with the production, will not excuse the omission, because if he had seen the money produced he might have been induced to accept it.(z) A tender of bank notes,(a) or even a provincial bank note,(b) is sufficient, unless objected to at the time on that account.(b) Properly the precise amount of pounds, guineas and fractions should be produced in gold, and shillings or sixpences, and not exceeding five-pence three-farthings in copper, so as to constitute the precise amount of the debt; and although it has been held that a tender of 20 guineas, with a request to return the difference of 15 guineas, is a good tender as to 15 guineas, because the creditor has only to select so much and to restore the residue; it would be otherwise, if the tender were in bank notes of a larger amount than the debt, and would be insufficient, because it may be physically impossible for the creditor to take what is due and to return the difference.(c) And it is the only safe course to tender the fraction of a pound in specie, when accompanied with a tender of a bank note or sovereign. If, however, a creditor, to whom a tender of a bank note is made in payment of a fractional sum, object to receive it merely on the ground of the sum offered to be paid being less than the sum claimed, then although the creditor be required to return the difference between the bank note and the fractional sum, it has been held

(t) 56 Geo. 3, c. 68.

(u) *Wade's case*, 5 Coke's Rep. 114, n. (b).(x) *Brady v. Jones*, 2 Dow. & Ry. 303.(y) *Thomas v. Evans*, 10 East, 101; 3 Bla. C. 304, n. 33; *Douglas v. Patrick*, 3 T. R. 683.(z) *Dickinson v. Shee*, 4 Esp. R. 68. The language of the ancient plea, averring a tender, is *obtulit*, &c.(a) *Per Buller, J. in Wright v. Reid*, 3 T. R. 554; *Grigby v. Oaks*, 2 B. & P. 526.(b) *Polyglass v. Oliver*, Law J. 3, Exch. M. T. 1831; *Chitty on Bills*, 8th ed. 554, 555, and Id. 801; *Peake's Evi. N. P.* 3d ed. 259.(c) *Bettersbee v. Davis*, 3 Campb. 70; *Spigbey v. Hide*, 1 Campb. 181; *Robinson v. Cook*, 6 Taunt. 336.

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to be a sufficient tender. (d) A tender of a part and proposed set-off as to the residue is insufficient. (e)

The tender must be unconditional and unqualified, because if the creditor were to accept it, the claim for any residue might be thereby prejudiced; therefore a tender of a named sum, insisting at the same time on a receipt in full, (f) or upon condition that it shall be received as the whole balance due, (g) or that a particular document shall be given up to be cancelled, is insufficient. (h)

The tender should be to pay on behalf of the debtor a named sum, produced and offered to be handed over to the creditor *without more*; and to avoid the risk of the counsel for the plaintiff being able on cross-examination of the witness called to prove the tender, to lead him to say that it was in some respects conditional or qualified, it would be as well to accompany the tender with a letter in the form stated in the note, and the person tendering the money should read and subscribe such letter as a witness immediately before he make the tender, and the creditor should have notice to produce the same on the trial; and a duplicate and the delivery of the original, and the service of the notice to produce, should be proved on the trial; for after the witness has thus read and subscribed such a letter, a jury would scarcely believe that he verbally vitiated the tender by annexing to it any qualification. (i)

A tender cannot be effectually *pleaded* if at any instant after the debt became due the party was not ready to pay, and espe-

(d) *Saunders v. Graham*, Gow's Ca. Ni. Pri. 121; *Black v. Smith*, Peake's R. 88; *Bettersbee v. Davis*, 5 Campb. 70; *Robinson v. Cook*, 6 Taunt. 336.

(e) *Brady v. Jones*, 2 D. & R. 305. Defendant tendered seven sovereigns in payment of a demand of 6l. 17s. 6d., and said to plaintiff, "there take your demand," and at the same time delivered a counter claim upon plaintiff of 1l. 5s. and plaintiff said, "you must go to my attorney." *Per Cur.* Here a larger sum than

that due is offered, and is accompanied by a counter demand in writing by the defendant upon the plaintiff. In both these respects this is an insufficient tender, and therefore the plaintiff is intitled to retain his verdict.

(f) *Glasscott v. Day*, 5 Esp. R. 48; *Huxham v. Smith*, 2 Campb. 21; *see vide Cole and another v. Blake*, Peake's R. 179; *Starkie's Evid.* tit. Tender.

(g) *Evans v. Judkins*, 4 Campb. 156.

(h) *Huxham v. Smith*, 2 Campb. 21.

Written notice
 of a tender.

(i) Sir,—The bearer is directed by me to pay or tender to you the sum of £27 : 10s. 6d. (twenty-seven pounds, ten shillings and sixpence,) in respect of the debt or sum of money claimed by you, and such tender and offer is and will be made unconditionally and without any reserve, or any condition or terms whatsoever; and to avoid all possible doubt, I beg you to understand that the same sum of money is to be offered, paid and received without prejudice to any claim you may have on me for any larger or different sum of money. Dated this 5th day of May, A. D. 1833.

5 May, 1833.

Your's, &c. A. B.

cially if in the case of a bill or note the debtor did not pay on presentment; for if a tender be pleaded, the plaintiff may reply a *prior* or a *subsequent* demand. (k) And as supposed valid tenders are often disproved on the trial, the safest course, in cases of the least doubt, is to pay the amount into court and not to *plead* the tender, though in that case the defendant will have to bear the costs to the time of such payment.

There is a peculiarity in the law in favour of a *tenant*, who need not find out the landlord and make a personal tender to him, but may, just before sun-set on the day when the rent falls due, produce the sum then accruing due, and in the presence of witnesses, who should count the amount, declare that he produces the same ready to pay and as a tender of his rent to his landlord; and this suffices, although neither the landlord nor any person on his behalf be upon or near the land. (l)

Tender by a
tenant on the
land.

If a proper tender have been made and certainly capable of proof, it will effectually prevent the plaintiff from commencing or proceeding in any action, unless he can prove a larger demand, or can show that after such tender and before the commencement of his action he made a *fresh demand*, and which must be of the precise sum tendered, or at least not of a larger sum, or it will be insufficient; (m) and the fresh demand must be made in person or by an authorized agent, (n) but a subsequent demand of one of several joint debtors is sufficient. (o)

Creditor's fresh
demand.

With respect to *contracts*, persons likely to be made defendants should frequently observe certain preliminary precautions. Thus the first duty of an agent, receiver, trustee, or executor, is to be *constantly* ready with his accounts, for neglect in this respect would be a ground for charging him interest and costs; (p) and if he neglect to deliver his account within a reasonable time after request, he will be liable to pay the costs of proceedings at law (q) or in equity (r) against him, even though he may have tendered a sum in gross which turns out to have been more than sufficient to cover the balance ultimately found due from him; for a principal has a right to have the materials before him, enabling him to ascertain and decide for himself what is the just balance, and until proper accounts be furnished he may reasonably suspect that more than the sum tendered is due to him from the agent. (s)

Readiness and
tender of ac-
counts.

(k) *Paine v. Peploe*, 8 East, 168.

(l) *Ante*, 486; see cases, Bac. Ab. tit. Tender.

(m) *Spigbey v. Hide*, 1 Campb. 181.

(n) *Coles v. Bell*, 1 Campb. 478.

(o) *Pevise v. Bowles*, 1 Stark. R. 523.

(p) *Pearse v. Green*, 1 Jacob & W. 135.

(q) *Topham v. Braddick*, 1 Taunt. 576.

(r) *Supra*, note (p).

(s) *Pearse v. Green*, 1 Jac. & W. 135; *ante*, 499—506, note (s).

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Obtaining a
set-off.

We shall also find that in many cases a party who expects to be sued for a debt may at any time before the commencement of an action, purchase or obtain a negotiable bill or note upon which the expected plaintiff is indebted, and may afterwards, if sued, avail himself of a set-off, but the authorities upon this subject will be more properly considered in the seventh chapter.

VII. Of repe-
tition of the
foregoing mea-
sures.

VII. Supposing all the precautionary measures thus suggested have been observed by the plaintiff or the defendant, it will still be necessary to consider whether there is adequate *evidence* to prove them in case of litigation, and if that be doubtful it will be important, before the intended defendant has been put on his guard and whilst he may be disposed to be candid, to obtain an *admission* of each material fact in writing, if possible, and in explicit terms, at least sufficient in the case of a debt to constitute a sufficient written acknowledgment of the debt within the recent act; (t) and if an admission in writing cannot be obtained, then a verbal admission in the presence of two or three persons, who will be competent and credible witnesses; for after litigation has commenced or been even threatened, it may be difficult even to extort by bill of discovery a sufficient admission. (t) Supposing such admission cannot be obtained, then before any proceedings have been commenced, the suggested precautionary measures should be *repeated*, in doing which it will be advisable to refer to the antecedent steps as already taken, and to the party's want of candour rendering its repetition expedient so as to prevent any supposition of *improper delay*. (u) The form of such *repeated notice or request* may be to the effect suggested in the note. (x)

VIII. Of pre-
cautions to be
observed by
executors and
administrators
in general.

VIII. *Of the Precautions to be observed by Executors and Administrators.*—Perhaps there is no character or situation so much requiring precaution as that of an executor

(t) *Ante*, 410, 441; 9 Geo. 4, c. 14.

(u) *Ante*, 440, 441.

Suggested form
of a second
notice or re-
quest.

(x) Sir,—I refer you to the notice given (or the request made) to you on, &c. whereby, &c. (copy or state the substance of the notice or request,) I regret that you have not complied with the terms of such notice (or request). In order to endeavour to avoid litigation I repeat my said notice (or request) and hereby again, &c. (stating the terms of the notice or request as suggested in the preceding pages.)

To Mr. &c.

Dated, &c.

Your's, &c.

or administrator. Volumes have been written on this difficult subject, but one in particular characteristic of the great learning and ability of its author. (y) In the following pages I have attempted to give a concise practical outline of the principal rules to be observed by executors and administrators to prevent loss or personal responsibility, with some suggestions for the more secure fulfilment of these important offices. The subject may properly be arranged under the following *twenty-seven* heads:—

1. Of securing the property of a deceased and his will.
2. Of opening and reading the will.
3. The funeral.
4. What other acts may be performed before probate or letters of administration.
5. The inventory and valuing the property.
6. Of ascertaining whether debts be good or bad.
7. Of advertising for debts or credits.
8. Of obtaining probate of the will.
9. Of obtaining letters of administration.
10. Collecting the assets, carrying on trade and the care of assets.
11. Of prosecuting actions and suits and the costs thereof.
12. Of resisting claims, actions and suits.
13. When costs of actions or defences are allowed to an executor or administrator out of the assets.
14. When or not an executor may refer to arbitration.
15. When he may compromise.
16. When he must be ready to render an account.
17. What are assets in hand.
18. The consequences of some assets but not enough to pay an entire debt.
19. Of an executor or administrator retaining for his own debt.
20. The *order* in which debts must be paid.
21. Of giving a preference.
22. How that power may be controlled in equity.
23. Of the payment of the legacy duty.
24. Of the payment of legacies.
25. Of remuneration to an executor or administrator.
26. The residue and distribution.
27. Of actions and suits by and against executors and administrators, and the pleadings, proceedings and evidence therein.

(y) Williams on Executors, 2 vols. 8vo. one of the most able and correct works that has ever been published on any legal

subject. See also Toller's Executor, Wentworth's Off. Ex. but more properly ascribed to Mr. Justice Dodderidge.

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1. Of securing
the property
and will of the
deceased.

1. *Of securing the PROPERTY and the Will.*—Even before it is known who is the executor or the next of kin, and immediately upon the death of the deceased, any person may lawfully, without risk, *secure the property and the will*, and make an inventory of the property found, although it would be indelicate and injudicious so to interfere in the absence of the nearest relations, unless there be risk of loss or injury. A party merely performing acts of necessity or humanity, as locking up the goods, burying the deceased, or providing necessities for his children or his cattle, will not amount to such an intermeddling as would render the party liable to be sued as executor. (x) And if he should be improperly sued in that character he might plead *ne unques executor* generally, or specially showing only what he did. (a) The safest course, however, upon the death of a person possessed of very considerable tangible personalty, would be, when the executor or next of kin be unknown or absent, to obtain letters merely *ad colligendum bona defuncti*, which makes the party neither executor nor administrator, and would merely authorize the securing the property and not the sale or disposition. (b) A Court of Equity will not, however, *appoint a receiver* until letters of administration have been obtained, unless an adequate reason be assigned why letters of administration cannot be forthwith obtained. (c) It is the duty of an appointed executor, unless he has immediately renounced, to preserve articles *specifically bequeathed* as heir-looms or otherwise according to the testator's wish, and unless it be certain that there be a deficiency of assets to pay debts, they must not be applied even in the payment of debts. (d)

If an executor, after knowledge of his appointment, should neglect to secure the property and loss ensue, he would be personally liable for a *devastavit*; (e) and if an executor suffer any personalty to remain an unreasonable time (as more than six days) on land or property that has become the property of an heir or devisee, remainder-man or reversioner, it may be distrained as damage-feasant. (f) And the executor may justify, after proper application, entering the house of the heir to take away the goods, though he could not legally break open a chest

(s) *Stokes v. Porter*, Dyer, 166 b; Godolph. Pl. 2, c. 8, s. 6; 2 Bla. C. 507; 1 William's Exec. 139.

(a) *Douglas v. Forrest*, 1 Moore & P. 677; Com. Dig. Pleader, 2 D. 7; *The King v. Sutton*, 1 Saund. R. 274, note 3; *Noel v. Wells*, 1 Lev. 236; see form and notes, 3 Chit. Pl. 5th ed. 941.

(b) *Anonymous*, Dyer, 256 a; 2 Bla. C. 505; Went. Off. Ex. ch. 14, 14th ed.

(c) *Jones v. Frost*, 3 Madd. Rep. 1.

(d) *Clark v. Earl Ormonde*, Jacob, 108.

(e) 2 William's Ex. 1021, 1022, 1112, 1113.

(f) *Stodden v. Harvey*, Cro. J. 204; Flowl. 280.

to take deeds and writings belonging to the personal estate, but must, in case of refusal to open the same, proceed by action. (g) And an executor, upon demanding papers or deeds to which he is entitled, is not bound to give an inventory and receipt, and if refused to be delivered without such vouchers he may support an action of trover. (h)

2. *Of the Will and opening the same.*—We have seen the nature of wills of *personalty as well as realty*, (i) and that if any person “shall either during the life of a testator or after his death, steal or for any fraudulent purpose *destroy* or *conceal* any will, codicil or other testamentary instrument, whether of realty or personalty or both, he shall be guilty of a misdemeanor and liable to transportation for seven years, or fine or imprisonment.” (k) But it is expressly declared that the criminal offence and proceeding for punishment shall not prejudice any civil remedy. (l) If the will be *criminally* withheld, it is clear that a magistrate might interfere summarily to compel delivery to the executor; and if withheld without any criminal intent, a party may be compelled in the *spiritual court* to exhibit the same, and would not be allowed to dispute the jurisdiction on pretence of *bona notabilia*; (m) and it should seem that even a solicitor cannot have a lien on an original will for his costs, as the detention thereof might retard or prevent the execution of the trust in favour of creditors and others. (n) And in a late case Sir John Nichol observed, “Practitioners have no right to keep wills in their possession. I have in several instances stated that the expense necessary to get a will out of the hands of a party must fall upon those who withhold it, and the proper way is for the will to be brought into the Registry for safe custody, and whenever a compulsory process is necessary for that purpose, the expense must fall on the party occasioning it.” (o)

2. Of the will
and opening the
same.

A person who, from his nearness of relationship or other circumstances, may reasonably suppose that he has been appointed executor, may legally *open the will* immediately after the decease, in order to ascertain whether there be any directions as

(g) Went. Off. Ex. 81, 202, 14th ed.

(h) *Cobbett v. Clutton*, 2 Car. & P. 471.

(i) *Ante*, 110 to 112, as to *personalty*; and *ante*, 351 to 365, as to *realty and personalty*.

(k) *Ante*, 144; 7 & 8 Geo. 4, c. 29, s. 22.

(l) *Id.* sect. 24.

(m) *Swinb. Pl.* 6, c. 12; *Godolph. Pl.*

1, c. 20, s. 2; *Brown v. Coates*, 1 Add. 345.

(n) *George v. George*, 18 Ves. 294; *Balch v. Symes*, 1 Turner, 87; and see *Baker v. Henderson*, 1 Clark & Fin. 28.

(o) *Cunningham v. Seymour*, 2 Phill. 250; as to a lien not prevailing against deeds held in trust, see *Baker v. Henderson*, 1 Clark & Fin. 28.

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to the *funeral*; but the most discreet course is to convene all the near relations who are within a reasonable distance to be present when the will is first read. (*p*)

3. Of the funeral expenses.

3. *Of the Funeral*.—It is the duty of the appointed executor or expected administrator in due time to bury the deceased, (unless he has directed his body to be delivered for dissection,) (*q*) and we have seen that the ceremony cannot legally be prevented; (*r*) and it is a legal as well as a moral duty for a husband to bury his wife; and if a party, in his absence, cause the ceremony to be performed in a proper way, he may sue the husband for the expense, although he never expressly authorized it. (*s*) And a husband is even liable to pay the funeral expenses of his wife though she lived separate from him and had a separate maintenance. (*t*) The funeral should be conducted in a style suitable to the quality, rank and station of the deceased *if he died solvent*; but if he died *insolvent*, then funeral expenses exceeding twenty pounds would not be allowed against creditors. (*u*) Extravagant charges in reference to these criteria are not allowed even against legatees or next of kin entitled to a distributive share of, or the residue of, the property. (*x*) But these greatly depend upon particular circumstances, and even 600*l.* for funeral expenses have been allowed, (*y*) and 193*l.* 12*s.* 6*d.* for mourning rings, where a general discretion was given to the executors, and the deceased left assets much more than sufficient to pay debts. (*z*) But if there be the least risk of ultimate insolvency appearing in the estate, then any funeral expenses beyond twenty pounds will be at the personal risk of those who authorize it. 79*l.* for the funeral expenses of a captain in the army were, in a late case, disallowed against a *creditor*, the executor having received only 129*l.* on account of assets; (*a*) and Bayley, J. seemed to think that the old rule which, in Lord Hardwicke's time, limited the sum to *ten pounds* for the funeral expenses of a person of condition *against creditors* would in the present day be *extended to*, but probably *not beyond, twenty pounds*. (*b*) Lord Holt, in his time, said, "in strictness no funeral expenses are allowed in

(*p*) See observations in *George v. George*, 18 Ves. 294.

(*q*) 2 & 3 Wm. 4, c. 75.

(*r*) *Ante*, 52.

(*s*) *Jenkins v. Tucker*, 1 Hen. Bla. 95.

(*t*) *Berlee v. Lord Chesterfield*, 9 Mod. 21, *sed vide Gregory v. Lockyer*, 6 Madd. Rep. 90; *ante*, 58, 59.

(*u*) *Hancock v. Podmore*, 1 B. & Adolp. 260.

(*x*) *Stackpoole v. Stackpoole*, 4 Dow's P. C. 227.

(*y*) *Offley v. Offley*, Prec. Ch. 261.

(*z*) *Purce v. Archb. Cant.* 14 Ves. 364.

(*a*) *Hancock v. Podmore*, 1 Bar. & Adolp. 260.

(*b*) *Id. ibid.*

the case of an insolvent estate, except for the coffin, ringing the bell and the fees of the parson, clerk and bearers, but not for the pall or ornaments; (c) but Dr. Burn observes, that the expense of the shroud and digging the grave ought to be added; (d) but clearly no allowance is to be made for feasts or entertainments. (e)

If the executor be absent, a stranger may order a suitable funeral, and the executor, if he have assets, will be liable to pay the expenses, the law implying his promise under such circumstances. (f) The act of a stranger, in directing a proper funeral and paying the amount out of his own monies, or from the assets of the deceased, will not render him liable to be sued or otherwise as an executor *de son tort*. (g) At all events, a demand for mourning for the widow and family of the deceased, cannot be ranked or allowed as part of the necessary funeral expenses. (h) The circumstances of a funeral having been permitted to pass over private property not in the line of a public or private way, will afford no presumptive evidence of a right of passage on other occasions, and therefore there is no risk of creating a right by granting permission to pass on a particular occasion. (i)

4. Before probate an executor may effectually do most acts that he could enforce afterwards, (k) because by the *very appointment* the testator has evinced personal confidence in his nominee, and therefore the interest of an executor arises not from the probate, but from the will, and for the same reason it has been held that he may release a debt or assign a term for years before probate; (l) he may collect and secure assets; (m) receive debts, and give effectual receipts; (n) and he may even effectually assent to a legacy, (o) or issue a commission of bankruptcy. (p) So he may issue a writ and arrest a debtor, though in strictness *he cannot declare*, because he cannot truly make the necessary profert of the probate. (q) But if probate should be obtained after a declaration, containing an averment that the

4. What other acts an executor or administrator may do before probate or letters of administration.

(c) *Shelly's case*, 1 Salk. 296; *Stag v. Punter*, 3 Atk. 119.

(d) 4 Burn. Ec. L. 348, 8th ed.

(e) Went. Off. Ex. 31.

(f) *Rogers v. Price*, 3 Y. & J. 28; but see 2 Wms. 1100. If the executor has ordered the funeral, he may be sued by the undertaker either in his private character or as executor, *Tugwell v. Heyman*, 3 Campb. 298, S. P.

(g) 1 Williams on Ex. 139.

(h) *Johnson v. Baker*, 2 Car. & Payne,

207, cor. Best, C. J.

(i) 2 Burn's J. 870.

(k) Toller, 6 ed. 45, 46, in general.

(l) *Hudson v. Hudson*, 1 Atk. 460.

(m) Went. Off. Ex. 34, 35, 92; Toller, 46.

(n) Went. Off. Ex. 35; Toller, 45.

(o) Toller, 6 ed. 46, 312; 11 Vin. Ab. 204; Went. Off. Ex. 35.

(p) *Ex parte Paddy*, 3 Maddex, 241.

(q) 1 Rol. Ab. 917, A. 2; Toller, 46, 47; 1 Williams' Ex. 163.

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plaintiff *then* was executor, that allegation will be sustained upon the trial, if the plea should take issue on that allegation, for it relates back, unless the defendant crave oyer and set out the subsequently dated probate. (r) The proper course, therefore, on behalf of a defendant, is not merely to plead, denying that the plaintiff is executor, but to crave oyer, and *thereby to suspend* the proceedings until it has been complied with. (r) The same rule prevails *in equity*, so that in strictness an executor should not file a bill until he has previously proved; for if the defendant should *plead that the complainant had not obtained probate as alleged*, such plea, if true, might prejudice the proceedings. (s) If there be any risk of the statute of limitations becoming a bar to a proceeding for a debt, in case of further delay, or of a debtor escaping out of the jurisdiction, then a writ and arrest before probate would be proper.

A person appointed executor, although he has not proved, may and ought to *present for payment bills and notes*, the property of the deceased, at the exact time when they will fall due, though it is said that the neglect before probate would not discharge the drawer or indorsers. (t) He should also give due, that is immediate, notice of dishonour, so as to prevent loss. (t)

An executor may *be sued* before probate, if he have acted in that character. (u) And a notice to quit, served upon the widow of a deceased tenant, if no other person has already obtained probate or administration, is sufficient. (x)

It has been said, that the next of kin, or a person who expects to obtain letters of *administration*, can do no act whatever before he has *actually* obtained the same. (y) But it has been considered that he might file a bill in Chancery, although he may not be able to commence an action at law. (z)

Certainly both an appointed executor or an expected administrator may, before probate or administration, have power to do many acts, such as collecting, securing, and ascertaining the value of the property, so as to enable him to make affidavit

(r) *Thompson v. Reynolds*, 3 Car. & P. 123. The same rule extends in equity to a bill filed before letters of administration, and in equity it suffices to obtain them before the hearing, *Fell v. Lutwidge*, 2 Atk. 120.

(s) *Simons v. Milman*, 2 Sim. 241; but see *Toller*, 95. And it should seem that in general, probate before hearing suffices, *Humphreys v. Humphreys*, 3 P. Wms. 351.

(t) *Poth.* pl. 46; *Molloy*, 32, c. 10, pl. 24; *Marius*, 184; *Chitty on Bills*,

8 ed. 389. But *semble*, the want of probate might excuse delay, *Roscoe on Bills*, 147; 2 *Williams*, 1171.

(u) *Wentw.* 86; *Toller*, 47, 49; *Douglas v. Forrest*, 4 Bing. 704.

(x) *Rees v. Perrott*, 4 Car. & P. 230.

(y) *Toller*, 6 ed. 95, cites 11 Vin. Ab. 202; *Winkford v. Winkford*, Salk. 301; 4 *Burn's Ecc. L.* 242.

(z) *Fell v. Lutwidge*, *Barnardis*. 1326; 4 *Burn's Ecc. L.* 93; *Toller*, 95.

that the same do not exceed a certain value, as required by statute; (a) and such preliminary steps may obviously be necessary, as letters of administration do not usually issue till after the expiration of fourteen days from the death of the intestate, unless for special cause. (b) It is also clear, that if a person reasonably expecting to obtain letters of administration as an administrator, before he is formally invested with that character, so as to subject himself to be sued as executor *de son tort*, he may, if so sued, and in case he obtained letters of administration pending the action, plead a retainer, and support such plea by rejoining that he has *puis darrien continuance* duly obtained such letters of administration. (c)

5. *Of the Inventory and valuing the Property.*—An executor or administrator should, immediately after the funeral, if not before, cause an *inventory* and *valuation* to be made, upon stamped paper, of all the personal property of the deceased at the time of his death, (d) by two competent and disinterested persons, usually sworn appraisers, who should sign the same, and whom he might afterwards, if necessary, call as witnesses to the authenticity and fairness of the valuation, before any sale or disposition has been made. (d) This is a duty enjoined by the statute 21 Hen. 8, c. 5, s. 4, and in effect *repeated* by the 55 Geo. 3, c. 184, s. 38, which require the executor or administrator to *swear* that the value is under a named amount; and it is obvious that the neglect to make a *full inventory* is calculated to excite suspicion, and expose the personal representative to difficulty in regard to the claims against the estate, whether of creditors or others.

5. Of the inventory and valuing the property.

It is not, however, now usual to exhibit an *inventory* or valuation to the spiritual court, except upon the *citation* of an interested party, as a creditor or legatee. The executor or administrator is however compellable, upon such citation, to exhibit the *inventory*, even at the instance of a person clothed with the colour or appearance of any interest. (e) But the right to call for an inventory may be lost by the neglect to require it for a great number of years; (f) and the spiritual court exercise a discretion as to the *sort* of inventory it will accept, particu-

(a) 55 Geo. 3, c. 184, s. 38.

(b) Toller, 6 ed. 96.

(c) 2 Stra. Rep. 1106.

(d) Toller, 6 ed. 248. It seems the profits of carrying on a trade after his death need not be noticed, Pitt v. Wood-

ham, 1 Hagg. R. 250.

(e) Phillips v. Bigwell, 1 Phill. Ec. C. 241; Middleton v. Rushout, 2 Id. 57; Toller, 6 ed. 249; 2 Williams, 642.

(f) Ritchie v. Rees, 1 Add. 144; Pitt v. Woodham, 1 Hagg. 247.

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larly in complicated cases. (g) In the present state of the practice, and in order to save the commission of a per-centage,

(g) *Reeves v. Freeling*, 2 Phil. 56. It is usual to file a *declaration* where the executors have not reduced *all* the property into possession, and to file an *inventory when they have*. In substance the form of the *inventory* is the same as the *declaration*, excepting in the introductory words. In the latter it is termed "a true, full, plain, perfect, and particular inventory," and the parties exhibiting it are called throughout "*exhibitants*," instead of "*declarants*." In many cases, upon a *citation* in the Prerogative Court, an executor has to deliver what is termed a *declaration*, accompanied with an account, upon oath, as in the subscribed form.

Form of executors' declaration of assets, as in lieu of a full inventory.

In the Prerogative Court of Canterbury.

A Declaration (instead of a true, full, plain, perfect, and particular *Inventory*) of all and singular the goods, chattels and credits of *A. B.* late of, &c. party in this cause, deceased, which at any time since his death have come to the hands, possession or knowledge of *C. D.* widow, the relict, and *E. F.* and *G. H.*, three of the executors named in the will of the said deceased, made and given in by virtue of *the corporal oaths* of the said *C. D.*, *E. F.* and *G. H.*, follows, to wit,

| | | | | |
|--------|--|-----|---|---|
| First, | These <i>declarants</i> declare that the said deceased was, at the time of his death, possessed of sundry articles of wearing apparel, the particulars of which these <i>declarants</i> are unable to set forth, but the whole of which did not together exceed in value the sum of ten pounds, as these <i>declarants</i> verily believe | 10 | 0 | 0 |
| Also, | These <i>declarants</i> declare, that the said deceased was, at the time of his death, possessed of cash in the house in which he resided amounting to the sum of nineteen pounds..... | 19 | 0 | 0 |
| Also, | These <i>declarants</i> declare, that the sum of two pounds nine shillings was due to the said deceased, at the time of his death, from the banking department of the Bank of England..... | 2 | 9 | 0 |
| Also, | These <i>declarants</i> declare, that the said deceased was, at the time of his death, possessed of sundry articles of household furniture, plate, linen, china, and other effects, in the house and premises at Mill Wall, Poplar, in the county of Middlesex, in which he resided at the time of his death, the whole of which were, shortly after the death of the said deceased, valued by <i>J. K.</i> of Ratcliffe Highway, sworn appraiser, as being together of the value of eight hundred and twenty-five pounds fifteen shillings, and these <i>declarants</i> have since sold part of the said effects, consisting of some of the effects on the wharf and out-door premises, for the sum of two hundred and ninety pounds, and the remainder of the said effects still remain in the possession of these <i>declarants</i> , but the <i>declarants</i> decline to charge themselves with the difference between the said two last-mentioned sums until they shall have received the same | 290 | 0 | 0 |

Here followed the statements and account of several other items of the deceased's property, and then concluded as follows:

Lastly, These *declarants* declare, that no further or other goods, chattels or credits, of or belonging to the personal estate or effects of the said deceased, have, at any time since his death, come to the hands, possession or knowledge of these *declarants*, save and except what are contained and set forth in the foregoing *declaration*, to the best and utmost of their recollection and belief

| | | |
|---|-----------------------------|--|
| On the 14th day of January, 1833, the said <i>C. D.</i> and <i>G. H.</i> were duly sworn to the truth of the foregoing declaration, | [Names subscribed in full.] | <i>C. D.</i> <i>G. H.</i> <i>E. F.</i> |
| Before me, <i>John Danberry</i> , Surr. Pres. <i>Wm. Slade</i> , Not. Pub. | | |

| | |
|--|--|
| On the 14th January, 1833, the said <i>E. F.</i> was duly sworn to the truth of the foregoing declaration, | |
| Before me, <i>John Danberry</i> , Surr. Pres. <i>Wm. Slade</i> , Not. Pub. | |

payable to two sworn appraisers for their valuation, an executor or administrator would act safely by having an accurate inven-

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A true and faithful account, made and entered by C. D. widow, the relict, and E. F. and G. H. three of the executors named in the last will and testament of A. B. late of Mill Wall, Poplar, in the county of Middlesex, deceased, of and concerning all and singular the goods, chattels and credits of the said deceased, which at any time since his death have come to the hands, possession or knowledge of them, or either of them, follows, to wit,

Form of execu-
tors' account
upon oath
thereupon,
and annexed to
the said decla-
ration.

The Charge.

These accountants charge themselves with the sum of two thousand three hundred and ninety-one pounds, being the sum total or amount of the several sums stated in the declaration hereunto annexed to have been received by them, or on their account, and also with the possession of or claims upon the several goods, chattels and credits, of or belonging to the personal estate and effects of the said deceased, set forth in the said declaration

2391 0 0

The Discharge.

- First, These accountants crave to be allowed the sum of eighty-three pounds one shilling, so much having been paid by them for the expenses attending the funeral of the said deceased.....
- Also, These accountants crave an allowance of thirty-eight pounds nine shillings, so much having been paid by them for mourning clothes furnished to the family of the said deceased.....
- Also, These accountants crave an allowance of five hundred and twenty-three pounds nine shillings, so much having been paid by them to W. M. the ground landlord of the leasehold premises held by the deceased, and described in the declaration hereunto annexed, for rent due to him for the said premises up to the 24th June, 1832
- Also, These accountants crave an allowance of twenty pounds nine shillings and ninepence, so much having been paid by them for king's taxes due on the said premises
- Also, These accountants crave an allowance of ninety pounds eight shillings, so much having been paid by them for parochial and other rates due on the said premises.....
- Also, These accountants crave an allowance of thirty-six pounds five shillings, so much having been paid by them for sundry necessary repairs done to the said premises
- Also, These accountants crave an allowance of five pounds five shillings, so much having been paid by them to G. G. for appraising the household furniture and other effects of the said deceased
- Also, These accountants crave an allowance of one hundred and twenty-four pounds five shilling and fivepence, so much having been paid by them to Messrs. P. & Co. of, &c. auctioneers, on account of their charges relating to the attempted sale of the said leasehold premises and sale of the aforesaid out-door effects
- Also, These accountants crave an allowance of thirty pounds two shillings and sixpence, so much having been paid by them to Mr. P. G. for costs of suit in an action brought against them as executors, named in the will of the said deceased, by Messrs. J. painters and glaziers, for a bill due to them from the said deceased
- Also, These accountants crave an allowance of one hundred and sixty-one pounds, so much having been paid by them to Mr. R. W. V. W. solicitor, for the expenses attending the probate of the said deceased's will
- Also, These accountants crave an allowance of two hundred and fifty pounds, so much having been paid by them to the said Mr. R. V. W. for law business done for them in their character of executors of the said deceased
- Also, These accountants crave an allowance of all and singular such costs, sum or sums of money, which they have already, or shall or may hereafter necessarily lay out, expend, or be put unto, for or by reason or means of this present or any future suit or suits, either at law or in equity, or otherwise howsoever, as executors of the will of the said deceased.....

83 1 0

38 9 0

523 9 0

20 9 9

90 8 0

36 5 0

5 5 0

124 5 5

30 2 6

161 0 0

250 0 0

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tory made by any competent person, and then obtain the written consent of all persons interested in the assets, or at least of the legatees, or residuary legatee, to save the expense of a valuation, which would unnecessarily fall upon the latter.

6. Of advertising and ascertaining whether the debts to the estate are good.

6. *Of ascertaining whether Debts to the Estate are sperate or desperate, and of endeavouring to collect Assets.*—The inventory we have just alluded to should, it is said, distinguish such debts as are sperate and good from those which are doubtful or desperate, (h) particularly as the probate stamp may be thereby influenced; (i) and independently of the necessity or importance of making out a formal inventory, it is a prudent measure for the executor or administrator to ascertain as soon as possible the amount and nature of the debts due to and from the testator at the time of his death, and the possibility of realizing those claims which are due to the estate. It is also his duty to collect in and demand and enforce restoration, within a reasonable time, of all goods withheld from him in his representative character. The non-observance of these duties may subject the executor or administrator to personal responsibility, should any loss accrue from his neglect. The law authorizes him to enter the house of the deceased, though it be freehold and does not pass to him, and take thereout the goods of the deceased; but neither a door, nor a drawer or chest can be

Also, These accountants crave to retain all and singular the goods, chattels and credits, of or belonging to the personal estate and effects of the said deceased, which now are or hereafter may come into the hands or possession of these declarants, or either of them, to the extent of the amount which may hereafter appear to be due to the representatives of the said J. B. the younger, deceased, and to those of the said J. H. deceased, upon the bonds mentioned in the inventory hereunto annexed, for the purpose of paying and discharging the said bonds, the said representatives of the said J. B. the younger, and those of the said J. H. being, as these declarants believe, the only specialty creditors of the said deceased

On the 14th day of January, 1833, the } C. D.
said C. D. and G. H. were duly sworn to } G. H.
the truth of this account, } E. F.
Before me, John Danberry, Surr.
Pres. Wm. Slade, Not. Pub.

On the 14th January, 1833, the said }
E. F. was duly sworn to the truth of this }
account, }
Before me, John Danberry, Surr.
Pres. Wm. Slade, Not. Pub.

(h) Toller, 248 ; 2 Williams, 644. Car. & P. 526, probate duty need not be
(i) According to *Moses v. Crafter*, 4 paid on *probably bad debts*.

broken for the purpose, although the heir or other person refuse to permit the executor to take the goods. (k)

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7. *Advertising for Debts and Credits.*—Upon the death of a party who, it is supposed, may have died entitled to property or owing debts to some unknown creditors, it is a usual and proper precaution, in cases of the least doubt, shortly after the funeral to publish an advertisement in the principal newspapers for debtors to pay their debts and claimants to send in the particulars of their claims to a named person; and this is essential before the speedy payment of *simple contract creditors*, and still more before the *payment of legacies*; for if without such advertisement and without suit an executor or administrator should *hastily* pay a simple contract creditor, and afterwards specialty debts should appear, he may be liable to the consequences of a misapplication of assets and devastavit. (l) In such advertisement care should be observed not to make an unqualified engagement to pay any debts which might bind the party or take out of the statute of limitations a debt otherwise barred by it, (m) but the sending in of claims should merely be required, and so guardedly as either to be silent with respect to *payment*, or at most to intimate the *uncertainty* that any claims will be paid, but only that they will be *inquired into* and considered. An executor or administrator must cautiously abstain from making any representation or engagement that might subject him to personal liability. Thus where *B.* having died indebted to *G.* for work, and his executors incautiously signed a memorandum on the back of *G.*'s account, thus—“Mr. *G.* having consented to wait for the payment of the within account, we, as the executors of *B.*, engage to pay Mr. *G.* interest for the same at 5*l.* per cent. until the same is settled;” it was held that the executors were *personally* liable to pay the debt and interest, because the original debt did not carry interest against the estate, and therefore the engagement must be considered *personal*. (n) The form of the public notices are usually as in the subscribed note. (o)

7. Of advertising for claims due to and from the estate, but avoiding personal engagements.

(k) See 2 Williams, 601, 402; *Anthony v. Harvey*, 8 Bing. 186; 1 M. & Scott, 300, S. C.; *ante*, 512, 513.

(l) See *Davis v. Blackwell*, 9 Bing. 10.

(m) *Jones v. Scott*, 1 Russ. & M. 255.

(n) *Bradley v. Heath*, 3 Simons, 543.

(o) WILLIAM FARMER, ESQUIRE, [or Mr. William Farmer,] deceased. All persons INDEBTED to or having any CLAIM upon the ESTATE of the said WILLIAM FARMER, late of —, in the county of —, deceased, and heretofore of —, are requested forthwith to send the amount and full particulars thereof to us in order that proper acquittances for the former may be prepared, and that the propriety of the latter may be examined and considered; and in default thereof all claimants will be

General notice on behalf of executor to pay debts and send in claims and for discovery of effects.

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8. Of obtain-
ing probate of a
will.

8. *Of Proving a Will.*—In general, within a very short time after the death *and funeral*, and as soon as the named executor has ascertained the probable value of the personal estate, without deducting the amount of debts due from the deceased, he should obtain probate, so as to have that document ready to produce and to remove all objection to his right to receive and enforce payment of the debts. But *at law* it suffices in general to prove within *six calendar* months, though if delayed after that time a penalty of 100*l.* and 10*l.* per cent. on the property would be incurred. (*p*) And if there be a suit or dispute relative to the will or administration, the probate or letters of administration should be obtained within two months after it has been ended. (*q*) Regularly, it is said *testaments* ought to be *insinuated* to the official or commissary within *four months* next after the testator's death, and the ordinary *may* sequester the goods of the deceased until the executors have proved the testament. (*r*) So that in strictness, and to prevent any proceedings in the Ecclesiastical Court against an executor, especially when the personal property is considerable, the will should be proved within *a reasonable time* after the death, and the statute provides for a further stamp and for a return of duty in case it should afterwards be discovered that there were more or less assets than had been supposed. (*s*) With respect to the amount of *the sum* for which the probate should be obtained in the first instance, it should seem not to be necessary to include in the amount a *desperate* or *doubtful* debt before it has been actually recovered and received, (*t*) but the probate should

peremptorily excluded from any benefit of the said estate. Any person giving to us any information so as to discover any at present unknown property belonging to the said estate will be liberally rewarded by the executors.

A. B. and Co., Solicitors to the Executors, No. —, Lincoln's Inn Fields.

The like, more
concise.

PHILIP EDRIDGE, senior.—All persons having CLAIMS or DEMANDS on the ESTATE of P. E., late of —, in the county of —, deceased, are requested forthwith to send the particulars to Mr. G. H., of —, or to Mr. I. K., of —, the executors. And all persons indebted to the estate are also requested to pay such debts to one of the executors before named.

The like, under
a decree.

Pursuant to a Decree of his Majesty's Court of Exchequer, made in a cause of "*Davis and another v. Tomkyns*," the Creditors of T. T. late of —, in the county of —, Esq., the intestate in the pleadings in the above cause named, (who died in or about the month of —, A. D. 1833,) are to come in and prove their debts before Jefferies Spranger, Esq. one of the Masters of the said Court, at his chambers, 2, Mitre-court-buildings, in the Inner Temple, London; or, in default thereof, they will be excluded the benefit of the said decree.

A. B. & Co. Lincoln's Inn, Plaintiff's Solicitors.

(*p*) 55 Geo. 3, c. 184, s. 37.

(*q*) Id. ib.

(*r*) Godolph. Pl. 1, c. 20, s. 2; and
see *Cunningham v. Seymour*, 2 Phil. Ecc.

C. 250; ante, 513, n. (*o*).

(*s*) 1 Williams' Exec. 373, 379, 380,
391; *Moses v. Crafter*, 4 Car. & P. 524.

(*t*) *Moses v. Crafter*, 4 Car. & P. 526.

nevertheless be to the extent of the sum really *expected* to be received. (u) This indeed is enjoined as well in obtaining probate as letters of administration, by the statute 55 Geo. 3, c. 184, s. 38, which enacts, that Ecclesiastical Courts shall not grant either without affidavit or affirmation of the value of the effects, *without deducting any thing on account of debts due from the deceased*, and that the effects are in value under the named sum, to the best of *the deponent's knowledge*. (x)

With respect to the proper *judge* or *place* to whom or where application should be made for probate, this in general depends on the question whether all the *legal personal assets* were in one diocese or in several; if the former, then probate or letters of administration from the local and limited jurisdiction of that diocese will be proper; but if there were several *bona notabilia* (*that is, assets of five pounds value*), in several dioceses, then neither can legally grant probate or letters; and if they did, the same would be invalid, and the probate or letters must then be obtained from the proper *Metropolitan Prerogative Office*, where the whole is situate, as either from the Archbishop of Canterbury or of York, and if there be several *bona notabilia* in *several* dioceses of both, then there should be *two prerogative* probates or letters, i. e. one from each; (y) though if there be *notabilia* only in *one* diocese of the province of York, and also *notabilia* in only one diocese of Canterbury, then *each bishop* may grant separate probate. (z) *Bona notabilia*, by express canon, are fixed (excepting in London, where the sum is 10*l.*) to be *legal personal estate* to the value of *five pounds* or upwards, (a) though if several personal things, each under the value of 5*l.*, but collectively worth more than that sum, be dispersed in several dioceses, they constitute *bona notabilia*, and prerogative probate or letters must be obtained, if the party died in another diocese; (b) and a mere *claim* in the nature of a debt, however difficult to recover, if by possibility it may exceed 5*l.*, is *bona notabilia*. (c) But a *devise for payment of debts* is merely *equitable assets*, and not *bona notabilia*. (d)

From what judge or Court probate or administration should be obtained, and what constitute *bona notabilia*, and where.

There are, however, peculiar distinctions as to the *places* where different kinds of personal property shall be deemed

(u) *Butler v. Butler*, 2 Phil. Rep. 39; 1 Williams, 379; see post, "Evidence."

(x) 55 Geo. 3, c. 184, s. 38.

(y) 1 Williams' Exec. 167, 175; *Burston v. Ridley*, 1 Salk. 39; *Shaw v. Stoughton*, 2 Lev. 86; *Stokes v. Bates*, 5 Bar. & Cres. 491; 8 D. & Ry. 247, S. C.

(z) 1 Williams' Ex. 175.

(a) Wentw. Off. Ex. 105, 106, 14 ed. In

the diocese of London *bona notabilia* are rated at 10*l.* 1 Oughton, tit. 6, n. (a), pl. 3.

(b) Godolph. Pl. 1, c. 21, s. 1; Swinb. Pl. 6, s. 11, pl. 5.

(c) *Coates v. Brown*, 1 Add. 345, note (a.); 1 Williams, 177, 178.

(d) Wentw. Off. Ex. 109; 1 Williams, 179, 1036.

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assets, or *bona notabilia*. *Tangible goods in actual possession* are assets or *bona notabilia* in the diocese where they happen to be, if the owner die within the same, but if *they* be in one diocese, and the owner die in another, then they are deemed *bona notabilia* where they were; but as the owner died elsewhere, there must be prerogative probate or administration. (e) If the owner of moveable goods about him, when he dies whilst upon a *journey*, they by express canon are not to render it necessary to obtain a *prerogative* probate or administration, (f) and consequently probate from the *bishop* of the diocese where he resided is proper, though he died *in itinere* in another diocese, having *bona notabilia* then about him. (g)

A *simple contract debt*, and bills of exchange, and notes, and other *choses in action* (rights of action) due to the deceased, are considered to be *bona notabilia* in that diocese where the *debtor* inhabited at the time of the death of the creditor; (h) but there is an exception as to wages due for working in the king's yards and docks; (i) whilst a *Bond* or other *Specialty* debt due to the deceased is *bona notabilia* where the instrument or security may happen to be at the time of his death. (k) *Judgments* of Courts of Record are *bona notabilia* in the diocese where the same were recovered, as in Middlesex, in case of a judgment of one of the superior Courts sitting there, and *Statutes and Recognisances* are so where each was acknowledged. A *Lease for years*, when of 5*l.* value, or upwards, is *bona notabilia* where the deceased's lands lie; (l) as is an *Annuity* for years, when legally issuing out of a parsonage. (m)

If a *Canal* be situate in both provinces, but the office for transacting the business of it be in that of Canterbury, the probate of a will of a shareholder in Canterbury will suffice, and a probate in York will be unnecessary, (n) and it may happen that a mere diocesan's probate will suffice, although the canal passes through several dioceses of the same province. (o) But in general, if there be *bona notabilia* in both provinces, the archbishop in each is to grant probate accordingly. (p)

(e) 1 Rol. Ab. 909, Executors, 1, pl. 7; 1 Williams' Ex. 172.

(f) Went. Off. Ex. 167, 14 ed.; 1 Williams, 179, 180.

(g) *Doe ex demise Allen v. Owens*, 2 Bar. & Adolph. 423.

(h) 1 Rol. Ab. 909; 1 Williams, 177, 178.

(i) 4 Ann. c. 16, 526.

(k) *Byron v. Byron*, Cro. Eliz. 472; 1 Williams, 178.

(l) *Daniel v. Duker*, Dyer, 305, a.; 1 Williams, 178.

(m) Id. ibid.

(n) *Smyth v. Stafford*, 2 Wils. Ch. Rep. 166; 1 Williams, 179.

(o) *Ex parte Horne*, 7 Bar. & Cres. 632; 1 Williams, 179.

(p) *Burston v. Ridley*, 1 Salkeld, 39; *Shaw v. Stoughton*, 2 Lev. 86; Off. Ex. 48; *Stokas v. Bate*, 5 B. & Cres. 491.

When all the personal estate is entirely in one diocese, then, however large the amount, *regularly* the probate *should* in general be obtained before the bishop of such diocese or his officer, and not in the Prerogative Court. (q) But if the Metropolitan or Prerogative Court grant probate or letters of administration in such a case, where the deceased had not any *bona notabilia* in divers dioceses, though this is not strictly regular, still such probate or letters are not void, but only voidable, (r) and this circumstance makes it safer, generally speaking, to obtain probate in the Prerogative Court; for if probate or letter of administration be granted by a bishop or other inferior judge, in a case where the deceased had *bona notabilia* in divers dioceses, they are absolutely void, (s) and the Court of Chancery usually require a prerogative administration before decreeing money to be paid out, (s) though Sir John Nichol has observed, that that administration is only essential when there really have been *bona notabilia* in several dioceses. (t)

If a person die abroad, or in Scotland, leaving goods in the diocese of London, and in no other diocese, prerogative probate or letters will be proper, but it may be in the Consistory Court of London; (u) and it should seem that the same rule would apply if a party die upon the high seas, in which case, if he have *bona notabilia* only in one diocese, probate or letters there are sufficient, though if he had been in several dioceses, then a prerogative probate or letters would be requisite. (x) If there be *bona notabilia* as well in Ireland as in England, then probates should be granted in both countries. (y)

On obtaining probate in the common form, the executor (with two of the witnesses to the will when living) and usually with his proctor, presents the *original will* to the proper judge, and the witnesses swear that the same "is the true whole and last will and testament of the deceased;" and the executor makes an *affidavit* in the subscribed form, and the judge thereupon, and sometimes upon less proof, annexes his probate and seal thereto. (z) The will itself should be deposited in the

(q) 2 Bla. C. 508.

(r) Id.; 1 Williams, 181, 182; Stokes v. Bate, 5 B. & Cres. 491.

(s) Thomas v. Davies, 12 Ves. 417; 1 Williams, 174, 175.

(t) Scarth v. Bishop of London, 1 Hagg. 626.

(u) Scarth v. Bishop of London, 1 Hagg. 625; 1 Williams, 172, 173.

(x) Id.; Griffiths v. Griffiths, Sayer, 83; Rol. Ab. 908; 3 Bac. Ab. 35.

(y) Daniel v. Luker, Dyer, 305; Bac. Ab. Executors, E. F.; Codex, 472.

(z) Swinb. Pl. 6, s. 14, pl. 2.; Godolph. Pl. 1, c. 20, s. 4; 1 Williams' Executors, 188. The following is the form of the oath to be taken by the executor: "You shall swear that you believe this to be the true last will and testament of A.B., deceased; that you will pay all the debts and legacies of the deceased, as far as the goods shall extend and the law shall bind

Executor's oath.

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Registry of the Ordinary of the Metropolitan, and a copy thereof in parchment is made out under his seal and delivered to the executor, together with a certificate of it having been proved before him, and such copy and certificate are styled *the probate*.

The *probate* itself is usually in the subscribed form, (a) and the executor must, in pursuance of 55 Geo. 3, c. 184, swear that the value of the assets is, to the best of his knowledge and belief, *under* a named sum, as thus: "Sworn under £——, and "that the testator died —— day of ——, A. D. A. B." and which it seems is *prima facie* evidence at law against the executor that the assets are nearly the named amount, since it is to be presumed that he would not swear to and pay a much larger stamp duty than was necessary according to the assets received. (b)

Probate to *one* of several executors operates as if granted to all, so as to enable each to sue, (c) until the other has formally renounced.

A due application of the assets by the executor, either for general or particular purposes pointed out by the will, may be enforced by any party interested in the assets. (d)

Of executors *de son tort*.

An executor *de son tort* cannot retain for his own debt. (e) But a wrongful and a rightful executor only differ in this respect, that the first is to take no benefit by his own wrongful interference, but as regards other creditors there is no difference; and an executor *de son tort*, as well as a rightful executor, may administer the assets in due course of law, and in so doing, stands in precisely the same situation as a lawful executor. (f)

9. Of obtaining letters of administration.

9. *Of obtaining Letters of Administration.*—With respect to *letters of administration*, we have seen *who* is entitled to the same amongst next of kin, and if they refuse, then what other persons. (g) Administration is not generally obtained until after *fourteen* days from the death. (h) It is then granted by writing under seal from the proper judge, being the same person who

you, and that you will exhibit a true, full, and perfect inventory of all and every the goods, rights and credits of the deceased, together with a just and true account into the Registry of the —— Court of ——, when you shall be lawfully called thereto. So help you God." See form, 4 Burn's Ec. L. 254, 8 ed.

(a) See form of a prerogative probate, 1 Williams' Executors, 212.

(b) *Forster v. Blakelock*, 5 Bar. & Crea. 328; 8 Dowl. & R. 48, S. C.; *Curtis v. Hunt*, 1 Car. & P. 180.

(c) *Wallens v. Pleil*, 1 Mood. & M. 561.

(d) *Parry v. Ashley*, 3 Simons, 97.

(e) *Post*.

(f) *Ozenham v. Clapp*, 2 B. & Adolph. 309 to 315.

(g) *Ante*, 108 to 110.

(h) *Toller*, 6 ed. 96.

grants probate. (i) It may be also committed by entry in the registry, without letters *sub sigillo*, but it cannot be granted by parol. (k)

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Upon taking out letters of administration, when the party applies merely as the *next of kin*, no *collateral proof* of his being next of kin is required, but the party merely alleges that fact before the surrogate, and he then swears to the time of the death, and that the whole value of the deceased's personal estate and leaseholds, without deducting for debts, are under the value of a named sum, to the best of his knowledge, information, and belief. (l) Upon such affidavit a *warrant* for issuing letters of administration is granted in the subscribed form. (m) After swearing to such affidavit before the surrogate, and after executing an *administration bond with two sureties*, in double the amount of the assets sworn to, for the faithful administra-

(i) *Ante*, 523 to 526. (k) Toller, 120 ; 11 Vin. Ab. 76 ; Com. Dig. Adm. B. 7.

(l) The Affidavit as to such value is required by 55 Geo. 3, c. 184, s. 38.—The following is the usual form of affidavit:

In the Goods of C. D., deceased.

In the Prerogative
Court of Canterbury.

3d April, 1833.

Affidavit to
obtain adminis-
tration.

Appeared personally A. B. of —, the party applying for letters of administration of the estate and effects of the said C. D., late of, &c., deceased, and *made oath* [in case of Quakers, *solemnly affirmed*,] that the said deceased died on or about the 1st day of March, in the year of our Lord one thousand eight hundred and thirty-three, and that the estate and effects of the said deceased, which he any way died possessed of or entitled to, and for or in respect of which said letters of administration are to be granted exclusive of what the said deceased may have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, including leaseholds (if any), and without deducting any thing on account of the debts due and owing from the said deceased, are under the value of three hundred pounds, to the best of this deponent's knowledge, information and belief. And lastly, this deponent made oath that, &c., (no leaseholds, if so.)

Sworn before me, E. F.,
Surrogate.

A. B.

(m) 3s. Stamp.

3d April, 1833.

Warrant
for granting
administration.

Appeared personally A. B. and alleged that C. D., late of, &c., deceased, died 1st March last, a bachelor and intestate, without a parent; that the appearer is the natural and lawful brother and next of kin of the said deceased, Wherefore he prayed letters of administration of all and singular the goods, chattels, and credits of the said deceased, to be granted to him on giving the usual security.

Sub £300.

Let administration be passed as prayed, the said A. B. having been first duly sworn faithfully to administer and as usual; as also that the whole of the said deceased's personal estate does not amount in value to the sum of three hundred pounds, and that the said deceased died on the 1st day of March, one thousand eight hundred and thirty-three.

Before me,

E. F., Surrogate.

Which I attest,
G. H. Notary Public.

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tion of assets as required by the statute, (n) the party applying obtains the grant, and the *letters of administration* are delivered to him.

The statute 22 & 23 Car. 2, ch. 10, prescribes the form of the bond. The sureties are too frequently little better than nominal, and considering that the bond frequently cannot be put in suit *till after a decree* in the Ecclesiastical Court, at least by legatees or parties entitled to the residue, (o) which may occupy years, in cases where the personal estate is considerable, the parties interested would do well to enter a caveat, or otherwise to take care that *very substantial sureties* are given before letters of administration are granted, as many instances have occurred, after a lapse of years, of total inability to pay legacies or divide the actual residue. (p) And a bill in equity to prevent waste should also be filed, in cases where loss would probably be otherwise incurred. (q)

An administrator, after obtaining letters of administration, stands in most respects in the same situation as an executor, and the cases relating to one in general equally apply to the other. (r) The office of an administrator, so far as it concerns the collecting of the effects, the making of an inventory, and the payment of debts, is altogether the same as that of an executor. (s)

10. Of collect-
 ing assets, car-
 rying on trade,
 and care of the
 assets.

10. *Of collecting Assets, carrying on Trade, and care of the Assets.*—It is the duty of the executor or administrator to collect and speedily reduce into money the personal assets when not otherwise directed, especially if they be of a perishable nature, (t) and if he carry on the trade of the deceased, he does so at his peril, for though we have seen that any small subsequent profits need not be brought into or stated in an inventory when cited, (u) yet, on the other hand, if there be any considerable gain, it belongs to the estate, though if there be any loss, he must bear it, and an executor might, though he intended to derive no personal benefit, be made a bankrupt in respect of such trading. (x) If executors be directed by the will to carry on the trade, they should do so under the protection of the Court

(n) 21 Hen. 3, c. 5; 22 & 23 Car. 2, ch. 10; see Chit. Col. Stat. 324, and *Archbishop of Canterbury v. Tappen*, 8 Bar. & Crea. 155; 2 Man. & R. 136.

(o) Toller, 6 ed. 96; *Archbp. of Canterbury v. Tappen*, 8 Bar. & Cres. 150.

(p) It was so in the case referred to above, n. (o).

(q) *Parry v. Ashley*, 3 Simons, 97.

(r) Toller, 6th ed. 369.

(s) Id. ibid.

(t) Id. 427.

(u) *Ante*, 517, n. (d); *Pitt v. Woodham*, 1 Hagg. 250.

(x) *Wrightman v. Townroe*, 1 Maule & S. 412; 2 Williams, 1101.

of Chancery. (y) But in some cases it will be the duty of the executor to continue the trade so far as may be essential to complete orders in hand and wind up the concern. (z)

An executor should immediately after the funeral, without loss of time, request payment of all claims due to the estate, and, if not paid, should sue for the amount, unless there be reasonable grounds for doubting the success of proceeding, and if he delay, and allow the statute of limitations to become a bar, he would be personally liable for the loss to the estate. (a) If the assets be considerable, and it become necessary to deposit the same in the hands of bankers, rather than incur the risk of burglary or robbery, then the executor should be well assured of their responsibility, and should pay in the assets to his separate account, *as executor*, perfectly distinct from his *private* account, by which means he would avoid personal responsibility in case the banker should fail. (b) If an executor vest the assets in the funds, he will not be liable to make good a loss by the fall of stock. (c) But the safer course, unless indemnified by the residuary legatee, is to pay any balance of assets not immediately wanted into Court; (d) and he ought not to lend the assets on personal security or doubtful realty. (e)

11. *Of prosecuting Actions and Suits.*—An executor or administrator must take care expeditiously to enforce claims due to the estate, so as to prevent loss by a plea of the statute of limitation or other consequence of delay. (f) If there be any doubt upon the claim or the expediency of proceeding for its recovery, he should require the directions of all persons interested. In the next volume will be considered what claims can be enforced by an executor or administrator. It will suffice here to observe, that the right to sue for *torts* to the *person*, and even a promise of marriage, die with the person of the deceased; (g)

11. Of prosecuting actions and suits.

(y) *Ex parte Garland*, 10 Ves. 119; 2 Williams, 1101.

(z) *Marshal v. Broadhurst*, 1 Crompt. & J. 405; 1 Tyrwh. 350; 2 Williams, 1103.

(a) *Hayward v. Kinsey*, 12 Mod. 573; 2 Williams, 1111.

(b) *Wren v. Kirton*, 11 Ves. 377; *Fletcher v. Walker*, 3 Madd. 73; *Manserg v. Banner*, 4 Madd. 413; 1 Jac. & Walk. 241, S. C.; 2 Williams, 1117, 1118.

(c) *Hutchinson v. Hammond*, 3 Bro. Ch. Rep. 147; Toller, 428.

(d) *Eagleson v. Kingston*, 8 Ves. 406.

(e) *Wilkes v. Stewart*, Coop. 6; *Powell v. Evans*, 5 Ves. 844.

(f) *Supra*, (a); *Hayward v. Kinsey*, 12, Mod. 573; 11 Vin. Ab. 309; 2 Williams, 1111; so the merely employing an attorney to demand payment of a bond debt, but not suing, whereby the debt was lost, subjected the executor to pay the amount out of his own funds, *Lawson v. Copeland*, 2 Bro. Ch. R. 156; and see *Goodfellow v. Burchett*, 2 Vern. 299; Toller, 426.

(g) *Chamberlain v. Williamson*, 2 Maule & S. 408; 1 Chit. Pl. 5 ed. 21, 22, 78, 79; but see proposed alterations in some respects of the rule *actio personalis moritur cum persona* in the now pending bill.

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but the payment of debts and compensation for many injuries to personal estate may be enforced by an executor or administrator. (*h*)

At *law*, executors or administrators, when plaintiffs, are not *personally* liable to costs, when they have sued only on contracts alleged to have been made with their testator, although they be nonsuited, or have a verdict against them, (*i*) but it is otherwise, if a count be introduced upon a supposed contract with himself, though in his representative character; (*k*) and although no personal liability for costs affects the executor, yet the estate is liable, and therefore a residuary legatee is not a competent witness, although he have released his claim for the amount of debt sued for by an executor. (*j*) In equity, an executor, whether plaintiff or defendant, who, in performance of his duty, has incurred costs, *will be allowed them out of the estate.* (*l*)

12. Of resisting
claims, actions,
and suits

12. *Of resisting Claims, Actions, and Suits.*—As, on the one hand, an executor or administrator is bound to use due endeavours to recover assets, so, on the other hand, he is bound to *resist* all *unfounded claims*, the payment of which would diminish the fund for creditors, legatees, or next of kin; as, if he pay a bond debt, which he knew he might have resisted on the ground of usury, or other illegality, such as future cohabitation; (*m*) or if he pay a debt contracted by the widow, in the name of a testator after his death, though unknown. (*n*) But it is optional whether an executor will plead or take advantage of the statute of limitations, (*o*) though a Court of Equity will, at the instance of a creditor or legatee, direct that defence to be set up. (*p*) A general direction in a will to pay all debts, or a devise of land to be sold to pay all debts, will not *revive* a debt already barred by the statute of limitations, (*q*) but the latter, or any will creating *a trust*, would suspend the *future* operation of the statute as to debts not already completely barred. (*r*) The whole of the law upon the subject of devastavits would lead us beyond the scope of the present undertaking. (*s*) The exercise

(*h*) 1 Chit. Pl. 22, 79, 80.

(*i*) *Baker v. Tyrwhit*, 4 Campb. 27.

(*k*) *Jobson v. Forster*, 1 B. & Adolph. 6; *Slater v. Lawson*, 1 Bar. & Adolph. 893.

(*l*) 2 Williams, 1252, 1253; *post*, 531.

(*m*) *Winchcombe v. Winchester*, Hobart, 167; 1 Brownl. 33; *Robinson v. Gee*, 1 Ves. sen. 254; Com. Dig. Administrator, I. 1; 2 Williams, 669, 1109.

(*n*) *Giles v. Dyson*, 1 Stark. R. 32; *Blades v. Free*, 9 Bar. & Cres. 171.

(*o*) 2 Williams, 1110.

(*p*) *Shewen v. Vauderhon*, 1 Russ. & M. 349.

(*q*) *Burke v. Jones*, 2 Ves. & Beames, 275; and see Chitty on Bills, 8 ed 613.

(*r*) *Ex parte Ross in re Coles*, 2 Glynn & Jam. 331; and see *post*, chap. ix. on statutes of limitations.

(*s*) See in general 2 Williams, 1104 to 1130.

of the power to prefer a particular creditor, and the control of that power will be presently considered.

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13. *When or not an Executor will be allowed his Costs.*—An executor or administrator would be allowed out of the estate his costs of an unsuccessful action *bonâ fide brought* or defended by him where there was a reasonable ground to institute or defend the action, and no laches or misconduct can be justly imputed to him. (u) But an executor conducting suits as solicitor for the legatees under the will of his testator, will not be allowed his costs in the first instance, if it appear that he had conducted the suits in a negligent and tardy manner. (x) So where an executor misconducts himself, and gives a false account, he will have to pay interest as well as costs; (y) and if an executor, having assets in hand, unnecessarily delay payment, and defend a suit, and afterwards suffer judgment by default for principal, interest, and costs, he will personally have to pay the two latter. (z) But in general the costs of a *bonâ fide* suit or defence are not to fall personally on the executor. (a) In doubtful cases it is prudent to require and take the directions and indemnity of the parties beneficially interested, or, where there will clearly be a residue, of the residuary legatee, as to the adoption of proceedings or defending them; and for this purpose, especially in cases of foreign claims, when the expense of a commission to obtain evidence, or on any other account, the suit would be attended with great expense, it would be prudent, though not absolutely necessary, to convene a meeting of creditors and legatees, and those entitled to the residue, and act with their concurrence. Executors, who plead a plea, which, on the trial, is proved false, (unless he have also pleaded a plea to the *whole* action, which has been found true,) is *personally* liable to pay costs to the plaintiff; (b) as if he plead ineffectually nonassumpsit or plene administravit, and do not succeed on any plea that goes to the whole action. (c) But he will be allowed such costs out of the assets, unless he has been guilty of misconduct in resisting a clear demand. (d)

13. When costs allowed to an executor or administrator. (t)

(t) See several cases as to costs, Chit. Eq. Dig. tit. Executors, 409, 410.

(u) *Baker, executor, v. Tyrchitt*, 4 Camp. 27, where Lord Ellenborough so ruled; *Wekett v. Raby*, 2 Bro. C. C. 386, and see 1 Stark. 32; 2 Williams, 1252.

(x) *Wilson v. Carmichael*, 2 Dow. and Clark, 51, A. D. 1830.

(y) *Crackley v. Bethune*, 1 Jac. & W. 586, 589.

(z) Toller, 6 ed. 426, *Seaman v. Everard*,

2 Lev. 40; *Hall v. Hullet*, 1 Cox's Rep. 134.

(a) *Wekett v. Raby*, 2 Bro. C. C. 386, in error, reversing decision below as to costs.

(b) *Marshall v. Wilder*, 9 B. & Cres. 655; 2 Williams, 1219.

(c) *Marshall v. Wilder*, 9 Bar. & Cres. 655.

(d) 2 Williams, 1252, 1253; see further post.

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14. When executor ought not to submit to arbitration or compromise, or give time.

14. *Submission to Arbitration.*—An executor or administrator should not refer a dispute to arbitration, at least without expressly restricting the arbitrator from awarding against him personally; nor indeed is any reference even with that qualification, but without the consent of creditors and legatees and of the next of kin, prudent; for if an executor refer generally, and the arbitrator should award him to pay, he will be personally liable, although assets have not actually come to his hands. (e) So if an arbitrator should award that a debt claimed by an executor as due to the estate is not due, and the same be thereby lost, the executor will be personally liable to pay the amount. (f) Also if an executor compromise or give time and take a new security, and the debt be thereby lost, he must sustain it. (g) But an executor, to get rid of a bad tenant, may release an arrear of rent and even give him money out of the assets to obtain possession, and if it appear he has *bonâ fide* acted for the best, he shall be allowed both. (h)

15. When he may pay all creditors equally.

15. *Of general Compromises with Creditors.*—But an executor (when there are some assets but not enough to pay all) may and ought properly, even without bill filed, to convene a meeting of creditors and propose an equal distribution, and if upon the faith of an agreement to that effect he executed an assignment of assets, one of the creditors, who assented, cannot afterwards refuse to come in, nor could he sue the executor. (i)

16. Executors accounting. (k)

16. *Accounting.*—An executor should at all times be ready, on the reasonable application of a creditor or legatee or next of kin, to render a just and explicit account of the assets and his administration, or he may be liable to pay interest or costs. (l) But there is not any regular way of calling an executor to account but by bill, and which ought not to be filed without formal demand of an account and refusal or unreasonable delay in rendering the same. (m)

17. What are assets in hand.

17. *What are Assets in Hand at Law.*—As an executor cannot compel a creditor to take goods in payment of any claim,

(e) *Taylor v. Lyon*, 5 Bing. 200.

(f) *Anon*, 3 Leonard, 51; Went. Off. Ex. 71, 159, 160; Toller, 425. But *semble*, this must mean when it is clearly proved that the debt might have been recovered by proceedings at law or in equity, and not that the executor is absolutely responsible.

(g) Toller, 6th ed. 425; *Goring v. Goring*, Yelverton, 10; *Norden v. Sevit*,

2 Lev. 189; 2 Jones, 88; Keilw. 52; *Barker v. Talcot*, 1 Vern. 474.

(h) *Blue v. Marshall*, 3 P. Wms. 381; Toller, 429.

(i) *Brady v. Sheil*, 1 Campb. 147; *Steinman v. Magnus*, 11 East, 390.

(k) See in general 1 Chit. Eq. Dig. 409.

(l) *Pearse v. Green*, 1 Jac. & W. 135.

(m) *In mrs. v. Burke*, 1 Ball & B. 75.

it should seem that *goods* are not actually assets, unless they have actually come to the possession of the executor or administrator, and might have been sold by him for money if he had used due diligence. (n) As to *debts due* to the estate and *choses in action* they are not assets in hand until actually reduced into possession, (o) though if the executor should release a debt or damages, or take a fresh bond or note to himself, that would be deemed in law equivalent to an actual receipt, and charge him accordingly. (p)

Property vested in the testator as a *trustee* for others, and terms attending the inheritance of the testator, are not assets, although the *legal* interest has vested in the executor or administrator. (q) Nor at law or in the Ecclesiastical Court are lands *devised* for the *payment* of debts or legacies, assets in respect of which either can be sued at law, but only in a court of equity, and not even in the Ecclesiastical or Spiritual Court, which has no cognizance of lands; and therefore, in case of such a devise, the creditor can, as respects such equitable assets, only proceed in a Court of Equity, and this although the testator has expressly declared that the produce of the sale of the real estate shall be deemed personalty. (r) This constitutes a most important distinction between legal and equitable assets. (s)

The words in a will, "In the first place, I will and direct all my just debts and funeral expenses to be paid," and afterwards devising the real estate specifically, constituted a charge on such real estate and *equitable assets*, but no proceeding *at law* can be sustained against or in respect of such assets. (t) Where bond or specialty debts have exhausted the personal estate, then simple contract creditors, and even legatees, may, in equity, under the doctrine of *marshalling the assets*, obtain satisfaction in a Court of Equity out of the real estates, to the extent of the fund subtracted by the bond and specialty creditors. (u) The modern act against fraudulent devises, and subjecting the *lands* of traders to the payment of even simple contract debts,

(n) See cases 2 Williams, 1021; but see the judgment of Lord Ellenborough in *Cross v. Smith*, 7 East, 258; 6 Mod. 181; Com. Dig. Assets, D.

(o) Godolp. Pt. 2, c. 24, s. 5; *Jenkins v. Plume*, 1 Salk. 207; *Williams v. James*, 1 Campb. 364.

(p) *Coke v. Jenner*, Hob. 66; *Hosier v. Arundell*, 3 Bos. & Pul. 7; *Partridge v. Court*, 5 Price, 419.

(q) 2 Williams, 1031, 1032.

(r) *Barker v. May*, 9 Bar. & Cres. 489.

(s) See 2 Williams, 1033 to 1037.

(t) *Williams v. Williams*, 3 Vet. J.; *Bailey v. Ekins*, 7 Ves. 319; *Shephard v. Lutwidge*, 8 Ves. 26; Chit. Eq. Dig. 417.

(u) As to *marshalling assets* in general, see Woodes. Vinerian Lectures; and Chit. Eq. Dig. 419 to 422.

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does not alter the proceeding at law, and the lands can only be affected in a Court of Equity. (x)

18. Some assets, but not enough to pay an entire debt.

18. *Some Assets, but not sufficient to pay the Whole of a Single Debt.*—Supposing an executor or administrator to have some legal assets, but not sufficient to pay the whole of a legal claim, it seems that if he be sued and correctly plead *plene administravit præter* the sum in hand, and the plaintiff pray judgment for the sum confessed, and *quando acciderient* to the residue, the executor or administrator will not be personally liable to pay costs, though the plaintiff will be entitled to them out of future effects, for an executor is not bound to pay away every trifle of assets the instant he receives the same. (y)

19. Of retaining by an executor or administrator.

19. *Of Retaining.*—As an executor or an administrator cannot *sue* himself, the law allows him, when he has been *legally* invested with his representative character, to retain out of any assets that may have come to his hands, to the extent of all funeral and testamentary expenses and debts *legally* paid by him out of his own pocket, (z) and also any debt due to himself, before he pays any other creditor in *equal degree*. (a) It has long been an acknowledged principle in courts of equity, that an executor paying to creditors more or equal to the value of his testator's personal assets, acquires an absolute right to them; indeed this principle equally extends to trustees of real estate, though in general a trustee is not allowed to purchase any part of the trust, (b) and for the same reason he may retain his own debt, notwithstanding a decree has been made in a suit by other creditors for administration of assets equally, and notwithstanding assets out of which he seeks to retain his debt came to his hands after decree; (c) but he cannot retain in respect of his own debt any assets from a creditor of a higher degree. (d) It should even seem that an executor may retain a debt due to himself and really unsatisfied, though barred by the statute of limitation; (e) and an executor who has

(x) 1 Wm. 4, c. 47; and see *Johnson v. Compton*, 1 Clark & Fin. Rep. 47.

(y) *De Tustet v. Andrade*, 1 Chit. R. 629; Tidd, 980, 9 ed.; 2 Williams, 1222, 1223; and see Rast. 323; *Shipley's case*, 8 Co. 134; *Noel v. Nelson*, 2 Saund. 226; 3 Chit. Pl. 5th ed. 943, 945, in notes.

(z) *Gillies v. Smither*, 2 Stark. R. 528, where the expenses of a funeral paid out of executor's own pocket were held to be properly retained.

(a) *Robinson v. Cummings*, 2 Atk. 411; *Cockcroft v. Black*, 2 P. Wms. 298; 1 Saund. 353, n. 6; *Picard v. Brown*, 6 T. R. 558.

(b) *Chalmer v. Bradley*, 1 Jac. & Walk. 64.

(c) *Nunn v. Barlow*, 1 Sim. & Sta. 588.

(d) 2 Williams, 685, 1206.

(e) *Hepkinson v. Leach*, Mad. Ch. Pr. 583; 2 Williams, 693, *sed quære*.

paid to creditors more than the value of his testator's personal property acquires an absolute right to them. (f) Where there are joint executors, or joint administrators, they must *inter se* retain their debts rateably and in proportion to the assets. (g) It is optional to *plead* a retainer or give it in evidence under a plea of *plene administravit*, (h) but it is in general better to plead it specially, as the replication must then narrow the evidence.

To prevent a struggle amongst creditors in order to pay themselves, it is settled that an executor *de son tort* is not entitled to retain, (i) though if he obtain letters of administration pending the suit against him, he may rejoin the same *puis darrein continuance*, so as to sustain a previous plea of retainer, to which the creditor had replied that the defendant was executor *de son tort*. (k)

20. Of the Order in which Debts and Legacies are to be paid in general.—It is of the utmost importance, when there are not sufficient assets *to pay all*, that the executor or administrator should in the first instance pay debts of the highest degree, and so on down to the most inferior, (l) for otherwise he will be guilty of what is termed a *devastavit*, and *personally* liable to the extent of the misapplied assets, (m) but no further. (n) And for the same reason he must, by pleading that a higher debt is outstanding, resist the payment of an inferior debt, or he will be liable to pay both. (o) Where, however, there are certainly sufficient assets to pay all, executors may pay simple contract debts not bearing interest, before specialty debts bearing interest, if not objected to by the specialty creditors; and the legatees in such a case are not at liberty to complain of the order of payment, although it is obvious that they may be prejudiced to the extent of the accumulating interest on the specialty debts. (p) So where the executor is quite certain that there is a sufficiency of assets already in hand, he may

20. Of the order of paying debts and legacies.

(f) *Chalmer v. Bradley*, 1 Jac. & Walk. 64.

(g) *Chapman v. Turner*, 9 Mod. 268.

(h) *Loane v. Casey*, 2 Bla. R. 965; 1 Saund. R. 333, n. 6; 2 Williams, 693.

(i) *Coulter's case*, 5 Coke, 30; *Pudget v. Priest*, 2 Term Rep. 97; and this although he obtain the assent of the rightful administrator after administration granted, and though his debt may have been of a superior nature; *Curtis v. Vernon*, 3 T. R. 587; per Lord Tenterden in

Ozenham v. Clapp, 2 Bar. & Adolph. 312 to 314.

(k) *Pyme v. Woodland*, 2 Vent. 180; *Vaughan v. Browne*, 2 Strange, 1106.

(l) *Davis v. Blackwell*, 9 Bing. 5.

(m) 2 Bla. Com. 511.

(n) 1 Saund. 336, n. 110.

(o) *Rock v. Leighton*, 1 Salk. 316; 1 Saund. R. 333, n. 8.

(p) *Turner v. Turner*, 1 Jac. & W. 39.

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voluntarily pay legacies even before the expiration of the year, though he need not do so, and will pay at the peril of superior claims afterwards appearing ;(q) and consequently should always withhold payment until adequately indemnified.

The following is the order of payment in prudence to be observed, unless there be certainly more than sufficient to pay every description of debt.

1. *Funeral Charges*.—We have seen that these to the extent of 20*l.* will *probably* be considered reasonable, if the deceased were an officer in the army, or in a middling rank of society, although he died insolvent, though it would be safer not to exceed 10*l.*, a sum which has been long allowed for the funeral of a person even in the middling class of society.(r) Where the deceased died possessed of assets more than sufficient to pay all debts, then, as against legatees or the next of kin entitled to the residue, even a much larger sum may be allowed, and even presents of mourning rings, at the discretion of the executor.(s) If the executor himself ordered or assented to the funeral, he will be personally liable for the amount, without regard to the extent of assets, as upon his own contract.(t) To the above limited extent funeral expenses will be allowed, and recoverable from an executor even in preference to a debt to the crown ;(u) and although he were absent, and did not concur in ordering the funeral.(v)

2. *The Expenses of proving the Will, or taking out Letters of Administration*, viz. the expense of valuing the property, the fees to the proper spiritual judge, and stamp duty ;(x) and amongst these also may be arranged the costs of a suit in equity to administer the property ;(y) but testamentary expenses do not include the costs of a suit occasioned by a will.(z)

3. *Debts to the Crown by Record or Specialty, &c.* (a)—But other debts to the crown not of record or specialty are to be postponed to debts of record due to a subject, (b) although Magna Charta would import that *all debts to the king* should be first paid.(c) By 33 Hen. 8, c. 39, all obligations and spe-

(q) *Angerstein v. Martin*, 1 Turner & Russ. 241; *Davis v. Blackwell*, 9 Bing. 5.

(r) *Ante*, 514.

(s) *Ante*, 514.

(t) *Ante*, 515, n. (f).

(u) *Rex v. Wade*, 5 Price's R. 627, per Richards, C. B.; 11 Vin. Ab. 432; Bro. tit. "Executor;" Doctor and Student, Dial. 210.

(v) *Ante*, 515, n. (f).

(z) 2 Bla. Com. 511; Off. Ex. 130, 1.

(y) *Loomes v. Stotherd*, 1 Sim. & Sta. 461; when otherwise, *Browne v. Groombridge*, 4 Madd. 495.

(z) *Brown v. Groombridge*, 4 Madd. 495.

(a) 2 Williams, 652; *Littleton v. Hibbins*, Cro. Eliz. 793; Com. Dig. Administration (C. 2.)

(b) 2 Williams, 653.

(c) 9 Hen. 3, c. 18.

cialties, taken to the use of the king, are of the same nature as a statute-staple; but as to sums of money owing to the king on wood sales, or sales of tin, or other his minerals, for which no specialty has been given, they shall not be preferred to a debt due to a subject by matter of record. (d) Fines and amercements in the king's courts of record (e) shall be preferred; but amercements in the king's courts baron, or courts of his honours, which are not of record, have no priority; (f) nor have fines for copyhold estate, nor money arising from the sale of estrays within his manors or liberties, for these are not debts of record. (f) But whatever accrues to the king by attainder of felony or outlawry is considered as a debt by simple contract before office found; and the prerogative does not extend to a debt assigned to the king; so arrears of rent due to the crown, whether fee-farm rent, or rent reserved on a lease for years, are it appears debts by simple contract. (g) And a recognizance in the court of chancery by a guardian in the matter of a minor, is not to be considered a debt due to the crown. (h) Where the king's debt and that of the subject be both inferior to debts of record, the king shall be preferred. (i) By statute 55 Geo. 3, c. 184, s. 45, the commissioners of stamps are authorized in certain cases to give credit for the duties on probates and administrations; and by sect. 48 it is provided, "that the duty for which credit shall be so given shall be a debt to the crown, and shall be paid in preference to any other debt whatsoever."

4. *Debts secured by Statutes*, as money due from an overseer of the poor who dies whilst in office, (k) or money due in certain cases to a friendly society, (l) or from a treasurer or collector under the metropolis paving act to the commissioners; (m) and it has been suggested that some of these kind of enactments may even give a preference to a crown debt. (n) Debts to the post office for postages of letters not exceeding 5*l.* are to be preferred. (o)

5. *Debts of Record* in general, as *judgments* recovered in any courts of record against the deceased; and these are entitled to a preference before recognizances or statutes; (p) and this

(d) 3 Bac. Ab. tit. "Executors," (L.) 2.

(e) Godolph. pt. 2, c. 28, s. 3.

(f) Went. Off. Ex. 263, 14th ed.; Com. Dig. Administration, (C. 2.); 3 Bac. Ab. 80, tit. "Executors," (L.) 2.

(g) Id.; *sed quare*, post, 539, n. (g).

(h) 1 Ball & Beatt. 199.

(i) Bac. Ab. tit. "Executors."

(k) 17 Geo. 2, c. 38, s. 3.

(l) 10 Geo. 4, c. 56, s. 20; 2 Williams, 653.

(m) 57 Geo. 3, c. 29, s. 51.

(n) By Lord Alvanley in *Ex parte Lancaster Society*, 6 Ves. 99; 2 Williams, 656.

(o) 9 Ann. c. 10, s. 30; 2 Bla. 511.

(p) *Sadler's Case*, 4 Co. 59, b; 2 Williams, 657.

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priority equally extends to judgments of inferior as well as superior courts of record, even of a court of pie poudre. (q) And a *final* decree of a court of equity is entitled to a preference equally with a judgment at law, and shall stand in the same order of payment; (r) and though such decree is not pleadable at law as a debt outstanding, the executor may relieve himself by a bill in equity, and have an injunction; (s) and he ought cautiously to inquire whether there has been any decree before he pays a simple contract creditor. (t)

But unless a *judgment* of the superior courts at *Westminster* be *docketed*, it has been enacted and held, both at law (u) and in equity, (x) that in the administration of the ancestor's or testator's estates a judgment shall be considered only as a *simple contract debt*; and that if an heir or executor should plead to an action on a bond or simple contract an outstanding judgment, the plaintiff may reply that it was not docketed and entered according to the provisions of the statute. (y) The judgment must be docketed, and not merely the issue. (z) But the act does not extend to judgments of *inferior courts of record*, which therefore are still entitled to a preference, although they have not been docketed, (a) and of which therefore the executor must it seems take notice at his peril. (b)

We have seen that a judgment in the Lord Mayor's Court, obtained against the garnishee by foreign attachment, does not entitle the plaintiff to rank as a judgment creditor for a *debt* in the administration of the garnishee's assets; (c) and some other interlocutory judgments and decrees stand in the same situation. (d)

When there are several judgments, neither the order of time when they were recovered, nor the consideration or original debt, is material, and the executor or administrator may prefer the last, (e) and this although one judgment creditor has already proceeded by *scire facias*. (e)

6. *Recognizances and Statutes-Merchant or Staple* stand

(q) *Searle v. Lane*, 2 Vern. 89.
(r) *Shafto v. Powell*, 3 Lev. 353; 3 P. Williams, 401.
(s) *Stasby v. Powell*, 1 Freem. 334; *Harding v. Edge*, 1 Vern. 143; 2 Williams, 661.
(t) 2 Williams, 678.
(u) *Hickey v. Taylor*, 6 Term Rep. 384.
(x) *Landon v. Ferguson*, 3 Russ. Chan. Cas. 349; but see Tidd, 9th ed. 938 to 941; and Sugd. V. & P. 8th ed. 685.

(y) *Steel v. Rooke*, 1 Bos. & Pul. 307; *Hickey v. Haytor*, 6 T. R. 384; *Hall v. Tapper*, 3 Bar. & Adolp. 655.
(z) *Braithwaite v. Watts*, 2 Crompt. & J. 318.
(a) 2 Williams, 660.
(b) 2 Williams, 677.
(c) *Ante*, 104; *Holt v. Murray*, 1 Simon's R. 485.
(d) 2 Williams, 658, 661.
(e) Went. Off. Ex. 269, 4th ed.; Toller, 264; 2 Williams, 660.

next in degree, and though to be postponed to *judgments* for debts, are to be preferred to specialty debts. (*f*)

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7. *Rent, and Covenants and Contracts of Tenants.*—*Rent in arrear before the Death of the Tenant*, though due on a *parol* demise, and *not* secured by covenant or bond, stands in the same rank as to precedency in payment as *specialty debts*, and consequently to be preferred to simple contract debts; and this although the tenancy has expired, and the right of distress determined, or even though it has become due *since* the death of the tenant. (*g*) But it is said that an executor cannot, to an action on a bond, plead a payment of rent grown due since the testator's death, unless where the rent is *greater* than the profits of the land in the executor's time, in which case so much of the rent as exceeds such profits shall stand in equal degree with other debts by specialty; (*h*) and if the executor *enter*, he may be charged in the *debet* and *detinet* for the current half-year's rent which commenced before the testator died. (*i*)

As to rent which has altogether accrued due *after* the death of the lessee, and as to other breaches of covenant after such death, the law is somewhat complicated. If the executor or administrator have assets, he is always liable to be sued in his representative character in respect of such assets. But supposing he has not, still in the language of the law, if he have *entered on the demised premises*, (*i. e.* exercised any act of ownership with reference thereto,) then the lessor has an option either to sue him as executor, or *personally* in the *debet* and *detinet* in respect of his supposed perception of the profits, and he cannot in the latter case plead *plene administravit*. But if the land be of less value than the rent, the executor may plead the special matter, *viz.* that he has no assets, and that the land is of less value than the rent, and pray judgment whether he shall be charged otherwise than in the *detinet* and merely in respect of the assets of the testator. (*k*) But so long as the executor *retains possession* or exercises acts of ownership, he continues *personally liable as assignee* to pay the rent and perform the other covenants. (*l*) If the demised pre-

(*f*) 2 Williams, 662.

(*g*) *Thompson v. Thompson*, 9 Price, 476; Toller, 6th ed. 278 to 281; 2 Williams, 666, 688, 1107; Com. Dig. Administration, (C. 2.)

(*h*) Went. Off. Ex. c. 12, p. 286, 290, 14th ed.; 2 Williams, 667.

(*i*) *Burliiffs v. Martin*, Cro. J. 411; *Geuens v. Harridge*, 1 Saund. 1.

(*k*) *Billinghurst v. Spearman*, 1 Salk. 297; *Buckley v. Pitt*, 1 Salk. 317.

(*l*) *Wigley v. Ashton*, 3 Bar. & Ald. 101. It was there held that if the executor be sued in *assumpsit* for use and occupa-

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mises be of less value than the rent, and the executor has pleaded specially as above, then he must in evidence show that he offered to surrender the premises to the plaintiff, for if he have entered or adopted the term, he is then liable so long as he *retains* possession. (m) But it seems clear that although an executor has taken to a lease or tenancy, yet if the profits of the land are of less amount than the rent, and there is a deficiency of assets, he may at any time waive the lease, although he have retained it for some time, and although he is bound to pay so long as the assets hold out, and then he may waive the possession and pay rent to that time, and immediately give notice of his abandonment to the reversioner and that he has no assets. (n) But whatever profits an executor at any time derives from demised premises after the death of his testator, he must apply specifically in the payment of rent and fulfilment of covenants, and not in payment of any debt even of an higher nature. (o) If he has so applied the same, he will then be free from personal liability upon proper pleading; and therefore in an action for use and occupation, where it appeared that the defendant, who was administrator of the original tenant under an agreement for a lease, had taken possession after the intestate's death, yet it having been proved by the defendant under the *general issue* that the premises had been productive of no profit to him, and that eight months after the death of the intestate he had offered to surrender them to the plaintiff, it was held that this constituted a good defence to the action. (p) It should seem, therefore, that so long as an executor has any assets he should reserve them, so as to enable him to pay rent during the term, and that if he discover that he have not assets to cover such continuing liability, and have for a time entered or acted under a lease, he must pay rent and give notice to the landlord of the facts, and tender the draft of a written surrender, and immediately after send the key and quit possession. (q)

8. *Debts, or Unliquidated Demands, secured by bond or covenant under seal*, and though payable at a future day, are to be preferred, and assets retained to cover them in preference to a

tion in his own time, he shall be liable *de bonis propriis*, though it be laid in the declaration that the defendant occupied as executor.

(m) *Remnant v. Brembridge*, 8 Taunt. 191; 2 J. B. Moore, 94, S. C.

(n) Toller, 6 ed. 281; Went. Off. Ex. c. 11, p. 244; *Wilkinson v. Caswood*, 3 Anstr.

909; 2 Williams, 1079.

(o) *Lyddall v. Dunlapp*, 1 Wils. 4; *Wilson v. Wigg*, 10 East, 315; 2 Williams, 1079.

(p) *Remnant v. Brembridge*, 8 Taunt. 191.

(q) *Id. ibid.*; 2 Williams, 1078, 1079.

present simple contract debt. (r) But if there be two specialties, one already payable and the other not yet due, the former must be preferred. (s) But to entitle the debt to priority as a specialty, the very contract to pay it must have been under seal, and a mere recital of the existence of such debt in a deed will not constitute a specialty. (t) If an indemnity security be payable absolutely on a certain day, then funds to satisfy it must be retained, although the surety has not yet in reality been prejudiced. (u)

Contingent specialty securities, such as bonds to save harmless, are not to stand in the way of debts of inferior degree, unless already forfeited; (x) and therefore before breach of the contingent condition or covenant an executor may and ought to pay even a simple contract claim. (y)

But if the contingency has taken place, then, although the damages be unliquidated and secured only by a covenant and not by a penalty, the executor must reserve adequate assets before he pays simple contract claims, and the executor may plead the *penalty* of such a bond against a simple contract action. (z)

But though a bond of a married woman is valid in equity as against her separate estate, it is not recognized at law as a specialty, so as to be entitled to priority to or pleadable against simple contract debts in the administration of assets. (a)

And voluntary bonds are to be postponed to simple contract debts, but must be paid by an executor in preference to legacies. (b)

And if a surety pay a bond debt to the obligee either in the life-time of the principal or after his death, such surety is merely a simple contract creditor; and it makes no difference although the obligee assign the bond to the surety, for the action must be brought in the name of the obligee, and the payment to him by the surety will be a good plea to answer the bond. (c) The proper course in such case is for the surety to get a *third* person to buy the bond, so as not to satisfy it as a payment but only as a *purchase*.

(r) *Woodham v. Fulmerstone*, 1 Leonard, 187; *Buckland v. Brook*, Cro. Eliz. 315.

(s) 1 Rol. Ab. 927; 2 Williams, 672.

(t) *Lacem v. Mertins*, 1 Ves. sen. 313.

(u) *Goldsmith v. Sidnor*, 1 Rol. Ab. 925, tit. Executors; Cro. Car. 362, S. C.

(x) *Harrison's case*, 5 Coke, 28, b; *Cox v. Joseph*, 5 Term R. 307; Toller, 284.

(y) *Eeles v. Lambert*, Aleyn, 4; Toller, 282, 283.

(z) *Cox v. Joseph*, 5 T. R. 307; *Mussen*

v. May, 3 Ves. & B. 194; *Davis v. Blackwell*, 9 Bing. 5.

(a) *Anonymous*, 18 Ves. 258; 2 Williams, 669.

(b) *Jones v. Powell*, 1 Eq. Cas. 94; *Lady Cox's case*, 3 P. Wms. 339; 2 Williams, 668.

(c) *Gammer v. Stone*, 1 Ves. sen. 339; *Woffington v. Sparkes*, 2 Ves. sen. 569; 2 Williams, 668.

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9. *Simple contract debts*.—Of these, simple contract debts to the King are first to be paid, (d) next servants' and labourers' wages; (e) and it has been held that in London a simple contract debt to a citizen must be preferred, but that supposition is doubtful. (f) As to other simple contract debts, the executor or administrator must be certain that the debt was due from the *deceased* and not incurred *afterwards*, though in ignorance of the death. (g) If he be certain that the assets are or will be sufficient to pay all judgment and specialty debts and other debts entitled to preference, he may pay simple contract creditors in the first instance, but then it is at his peril; (h) and he may in that case pay simple contract debts *not* bearing interest before specialty creditor's debt that do bear interest, if not objected to by the latter, and legatees cannot complain with effect though an increase of interest is thereby subtracted from the fund that would otherwise come to them. (i) If the executor or administrator be certain that he has sufficient assets to pay all judgments and all rent and specialty debts of which he is apprized, he may then at any time before action commenced or decree to administer equally, pay any simple contract creditor he prefers, although he leave nothing for other simple contract creditors; and as an executor having assets in hand would not be allowed out of the assets his costs of defending an action for a simple contract debt, merely on the supposition that debts of a higher nature *might* appear, it seems that if he *bonâ fide* pay such a debt *without* collusion, though shortly after the death, he will be protected in so doing.

But before any executor or administrator pays any simple contract debt, he should, in the presence of one or more competent witnesses, (so as to be secure of evidence of the fact,) retain a respectable and responsible attorney to *search* in all the *superior* courts for judgments that may have been docketed; and he should also immediately *advertise* for all judgments of *inferior courts*, and for all outstanding bond and other creditors to send in their claims; (k) and he should not with unnecessary haste pay simple contract creditors; though it seems that unless an executor actually have knowledge of a bond or other specialty, though *not formal notice thereof*, he may pay simple contract creditors really to avoid the costs of a threatened action, (l) or even pay the same without such formal notice

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| (d) Bac. Ab. Executors, L. 2. | (i) Id. <i>ibid.</i> |
| (e) 2 Bla. Com. 511; Toller, 286; 2 Williams, 674. | (k) <i>Ante</i> , 521; <i>Davis v. Blackwell</i> , 9 Bing. 9. |
| (f) 2 Williams, 674. | (l) Toller, 292; <i>Brooking v. Jennings</i> , 1 Mod. 175; <i>Harrison v. Harrison</i> , 3 Mod. 115; 2 Williams, 678, 679. |
| (g) <i>Blades v. Fres</i> , 9 Bar. & Cres. 167. | |
| (h) <i>Turner v. Turner</i> , 1 Jac. & W. 39. | |

pending an action at the suit of a simple contract creditor, and may legally plead such payment *pending* the action; and this although the defendant be an *executor de son tort*. (m) But a *precipitate* payment of a simple contract debt might, in case a specialty should afterwards appear as well as an insufficiency of assets, afford evidence of fraud. (n) If a simple contract creditor *bonâ fide* threaten to sue, then the executor may safely pay him, provided there be no outstanding judgment, and that he have no knowledge of specialty, and this although the claim of the simple contract creditor and the payment be very shortly after the death, (o) though it seems to have been considered safer to suffer judgment by default; and if a specialty creditor should afterwards sue him, he may plead *plene administravit* before notice of the specialty or the judgment outstanding, for the law does not compel any simple contract creditor to wait any definite time, (though a *legatee* must wait a year,) and he may sue at any instant after the death, and the executor would have no defence unless he had actual knowledge of an outstanding specialty. (o) It has even been supposed that an executor must have notice of a specialty by suit thereon, and that otherwise he may pay a simple contract debt in preference, (p) but that doctrine is erroneous, and any knowledge of a higher outstanding debt is compulsory on the executor to plead it, so as to prevent the simple contract creditor obtaining a judgment otherwise than after satisfaction of *that debt*. (q)

21. *Of giving a Preference.*—It has long been settled that amongst creditors in equal degree an executor may, even after action commenced by an adverse creditor, and at any time before judgment therein, confess a judgment, and give a preference to any other favoured creditor in the same or an higher degree, thereby postponing the party first suing; and unless assets should afterwards come to hand sufficient to pay both, the first suitor will be totally deprived of the benefit of his prior action, and this although it be done for the express purpose of depriving the plaintiff of the debt. (r) Nor will a Court of

21. Of executor's power to give a preference to a particular creditor in equal degree.

(m) *Oxenham v. Clapp*, 2 Bar. & Adolp. 309, 312.

(n) Toller, 192; 2 Williams, 676, note (d); and *Davis v. Blackwell*, 9 Bingh. 5.

(o) 2 Williams, 677; *Davies v. Monkhouse*, Fitzg. 76; Bul. N. P. 178; *Sawyer v. Mercer*, 1 Term Rep. 690.

(p) *Brooking v. Jennings*, 1 Mod. 175.

(q) Toller, 292; 2 Williams, 678, 679.

(r) *Bryant v. Perring*, 5 Bing. 414; *Blundwell v. Loverdell*, 1 Sid. 21; *Edgcomb v. Dee*, Vaugh. 95; 1 Saund. 333, a, note 8; 2 Saund. 49, 50; *Prince v. Nicholson*, 5 Taunt. 665; 1 Marsh. 280, S. C.; *Lyttleton v. Cross*, 3 Bar. & Cres. 216; and the rule is the same in equity at any time before decree, *Maltby v. Russell*, 2 Sim. & Stu. 227, 228.

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equity interpose to prevent this preference, excepting *after a decree* upon a bill filed, as presently noticed; (s) and if an executor has pleaded to a prior action *plene administravit præter* a named sum, and then another action be brought, he may and ought to plead to the latter, before the former has obtained judgment, that he has so pleaded to the former action, and has confessed judgment to that extent, and that he has no assets ultra. (t) Nor is it necessary that process should be taken out by the creditor to whom judgment is confessed, and the executor may at once execute a warrant of attorney to confess a judgment to a particular creditor for the precise sum due to such particular creditor, and judgment may be immediately signed thereon, (u) and he may give a cognovit, which would have the same effect; (x) and after pleading the general issue to the first suit, the executor may confess a judgment to another creditor, and plead it *puis darrein continuance*, (y) and this although under an order to plead *issuably*. (z) But a warrant of attorney or cognovit must be confined to the debt of a particular creditor, and cannot be given to one creditor as a trustee for several, so as to be effectually pleaded to an adverse suit of an omitted creditor, or one who has not concurred in such security. (a) Nor can an executor, after action commenced, *pay* another creditor in *equal* degree, without first confessing a judgment in his favour, (b) though such a *payment* would be legal and effective pending a suit in *equity* for an account and distribution. (c) A *payment* even of a *higher* security, pending an action, should be pleaded specially. (d) But at *law*, when an executor or administrator is obliged to apply for time to plead, or other favour, the Court will in general impose terms to prevent such unjust proceeding; and the power to give a preference is confined to *debts* in equal degree, and does not extend to *legacies*, and an executor cannot retain for a general legacy to himself in preference to other legatees, but must, in case of deficiency of assets to pay the whole, abate equally with the other legatees. (e)

(s) *Maltby v. Russell*, 2 Sim. & Stu. 227, 228; *Waring v. Danvers*, 1 Peere Williams, 295; 2 Saund. 51, note 3.

(t) *Waters v. Ogden*, Doug. 452, 3 ed., and see 1 Saund. 333, b., note 8.

(u) *Macbreth v. Jackson*, 1 Maule & S. 408.

(x) *Davis v. Hughes*, 7 T. R. 206.

(y) *Prince v. Nicholson*, 5 Taunt. 665; 1 Marsh. 220, S. C.

(z) *Bryant v. Perring*, 5 Bing. 414.

(a) *Tolpatt v. Wells*, 1 M. & S. 395; notwithstanding the dictum of Lawrence, J. in *Mear v. Howell*, 4 East, 9; 1 Saund. 333, b. note (c.)

(b) 1 Saund. 333, note 8, *semble* *Orenham v. Clapp*, 2 B. & Adolph. 313, 314.

(c) *Maltby v. Russell*, 2 Sim. & Stu. 227.

(d) See form and law, *Orenham v. Clapp*, 2 Bar. & Adolph. 309, 314.

(e) Toller, 6 ed. 347; post.

22. *Of controlling such Power.*—But a Court of Equity will (to a certain extent, though not adequately,) by a decree controul and prevent the preference, upon bill filed by any creditor on behalf of himself *and all others* against the executor or administrator, requiring him to account and distribute equally, upon which a proper division and distribution will be decreed, and this is considered in the nature of a judgment in favour of all the creditors; (f) and although by such a decree the *legal* priorities of creditors, according to the *degree* in which their debts stand, are not affected, yet the power of *preference* is taken away, and suits of this kind have now become the usual and proper means of compelling an equal distribution of assets amongst the creditors of a deceased insolvent. (g) When an executor or administrator is pressed by numerous creditors before he has assets to pay all, it is advisable for him to get a friendly creditor to institute such a suit, so as to prevent an accumulation of litigation and costs. And an executor himself, and without the interference of any creditor, may, it seems, if he be desirous to apply the assets as far as they would go in satisfying the debts equally, may file a bill against all the creditors, that they may, if they please, contest each other's debts, and that their preference may be settled, and such a bill, on demurrer, was held proper. (h)

If it be doubtful whether there be assets more than sufficient to pay judgments and specialty debts, then a *simple contract* creditor should not file such a bill, or at least if he do, he might not be allowed his costs out of the assets, though a specialty creditor might appear and avail himself of the benefit of the proceeding. (i) It is the duty of the executor as far as possible to facilitate the obtaining a decree under which the estate may be protected from actions by his putting in his answer speedily; (k) and he will then be allowed his costs out of the assets. (l)

But, as already suggested, the controlling power of a court of equity is not perfect nor adequate, for pending suit, and at any time *before actual decree*, an executor may voluntarily pay or confess a judgment in favour of a particular creditor, though

(f) See cases, 2 Williams, 681.

(g) See the observations of Sir J. Mansfield, in *Brady v. Sheil*, 1 Campb. 148; *Nunn v. Barlow*, 1 Sim. & Stu. 568; 2 Williams, 682, 683.

(h) *Buckle v. Asleo*, 2 Vern. 37.

(i) *Young v. Everest*, 1 Russ. & M. 426; *Rowlands v. Tucker*, Id. 685; and see *Johnson v. Compton*, 1 Clark & Fin. 47.

(k) *Clark v. Earl Ormond*, 1 Jacob, 108.

(l) *Young v. Everest*, 1 Russ. & M. 426; *Lockmere v. Brazier*, 1 Russ. 72.

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after decree it would be too late to do so. (m) Though, according to the principle that equality is equity, the propriety of the rule has been questioned. (n) Immediately after decree to administer the assets equally, the executor should give notice to each creditor who has any pending action against him. (o) After decree in such suit, all the creditors *must* come in, and though at law an adverse creditor may proceed until decree, yet if by so doing he should, after notice of decree, obtain a priority by judgment and execution, a Court of Equity might compel him to refund what he may have thereby levied, (p) and although a creditor may have obtained judgment at law before the decree, he cannot afterwards take out execution. (p) It seems, however, that such creditor is entitled to his costs at law up to the time of notice of the decree. (q) It would seem more just if executors were wholly prevented from at any time giving a preference to a favoured creditor or legatee to the injury of others. (r) If, however, a creditor should so proceed, it is the duty of an executor to make a short affidavit of the state of the assets, and to move the Court of Equity to restrain him, or the executor may be personally responsible. (s) And any creditor may also make such motion; (t) and it seems that *an injunction against a creditor's proceeding at law may now be obtained without filing a bill.* (u) From the report of *Lord v. Wormleighton*, it appears that upon such a friendly bill being filed and duly expedited, a decree may be obtained in a very few days, (x) but an injunction will only be granted upon affidavit of the state of the assets and upon payment of costs at law, and in which must even be included the costs of a trial at law after notice of the decree,

(m) *Darston v. Lord Orford*, Prec. Ch. 180; *Toller*, 229; *Parker v. Des*, 2 Chan. C. 200; *Drewry v. Thacker*, 3 Swanst. 529; *Maltby v. Russell*, 2 Sim. & Stu. 227; 2 Williams, 683, *sed quære*, id. 684, note (p).

(n) Per the Vice Chancellor in *Maltby v. Russell*, 2 Sim. & Stu. 227, 228. *Inter vivos* a debtor may unquestionably, independently of the bankrupt laws, give a preference at any instant before execution to another creditor, *Holbird v. Anderson*, 5 Term Rep. 235; *Pickstock v. Lyster*, 3 Maule & S. 371; but then he still leaves the creditor the right to proceed against his person, and take him in execution. But it seems unjust that an executor or administrator, who is a mere trustee for creditors and legatees, should ever be allowed, at least in equity, to give a preference to a relation or other creditor, thereby taking

every remedy from the neglected or adverse creditor, who has no remedy against the person of his debtor. The power to give a preference seems to require further restraint. But see that an injunction may be obtained *Clark v. Lord Ormond*, Jacob, 124, 125, *infra*.

(o) *Clark v. Earl Ormond*, 1 Jacob, 122.

(p) Id. *ibid.* 122 to 125.

(q) Id. *ibid.* 124.

(r) *Supra*, note (n).

(s) *Clark v. Earl of Ormond*, Jacob, 122 to 125.

(t) *Lord v. Wormleighton*, Jacob, 148.

(u) *Clark v. Earl of Ormond*, Jacob, 124, 125.

(x) *Lord v. Wormleighton*, Jacob, 148. bill filed 12th July, answer and replication on 17th July, and decree obtained on 21st July, and notice of decree served on same day.

if the executor has pleaded non-assumpsit, and the same and other pleas have been found against the executor. (y) But as upon a false plea of *plene administravit* an executor is only personally liable to costs, and not for the debt beyond the assets found, the creditor must come in under the decree for his debt. (z)

Before paying any legacy, an executor should reserve funds to answer future demands that may arise under *any legal contract*, of which he has knowledge. (a)

With respect to dilapidations, which the executors of a deceased incumbent are liable at common law and by the ecclesiastical law to make good. (b) The books appear to be silent as to the degree in which a claim of this nature upon the assets shall stand. (c) It should seem that the claim ranks in equal degree or next to simple contract debts, and should at all events be satisfied before legacies. (d)

Dilapidation by an ecclesiastical person.

In equity, where a tenant for life has been guilty of equitable waste, a bill may be filed against his executors to compel satisfaction out of the assets, and such a claim will, it seems, be preferred to legacies, though not to simple contract debts. (e) An executor, therefore, having notice of such a claim, or at least after bill filed, should not pay legacies.

23. The *Legacy Duties* payable under the *English* act, 55 Geo. 3, c. 184, and the *Irish* act, 56 Geo. 3, c. 56, (and regulated by the prior acts, and *inter alia* by 36 Geo. 3, c. 52, as to stamped receipts on legacies, and 46 Geo. 3, c. 52, s. 6,) are to be paid before, and deducted out of the assets, before payment of legacies or division of the residue; and if not paid they become the personal debt of the executor or administrator, as well as of the legatee; and if the executor pay the legacy, without retaining the amount of duty, he may, after paying the duty, recover the amount from the legatee; (f) and the legacy duty is

23. Legacy duty.

(y) *Ante*, 546, n. (x); *Fielden v. Fielden*, 1 Sim. & Stu. 255, and as to costs, *post*, 557.

(z) *Id. ibid.* 255; *Lord v. Wormleighton*, Jacob, 150.

(a) *Johnson v. Mills*, 1 Ves. 282.

(b) *Ante*, 393; *Wise v. Metcalfe*, 10 B. & Cres. 299—308.

(c) See the cases in general, *Sollers v. Lawrence*, Willes, 421; 3 Woodes, 265; *Radcliffe v. D'Oyley*, 2 T. R. 636; *Watson's Cl. Law*, chap. xxxix.; *Vin. Ab. Dilapi.* 15; 2 Burn's *Ecc. L.* 146, 153; *Jones v. Hill*, 3 Lev. 268; *Salkard v. Beckwith*, 1 Lutw. 116, and 2 Chit. Pl. 785, 786, 5 ed.

(d) The late Mr. Serjt. Hill gave an opinion to that effect. The personal representative is clearly not liable without assets, *Gibs.* 753; *Carter v. Pecke*, 3 Keb. 619; *Lil. Ent.* 21, 67, 68.

(e) *Landsdown v. Landsdown*, 1 Madd. Rep. 116; 1 Jac. & Walk. 522; 1 Chit. Eq. Dig. 375; *Id. Waste*, 1345, Account.

(f) *Hales v. Freeman*, 1 Brod. & Bing. 391; 4 Moore, 21, S. C. See the cases on the Stamp Acts, *Williams' Exec.*; Chit. Col. Stat. tit. Stamps, 1017 to 1020; *Id. on Stamp Acts*, 227 to 231; *Hill v. Atkinson*, 2 Meriv. 45; 3 Price, 404, S. C.; *Attorney-General v. Wood*, 2 Young & J. 290

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to be paid upon the aggregate amount of the residue of the testator's property, at the time of the executor's delivering into the stamp office the note of what he intends to retain as residuary legatee. We have seen that gifts *donatio mortis causa* are subject to this duty; (g) and if a will *forgive* a bond debt, the principal and interest in arrear is subject to the duty, as in the nature of a legacy. (h)

24. Payment of
legacies. (i)

24. *Payment of Legacies.*—With respect to *legacies* we have seen, that when *specific*, whether of a chattel personal or real, it is the duty of the executor, as far as possible, to preserve them *entire*, such as heir looms, according to the testator's wish, and unless compelled by suit, he ought not to apply them to the payment of debts; (k) and where the legatee of a specific bequest of wine, which was reported before the death, but the entry was not made till after that event, it was held that the legatee was not subject to the payment of the duties, but that the executor was bound to pay the same out of the general assets. (l) A specific bequest, or rather devise, of land, as a legacy, is not bound to contribute, in case of deficiency of assets, to pay legacies, (m) nor are specific legacies in general to be abated from, unless in favour of creditors. (n)

An executor should cautiously withhold his *assent* to the bequest, by any, even *very slight*, expression of congratulation or approbation, (o) until he be confident that the other assets will certainly be sufficient to pay every expense and all debts; and in cases of the least doubt, he will not be safe in assenting to the bequest until a year has elapsed; (p) for if he assent to a bequest of a term, he thereby vests the legal interest in the legatee, who might afterwards maintain ejectment against him, should possession be withheld; (q) but before assent, the legatee could not legally withhold the chattel specifically bequeathed from the executor. (r) If an executor should incautiously

(g) See 55 Geo. 3, c. 184, ante, 547; 36 Geo. 3, c. 52, s. 7. A note given to evade the legacy duty would be void, *Holliday v. Atkinson*, 5 B. & Cres. 501.

(h) *Attorney-General v. Holbrook*, 3 Young & J. 114.

(i) See in general, the cases fully collected and arranged, 1 Chit. Eq. Dig. tit. Legacies.

(k) *Clark v. Earl Ormond*, Jacob, 108.

(l) *Stewart v. Denton*, 2 Chitty's Rep. 456.

(m) *Spong v. Spong*, 1 Dow. Rep. New S. 365.

(n) *Clifton v. Burt*, 1 P. Wms. 679;

Toller, 339, 344.

(o) *Doe dem. Hayes v. Sturges*, 7 Taunt. 217; *Doe dem. Sturges v. Tatchell*, 3 Bar. & Adolp. 673; Toller, 6 ed. 308, 309; Com. Dig. Administration, C. 6; Shep. Touch. 456.

(p) *Davis v. Blackwell*, 9 Bing. 5. Assent to a bequest of stock is essential, *Franklin v. Bank of England*, 9 Bar. & Cres. 156.

(q) *Doe dem. Lord Saye and Sele v. Guye*, 3 East, 120; 4 Esp. R. 154, S. C. What not an assent, *Doe dem. Hayes v. Sturges*, 7 Taunt. 217; 2 Marsh. 505, S. C.

(r) Toller, 6 ed. 307.

assent, and a deficiency of assets to pay debts should afterwards appear, he might be thereby subjected to pay debts to the extent of the value of the lease, or other specific bequest, out of his own assets; but until assent, *no legal property* vests in the legatee.^(s) What amounts to *an assent* to a specific bequest or general legacy, is in general a question of *fact*, though decided cases upon particular expressions have gone far to settle the rule.^(t)

One general rule is, that where a party has two titles under a will, the one as executor, the other as legatee, some clear and specific act must be done to show that he elects to take in the latter character; "some circumstance is necessary to show whether the executor will assent to the legacy or refuse it," and in default of such evidence, the party will be presumed to take as executor only.^(u)

In a late case, containing most of the authorities relating to assents to legacies, the testator bequeathed a term in premises to S. his executors, &c. in trust to sell and dispose of the same as might seem most advantageous, and to apply the proceeds to the maintenance of testator's son during his life; and he bequeathed the remainder, after the son's decease, to such uses as the son should by will appoint, and he appointed S. his executor; and when the testator died, his journeyman was managing his business on the premises, as he had done for some years, and the testator's son also resided there. And at the funeral, S. said, in the presence of the journeyman and other persons, "*the house is young B.'s*" (meaning the sons); "*T. (the journeyman) must stay in the house and go on with the business, but young B. must have a biding place.*" And T. accordingly continued on the premises, carrying on the business, paying no rent, but maintaining the testator's son, who was weak in intellect and unable to provide for himself, and S. lived twenty years afterwards, and did not interfere further with the property: it was held, that this was sufficient evidence of a *disposal* of the property by S. according to the trusts in the will, and that he had *assented* to take under the will *as legatee in trust*, and not *as executor*.^(x)

An executor may, when he is certain that there are abundant assets to pay all known debts, and that there are no other debts outstanding, pay all legacies, and even hand over the residue

(s) 1 Saund. 279, d., note 5, and Id. note (a).

(t) See the leading cases, *Doe dem. Hayes v. Sturges*, 7 Taunt. 217; *Doe dem. Sturges v. Tutchell*, 3 B. & Adolp. 675,

and *infra*, n. (x).

(u) *Wellden v. Ellington*, Plowd. 520.

(x) *Doe dem. Sturges v. Tutchell*, 3 Bar. & Adolp. 675.

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within a year after the death, but this would be at his peril; (y) and if he invest the residue in the funds, bearing interest, legatees, or the party entitled to the residue, may be entitled to such interest even from the death. (z) But in general, legacies ought not to be paid within a year after the death, and not even then without an indemnity, if there be the least reason to apprehend that there are debts or claims outstanding, even for damages for breach of covenant. (a) This year is allowed for the payment of legacies with analogy to the statute of distribution, in order that the executor may have full opportunity to obtain information of the state of the property, (b) and within that period, an executor cannot be compelled to pay a legacy, even in a case where the testator directed it to be discharged within six months after his death. (c) But if the assets clearly appear more than sufficient to pay debts, then the executor may (without the right of creditors or other legatees to complain) pay at any time, even within the year. (d) But no payment of a legacy within a year should be made, unless upon adequate indemnity, which may always be required from the legatee. And where an executor paid a legacy six months after probate, it was held that such payment could not be pleaded to an action brought two years after the death, on a covenant to repair a house which the testator never occupied, and of the state of which the executor had no notice at the time of his payment. (e) If an executor do not pay legacies at the end of a year, and have assets, he will be liable after that time to pay interest, (f) and sometimes even compound interest, (g) and if he should attempt to impose improper terms, as a condition upon performance of which only he will pay, he will in equity be personally liable to pay the costs of a bill to enforce payment, or at least the costs will fall upon the residue to which he may be entitled. (h)

In general no action at law lies for a legacy, unless upon an express promise in consideration of forbearance, (i) or where the amount of the legacy has been treated by the executor as

(y) *Angerstein v. Martin*, 1 Turner, & Russ. 241.

(z) *Id. ibid.*; *Hewitt v. Morris*, *Id.* 241.

(a) *Davis v. Blackwell*, 9 Bing. 5.

(b) 22 & 23 Car. 2, c. 10, s. 8, which enacts "that no distribution of the goods of any person dying intestate be made till after one year after the intestate's death;" *Wood v. Penoyre*, 13 Ves. 333; *Pearson v. Pearson*, 1 Schol. & Lef. 11.

(c) *Benson v. Maude*, 6 Madd. 15; *Brooks v. Lewis*, 6 Madd. 358.

(d) *Supra*, *Angerstein v. Martin*, 1 Turn. & Russ. 241; *Garshore v. Charlie*, 10

Ves. 13; see further 2 Williams, 854 to 864.

(e) *Davis v. Blackwell*, 9 Bingham, 5; *Wilkins v. Pry*, 1 Meriv. 265; and see Toller, 6 ed. 322.

(f) *Pearson v. Pearson*, 1 Scho. & Lef. 10; 2 Williams, 878, 883; 2 Sim. & Sta. 396.

(g) 2 Williams, 883.

(h) *Waller v. Paley*, 1 Russ. R. 575; ante, 439, note (i).

(i) Ante, 112; 2 Williams, 1186, 1187, 1188, 1093; *Jones v. Tanner*, 7 Bar. & Cres. 54, 542.

lent to him by the legatee, *(k)* or where the executor has *assented* to a specific bequest. *(l)* In general a *suit in equity* or in the Ecclesiastical Court is necessary. *(m)*

The consideration of the persons to *whom* a legacy may be *paid*, and when it may be to the husband, or when the wife may interpose her claim and secure a provision, will be hereafter considered. *(n)*

It had been doubted whether an executor could insist on having a *stamped receipt* in payment of a legacy; *(o)* but now it seems clear that he is bound, and therefore *entitled* to have a receipt for the same, properly stamped according to the value of the legacy, and the relationship of the parties; *(p)* though, if the testator directed the legacies to be paid without deduction, then the legatees are entitled to the full amount, and the legacy duty must be paid by the executors out of the general assets. *(q)*

Security for the specific delivery or payment of a *specific bequest* or *legacy* may, in cases of doubtful solvency of the executor, be enforced by injunction. *(r)* And residuary legatees may sustain a bill for an account against the executor and the surviving partner of the testator, although collusion between them is neither charged nor proved. *(s)* So where an annuity has been charged upon real estate, and afterwards devised to the executor in fee, and a policy of insurance upon the estate had been kept on foot out of the personalty, and the estate was destroyed by fire, a bill filed by the annuitant to prevent the executor from receiving the insurance money was sustained. *(t)* With respect to the *costs* of a suit in equity for a legacy, it has been held, that if a trustee refuse to pay a legacy without the direction of the Court, in a case which admitted of no doubt, he will not be allowed his costs out of the estate, and must himself bear them, but that he will not be made to pay the other party's costs of the suit, because he might have acted from ignorance, and not from any improper motive. *(u)* But we have seen, that if an executor *perversely*

Of securing the
payment of
Legacies and
Residue.

(k) *Gregory v. Harman*, 1 Moore & P. 209.

(l) *Doe dem. Lord Saye and Sele v. Guye*, 3 East, 120.

(m) *Philpott's case*, 1 Rol. Ab. 919, F.; 2 Williams, 1266, 1270.

(n) See *ante*, 61. The distinctions are exceedingly fine; see *Pritchard v. Amos*, 1 Turner & Russ. 222; *Tyler v. Lake*, 1 Clark & Fin. 144; *semble*, over-ruling *Hartley v. Hurlc*, 5 Ves. 540; and see 2 Williams, 864 to 876.

(o) *Green v. Croft*, 2 Hen. Bla. 30.

(p) 36 Geo. 3, c. 52, s. 27; Toller, 329. The 28th section subjects an executor to a penalty for neglecting to take such a stamped receipt.

(q) *Barksdale v. Gilliat*, 1 Swanst. 562; *Waring v. Ward*, 5 Ves. 670; Toller, 329.

(r) *Bowsher v. Watkins*, 1 Russ. & M. 277; see *post*, chap. viii.

(s) *Bowsher v. Watkins*, 1 Russ. & M. 277.

(t) *Parry v. Ashley*, 3 Simon's Rep. 97.

(u) *Knight v. Martin*, 1 Russ. & M. 70.

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refuse payment of a legacy, unless something be done by the legatee which he is not bound to perform, he will then be personally liable to pay costs of the proceeding against him in equity. (x) We have seen that no action at law lies for a *distributive* share, even upon an express promise, (y) unless it has been treated as lent, or as a debt. (z)

Proceedings on
administration
bond, when.

To enable a legatee or party entitled to a residue to sue on the *administration bond*, it has been recently held at law (contrary to the doctrine in the Ecclesiastical and Spiritual Courts) that there must have been a *decree* in the latter court. (a) When, however such bond has been forfeited, a creditor, as well as the next of kin, is entitled to sue upon the same in the name of the archbishop or his ordinary, and they cannot refuse. (b)

No retainer,
priority, or pre-
ference amongst
legatees.

An executor cannot give himself or any other legatee (except in the case of specific legacies) *any preference* over other legatees, as he may in case of *debts*, nor can he retain so as to pay himself; (c) and in case of insufficiency of assets to pay the whole, all general legatees are to abate alike and in proportion to the amount of their respective legacies; (d) and no particular *legatee* can be preferred by an executor, he not having any power in that respect as in the case of *debts* in equal degree; (e) unless there be some expression in the will, denoting the testator's intention that a particular legatee shall have priority, and which will then be given effect to. (f) Even if a legacy be given to an executor expressly for his *care and pains*, yet it must abate in proportion with the other legatees. (g)

But in general, if there would be *no residue* left for an express legatee thereof, after paying particular legacies, yet such a residuary legatee, on a deficiency of assets, has been allowed to come in *pari passu* with the other legatees, by reason of the very special circumstances of the case. (h)

A Court of Equity will compel a *legatee* to *refund* when the estate proves insufficient, whether security has been given by him for such purpose or not. (i)

(x) *Ante*, 439, n. (i).

(y) *Ante*, 110; *Jones v. Tanner*, 7 Bar. & Cres. 542.

(z) *Ante*, 112; *Gregory v. Harman*, 1 Moore & P. 209.

(a) *Archbishop of Canterbury v. Tuffen*, 8 Bar. & Cres. 150; but see *Devey v. Edward*, 3 Add. Ece. Rep. 68, *contra*.

(b) *Canterbury, Archbp. v. House*, Cowp. 140; Loft, 622, S. C.; see Chit. Col. Stat. Executors.

(c) *Semble*, Toller, 6 ed. 347; *Anon.*

2 Atk. 171; *Ashley v. Pocock*, 3 Atk. 208.

(d) *Beeston v. Booth*, 4 Madd. 161, 168; *Clark v. Sewell*, 3 Atk. 99.

(e) *Ashley v. Pocock*, 3 Atk. 208.

(f) *Acton v. Acton*, 1 Meriv. 178; *Attorney General v. Robins*, 2 P. Williams, 23.

(g) *Fretwell v. Stacey*, 2 Vern. 434.

(h) *Dyos v. Dyos*, 1 P. Williams, 505.

(i) *Noel v. Robinson*, 1 Vern. 93; *Hawkins v. Day*, Amb. 162; Toller, 6 ed. 322; when not, Toller, 341

25. Of Remuneration for Trouble, &c.—In case of a will of personal property in this country an executor is not entitled to any remuneration for his own personal trouble or loss of time, unless expressly bequeathed and directed, and on which account it is that the law gives to the executor the whole undisposed-of residue, unless by some expression, to be collected from the will, as by a bequest to the executor for his trouble, a contrary intention on the part of the testator is to be collected. *(k)* A liberal testator ought at least *expressly* to direct that the executor shall be paid his expenses and for his trouble, loss of time, and interest on any money advanced, besides any legacy he may think fit to give, unless the latter be so considerable as certainly to more than cover reasonable remuneration. An executor *in India* is entitled to a commission of five per cent. on all assets of a testator collected by him *there*, including the assets he retains in respect of a legacy to himself, *not given* to him in the character of executor, and including monies belonging to the testator, which were in the hands of a commercial house in which the executor was, and that testator had a partner. *(l)* An executor with an annuity would be allowed expenses of collection of rents, *(m)* and an executor has been allowed the expense of an accountant under circumstances, *(n)* and also the costs of a solicitor's assistance. *(o)* But not his expenses of carrying on the trade as surviving partner and executor. *(p)*

25. Remuneration to executors or administrators for trouble.

But an executor is not allowed interest on his advances for costs, but only from the time of the balance having been struck upon the general report; *(q)* nor is he ever allowed, in the absence of express bequest, any compensation for time and trouble, especially where there is an express legacy for his pains, &c. however inadequate; *(r)* and if he renounce, but stipulate with the residuary legatee to act as executor for a certain sum for his trouble, if he die before he has completed the trusts, he will not be entitled to any part. *(r)* If however an executor borrow or advance his own money to pay importunate creditors, he is entitled to interest on his advances. *(s)*

(k) *Ante*, 531. In *Whittaker v. Tatham*, 7 Bing. 628, it was held that parol evidence of declarations in favour of giving the residue to the executor cannot be received where the will contains a specific bequest to the executor.

(l) *Cockerell v. Barber*, 1 Simon's Rep. 23; *Chetham v. Lord Audley*, 4 Ves. 72. But see *Freeman v. Fairlie*, 3 Meriv. 24.

(m) *Wilkinson v. Wilkinson*, 2 Sim. & Stu. 237.

(n) *Henderson v. M'Iver*, 3 Mad. 275.

(o) *Macknamara v. Jones*, Dick. 587.

(p) *Burden v. Burden*, 1 Ves. & B. 170.

(q) *Gordon v. Trail*, 8 Price's R. 416.

(r) *Robinson v. Pitt*, 3 P. Wms. 249.

(s) *Small v. Wing*, 3 Bro. P. C. 66.

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26. Of distribu-
tion or payment
of the residue.

26. Of the Residue.—As to the *residue*, the statute of distribution, 22 & 23 Car. 2, c. 10, s. 8, in case of *intestacy*, directs that no distribution shall be made till after one year, and that even then the persons receiving their distributive shares shall give bond to refund in case debts should appear.^(t) But if the executor or administrator detain the residue after the expiration of a year without reasonable grounds, it should seem that he will be liable to pay interest.^(u) An executor is entitled to the residue undisposed of by the will, for his trouble, unless there be expressions in the will which denote a contrary intention; as a bequest to him of a reversionary interest in personalty; but parol evidence is admissible to rebut that presumption.^(x) On the other hand, it has been held that parol evidence of declarations in favour of giving the residue to the executor cannot be received when the will contains a specific bequest to the executor, because such parol evidence would be repugnant to the written terms of the will.^(y) If an executor admit that all the testator's debts and funeral expenses have been paid, the Court of Equity will on motion order the income of a balance, paid in by the executor, to be paid to the person entitled to the residue.^(z)

The remedy for the *residue* is in Equity or in the Ecclesiastical Court,^(a) unless charged on land or payable out of *freehold* interest in lands devised to be sold, or out of equitable assets, and then the suit must be in *Equity*.^(b)

Before attempting to divide the residue amongst the supposed next of kin, it may in many cases be prudent, and in some necessary, first to advertise for the next of kin or heir, and sometimes this is expressly rendered essential under the decree of a Court of Equity. And if a debt appear at any distance of time, it must be paid in prejudice of a party entitled to the residue.^(c) The form of the public notice may be to the effect subscribed in the notes.^(d)

(t) See statute and decisions, Chit. Col. Stat. tit. "Executors," 326; see the table of distributions, *ante*, 108 to 110.

(u) *Kilvington v. Gray*, 2 Sim. & Stu. 396; *Turner v. Turner*, 1 Jac. & Walk. 39; *Cracklet v. Bethune*, Id. 586.

(x) *Oldman v. Slater*, 3 Sim. 84; *Whitaker*

v. Tatham, 7 Bing. 638; *ante*, 352, n. (k).

(y) *Whitaker v. Tatham*, 7 Bing. 628.

(z) *Dando v. Dando*, 1 Simon's R. 510.

(a) 2 Williams, 1270.

(b) *Baker v. May*, 9 Bar. & Cres. 489.

(c) *Greig v. Somerville*, 1 Russ. & Mylne, 338.

Concise advertisement for an heir.

The like for next of kin.

(d) HEIR-AT-LAW of J. N., Esq., who died at —, in —, in 1794.—Any person or persons who can give INFORMATION of such HEIR-AT-LAW to Mr. W. S. of P. aforesaid, or to Mr. W. C. of —, London, will be REMUNERATED for their trouble by the said W. C.

MR. J. W., deceased.—If the NEXT of KIN of Mr. J. W., who carried on the business of an apothecary in — Street, London, between the years 1795 and 1802, and who died intestate in or previous to 1803, will apply either personally or by letter (if the latter, the postage to be paid) to Messrs. W. and P., Solicitors, — Street, London, they will HEAR of SOMETHING to their ADVANTAGE.

27. Of Actions and Suits by and against Executors or Administrators, or one of several, and the Pleadings and Evidence therein.—When one of several executors alone has proved, it has in a recent case been supposed that he may sue alone in equity and need not join the other executors though they have not renounced; and in the same case it was said, that the same rule prevails at law. (d) But the better opinion is, that as well in equity as at law, all the executors ought to join, (e) or the defendant may plead in abatement or otherwise defeat the proceeding, unless those who have not proved have formally renounced in the Ecclesiastical Court. This is clearly the rule at law, (f) and it should seem that the same rule also should prevail in equity. (g)

Bailable process at the suit of an executor may be special; and when the plaintiff, having sued out general process and declared specially as executrix, the Court refused to enter an exoneretur on the bail piece. (h)

Declarations by executors or administrators should not (unless the clearest evidence in support of that form of declaring can certainly be adduced) contain any count upon an account stated with or other promise supposed to have been made to *the plaintiff*, though in his representative character; because if such count be inserted, the plaintiff, though in other respects suing in his representative character, will be personally liable to pay costs in case he be nonsuited, and the judgment will be for the costs *de bonis testatoris et si non de bonis propriis*. (i)

PURSUANT to a Decree of the High Court of Chancery, made in a cause wherein E. J., widow, is the plaintiff, and W. D. W. and others are the defendants, whereby it is referred to James Trower, Esq., one of the Masters of the said Court, to inquire and state to the Court who were the NEXT OF KIN and HEIR-AT-LAW of E. P. P., late of —, in the county of —, spinster, a minor, deceased, in the pleadings of the said cause named, living at the time of her death, (which happened on or about the 10th day of November, 1832), and whether any such next of kin are since dead, and when they respectively died, and who is or are the personal representative or representatives of such next of kin as have since died, and whether such heir-at-law is now living or deceased, and if dead who are or is heir or heirs, or new devisee or devisees, and who are his personal representatives. All persons claiming as such heir-at-law, new devisees, next of kin, or personal representatives, are, on or before the first day of April, 1833, by their solicitors, to come in before the said Master, at his chambers, in Southampton-buildings, Chancery-lane, London, to prove such heirship, kindred, or representation; or in default thereof, they will be peremptorily excluded the benefit of the said decree.

H. and G., Plaintiff's Solicitors, — Street.

(d) *Davies v. Williams*, 1 Simon's Rep. 4 T. R. 585; and see *Kilby v. Stanton*, 2 5, A. D. 1826; but see 2 Williams, 627, Young & J. 77.

(e) Bro. Executors, 83; 1 Saund. 291, n. 4; *Kilby v. Stanton*, 2 Young & J. 75; *Brassington v. Ault*, 2 Bing. 178; 2 Williams, 627, 1174; post, 560, n. (p).

(f) *Praed v. Duchess of Cumberland*,

(g) Id. and 2 Williams, 627, 1174.

(h) *Ashworth, executrix, v. Ryal*, 1 Bar. & Adolp. 19.

(i) *Dobbingen v. Harrison*, 9 Bar. & Cres. 666; *Jobson v. Foster*, 1 Bar. & Adolp. 6.

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27. Of actions and proceedings by and against executors, and administrators.

Who to sue or be sued.

The process.

The declaration.

The like for next of kin and heir, in pursuance of a decree.

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But on the other hand, unless the declaration contain a count on a promise to or by an executor or administrator *as such*, no promise or account stated since the death can be given in evidence, either to take the case out of the statute of limitations or otherwise. (k) The same liability to costs equally prevails, whether the declaration be upon a supposed account stated *with the plaintiff* of monies due to the testator, or of monies due to the plaintiff as executor, (k) or any other promise laid to the plaintiff in his representative character. (l) But so far as the pleadings are concerned this doctrine only applies to the costs of that count in particular which states a promise to the plaintiff. (l) The judgment as to costs against an executor is to be levied of the assets of the testator or intestate in the first instance, *et si non*, then as to the costs *de bonis propriis*.

The pleas by
executors or
administrators
and proceedings
thereon.

With respect to the pleas, when an executor or administrator is sued for a debt which may *justly* be disputed, he may and ought to plead a plea denying it, so as to prevent the creditors, or legatee, or next of kin, from being prejudiced by an unjust debt diminishing the fund. (m) But it is not compulsory on an executor to plead the statute of limitations, (n) though he may by bill in equity, at the instance of any party interested, be compelled to plead the same. (o) If at the time of pleading, the defendant has duly administered all the assets that have come to his hands, he should plead *plene administravit*, viz. "That he hath fully administered all the assets of the deceased at the time of his death, that have come to his hands as executor or administrator to be administered, (p) and that he hath not any goods and chattels which were of the deceased at the time of his death in his hands to be administered, nor had on the day of the commencement of this suit *nor ever since*, and which latter words are essential." (q)

If the plaintiff should take issue on a general or special plea of *plene administravit*, and it be found against him, he cannot have judgment of assets *quando*. (r) If assets have come to hand since the commencement of the action, and remain un-

(k) *Sarell v. Wine*, 3 East, 409; *Ward v. Hunter*, 6 Taunt. 210, and *per Parke, J.* in *Jubson v. Forster*, 1 Bar. & Adolp. 8.

(l) *Stater v. Lawson*, 1 Bar. & Adolp. 893.

(m) *Ante*, 530.

(n) *Id. ibid.*

(o) *Id. ibid.*

(p) Notwithstanding the observations of Mr. Serjeant Williams, that these words are unnecessary, see 2 Saund.

220, n. it seems advisable to insert them; *Id.* note (a), and see *Wells v. Fydell*, 10 East, 315.

(q) See 2 Saund. 220, note 3; *Gwen v. Role*, Cro. Jac. 132; *Covel v. Deval*, 2 Lutw. 1657; *Noel v. Nelson*, 2 Saund. 216, note 1. How an executor of an executor should plead *plene administravit*, see *Wells v. Fydell*, 10 East, 315.

(r) 1 Rol. Ab. 929, B. pl. 2; Bro. Executor, 18; S. C. 2 Saund. 217, note 1.

administered, or if assets have come to hand *since the plea*, then the plaintiff may reply that fact specially. (s) But where there is any doubt whether the plea is true, the safest course is as speedily as possible to pray judgment of assets *in futuro*, that have accrued, or may accrue, at any time *after the time of pleading*, and not merely from the time of praying the judgment, (t) for by that means the plaintiff may afterwards proceed and have the benefit of any assets received after the time of *pleading*, and not be confined to assets received after the time of signing judgment. (u)

If an executor or administrator plead a plea, *all the facts relating to which he must know to be false*, as *ne anques executor or administrator*, and it be found against him, the judgment is "that the plaintiff do recover as well the *debt* as the *costs de bonis testatoris*, and if none, then of the defendant's *own goods*;" (x) but this does not apply to a false plea of *plene administravit*, for although that plea be found against the defendant, whether he be executor or administrator, it is now settled at law and in equity, that although the defendant is liable personally for the *costs*, in case of a deficiency of assets to pay them, yet as to the *debt*, he is only liable to the extent of the assets actually shown to have come to his hands. (y)

At one time it was held that if an executor plead the general issue and *plene administravit*, and the plaintiff join issue on both, and upon the trial establish the debt, but do not prove assets, the plaintiff was not only entitled to take judgment of assets *quando acciderint*, but also to the costs; because the defendant, by an unfounded denial of the debt, had compelled the plaintiff to incur the expense of proceeding to trial, and *suspended* his right to pray judgment of assets *quando acciderint*, and thereby, perhaps, enabled another creditor in the same degree, pending the protracted action, to obtain judgment for his debt in priority to that of the plaintiff. But that decision has been over-ruled, and a different rule is now established, viz. that if the executor succeed upon any one plea which goes to the whole action, and the verdict upon which establishes that the action was premature, then the defendant is entitled to judgment for the costs

(s) See observations of Ashurst J. in *Mara v. Quin*, 6 T. R. 10; 2 Saund. 219, a., n. 2; 3 Went. 224, 245.

(t) *Mara v. Quin*, 6 Term Rep. 10.

(u) *Id. ibid.*; 2 Saund. 219, a., note 2, qualifying Bul. N.P. 169, *Taylor v. Norman*.

(x) *Ewing v. Peters*, 3 Term R. 688; 1 Saund. 336, b. note 10; as to costs in equity, *ante*, 531.

(y) See cases of law, 1 Saund. 219, b. 336, note 1, and *Fielder v. Fielder*, 1 Sim. & Stu. 255, 256.

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of defence, though the plaintiff, having proved his debt, is entitled to judgment of assets *in futuro*. (z) Whenever, therefore, a plea of *plene administravit*, or of *plene administravit præter* has been correctly pleaded, the plaintiff, instead of denying the same, should pray judgment of assets *in futuro*, conditionally, in case the general issue should be found in his favour; (a) and in that case the defendant should, to avoid costs, obtain leave to withdraw the general issue, unless he be confident that upon the trial a defence will be established upon that or some other disputed plea. (b)

Plene administravit, or plene administravit præter, or ultra Judgments, or Specialty Debts as yet unsatisfied.—If an executor be sued for a simple contract, or even a specialty debt, and he be confident that he has actually fully administered all the assets actually received, and all which he ought to have received in paying other debts of equal or higher degree, then he should plead *plene administravit* generally. (c) But if there are debts of *higher* degree remaining unsatisfied, then his plea should state the same, and aver that he has fully administered, except a named sum, not sufficient to pay such outstanding higher debts. (c)

If there be no debts of higher degree outstanding, and the defendant have *some assets* in hand, but not adequate to pay the whole of the plaintiff's claim, then the plea should admit the precise amount of the actual assets, or, for safety, rather more, and plead *plene administravit ultra*; upon which, as an executor is not obliged to divide every trifle immediately he receives it, he will not be liable to pay costs; though they, as well as the residue of the debt, would be recoverable out of future assets. (d)

When the defendant has pleaded *plene administravit* or *plene administravit ultra*, and the plaintiff apprehends that those pleas can be established on the trial, he should not

(z) *Edwards v. Bethell*, 1 Barn. & Ald. 254; *Hogg v. Graham*, 4 Taunt. 135; *Ragg v. Wells*, 8 Taunt. 129; 1 Saund. R. 336, b. note (g), 5th edit.

(a) *Id. ib.*; *Hendsley v. Russell*, 12 East, 232; 1 Saund. R. 336, b. note (g), 5 ed. In that case the defendant pleaded the general issue, and *plene administravit*, and *plene administravit ultra*, specialty debts outstanding, and the plaintiff took judgment of assets *quando* on the last plea, and traversed the first and second pleas, and on the trial proved his debt; and it

was held that the plaintiff was entitled to the general costs, although the defendant had a verdict on the *plene administravit*; but it will be observed that that decision was before *Edwards v. Bethel*, *supra*, n. (a).

(b) *Id. ibid.*; 1 Saund. 336, b. note (g) and (i).

(c) How to plead, 1 Saund. 333, note 7, *ante*, 556.

(d) *Scoble, De Tastet v. Andrade*, 1 Chitty's Rep. 629, note, and 1 Saund. 336, b.; note (h), *sed quære*.

traverse the same, but admitting their truth, should pray judgment for his debt to be levied out of any *future assets* absolutely, and immediately if there be no plea to be tried, or conditionally if there be. And afterwards, when assets have come to the executor's hands, the plaintiff may issue a *scire facias*, to show cause why he should not have execution against them for the sum recovered and costs. (e)

If only the plea of *plene administravit* or *plene administravit ultra* has been pleaded, or if some untenable plea be withdrawn, and the plaintiff has merely taken judgment of assets, *quando*, &c., then no costs are to be paid by the *executor or administrator personally*, but they will be allowed to the plaintiff *de bonis testatoris*. (f)

In pleading a *judgment or bond* outstanding, it is not necessary to aver that it was recovered or executed for a just and true debt, (g) or to show the consideration, (h) whether the judgment were recovered against the defendant as executor or administrator, or by a third person. (h). Nor is it necessary to aver that the judgment or bond remains in full force or unsatisfied, those facts being presumed, (h) and the contrary must come from the other side, under a replication of kept on foot by fraud, and the plaintiff could not legally reply that the judgment was *obtained* by covin. (i)

A plea of a *debt outstanding* to a *third* person, must be of a *higher* degree than that sued for; but a plea of *retainer* for a debt due to the executor or administrator, may, as he cannot sue himself, be of a debt of *equal degree*. (k) So under a plea of *plene administravit*, the defendant may show that he retains a sum of money for the expense of administration, to which he had made himself *liable*, although he has not actually paid the same. (l)

It should seem that under a plea of *plene administravit* generally, the defendant may give in evidence every description of debt of equal or higher degree *due to himself*, in respect of which he has a right to *retain* assets to the amount, without specially stating such debt in the plea; (m) but it is in general more advisable to plead the retainer specially, because then the plaintiff will be compelled in his replication to admit either the

(e) 1 Saund. 219, b.

(f) *De Tastet v. Andrade*, 1 Chitty's Rep. 629, note; 1 Saund. 336, b. note (h); *sed quære* if any costs at all.

(g) *Further v. Further*, Cro. Eliz. 471; 1 Lev. 200; 1 Saund. 330, note 4; 2 Saund. 50, 51, 333, note 6.

(h) *Robinson v. Corbett*, 1 Lutw. 662;

1 Saund. 329, note 3; 331, note (a).

(i) 2 Saund. 50, 51, note 3.

(k) 1 Saund. 333, note 6; *ante*, 534.

(l) *Gillies v. Smither*, 2 Stark. R. 528, *ante*, 534.

(m) 1 Saund. 333, note 6, and *id.* note b. and last note, Co. Lit. 283, a.

CHAP. V.
PRECAUTION-
ARY MEASURES.

Evidence in
actions by and
against exe-
cutors and ad-
ministrators.

existence of the debt, or that if he dispute it, the defendant has fully administered, supposing such debt should be proved.

If the representative character of an executor be put in issue by the pleadings, or be otherwise necessary to be proved, then only the *probate*, and not the original will, is evidence as to *personalty*; (n) when, *e converso*, as to *realty*, only the *original will*, proved to have been duly signed by the testator, and witnessed by three witnesses, is admissible, (n) and a probate of a will of copyhold is inadmissible. (o) A probate to one executor operates as to *personalty* as a probate to all. (p)

Proof of the probate act, or of the *act or order for granting letters of administration*, is sufficient, and indeed the best evidence against an executor. (q) It was held in equity, that where a party claims under an assignment of a lease made by the executors of the lessee, the Probate Act Book of the Prerogative Court, containing an entry of a will having been proved, and of a probate having been granted to the executors therein named, is admissible, as evidence of those persons being the executors, without even accounting for the non-production of the probate; (r) and *a fortiori* production of the book of the Ecclesiastical Court, wherein is entered the act or order of the Court for granting *letters of administration*, is evidence of the party being administrator. (s) But it is more usual, in an action against an executor or administrator, to serve him with a notice to produce the probate or letters of administration, and to prove that he has acted; but when the sum sworn to is essential to be proved, to show the extent of the assets, it is prudent to be prepared to prove the act itself, and the *oath* as to assets under a named sum, for fear the probate should not be produced; and the sum named in the oath is *prima facie* evidence of assets to that extent. (t)

(n) *Penny v. Penny*, 8 Bar. & C. 335.

(o) *Jervise v. The Duke of Northumberland*, 1 Jac. & W. 570.

(p) *Walters v. Phiel*, 1 Mood. & M. 561; *ante*, 555.

(q) *Cox v. Allingham*, 1 Jac. 514;

Garrett v. Lister, 1 Levinz, 25, there cited.

(r) *Cox v. Allingham*, 1 Jacob R. 514.

(s) *Id. ibid*, *Garrett v. Lister*, 1 Lev. 25.

(t) *Woolley v. Clark*, 5 B. & Ald. 744.

CHAPTER VI.

INCEPTION OF AN INJURY AND PRELIMINARY STEPS BEFORE
ACTUAL HOSTILITIES.

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|---|--|
| <p>I. Unconnected with contract.</p> <ol style="list-style-type: none"> 1. General observations on precautionary measures after inception of an injury. 2. Demand or request to explain an assault or slander. 3. Demand of wife, apprentice, &c. 4. Demand of goods. 5. Notice of reversioner's claim of goods seized by sheriff. 6. Notice of property being on land of another and request to permit removal. 7. Notice to remove a nuisance on wrong-doer's land. 8. Notice to discontinue a permitted nuisance. 9. Entry and demand of possession of land. | <ol style="list-style-type: none"> 10. Power of attorney and entry to avoid a fine. <ol style="list-style-type: none"> 1. How to make entry. 2. Indorsement of proceedings. 11. Oaths, examinations and proceedings connected with claims on the hundred. <p>II. Connected with contracts but <i>after</i> an incipient injury—</p> <ol style="list-style-type: none"> 1. Notices, demands, &c in general. 2. Demand of goods obtained by an infant or married woman. 3. Demand to create forfeiture by landlord. 4. Notice of adverse proceedings to a party who has agreed to indemnify, &c. |
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IN the last Chapter we principally considered the precautionary measures that may be requisite or advisable in *anticipation* of an injury, we are now to examine what precautionary measures may be proper *after the inception* of an injury, but *preliminary* to the actual commencement of hostilities.

There are many cases when, although there may have been an appearance or *inception* of an injury, yet it may be *ambiguous or uncertain* whether there was any *intention* to commit it, and it may be *necessary*, or at least expedient, to remove all doubt, and for that purpose to take or repeat, in the presence of witnesses, some preliminary step, which will at least tend to secure evidence of the right or of the injury, and facilitate the remedy. In all these cases there are two considerations—first, *what step* should be taken; and, secondly, the *manner* of taking it. At *Law* the result of litigation may frequently depend on these; and in *Equity* the recovery of costs will much depend even upon the latter; and if a proper step be taken but in an *offensive manner*, the party taking it may, entirely on that account, have to pay the costs, though it might have been otherwise if he had conducted himself with proper courtesy. (a)

General observations on the precautionary proceedings after the inception of an injury.

(a) *Ante*, 439, note (g).

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Requiring explanation of an ambiguous assault.

Thus although insulting words will in no case constitute an assault, yet they may sometimes explain an ambiguous act and prevent it amounting to an injury; as where a person, pending the circuit, half drew his sword upon another as if about to thrust him, but said, if it were not assize time I would run you through the body; these words were held sufficient to show that no immediate assault was intended. (b)

2. Requiring explanation or apology for supposed insult or slander.

2. In the highest ranks of society, independently of any moral or religious consideration, no man of strong mind and undoubted courage will hesitate to testify his anxiety as well to receive explanation and apology for what he may reasonably suppose or knows was an hasty and inconsiderate insult or attack upon his character, or is frankly acknowledged to have been so, or from evincing his anxiety to avoid the necessity for bloodshed. On the other hand, no real gentleman of good education and real courage should shrink from making explanation and proper apology when, upon calmer consideration, he finds he has erroneously gone too far in any imputation upon another. Hence great blame must attach at least upon one if not both the parties and also upon their seconds, when any dispute terminates in a *Duel*, which *might always* be averted by well-timed temperate and gentlemanly interference of any sensible friend. (c)

So amongst the inferior or middle ranks of society the same principle will also apply. In the case of *verbal or written slander*, if it were tacitly submitted to, it might subject a party to the imputation of cowardice or want of due regard for his character, and therefore he may be impelled by his own feelings or by the urgency of his friends to require an explanation; and if upon such demand it should appear that the conduct of the party was intended to be injurious, his assertion to that effect may then render litigation justifiable, which might otherwise be considered hasty, or his answer may establish whether the act complained of was in law actionable; and if not, then the urgency of friends to proceed in an action ought not to be com-

(b) *Tuberville v. Savage*, 1 Mod. 3; Bul. N. P. 15; Hawk. B. 2, c. 62, s. 1.

(c) The correspondence, in ten letters, between Sir J. De Beauvoir and Sir F. Watson respecting the Windsor petition, advertised in the Times, Morning Herald and other newspapers of March, A. D. 1833, well illustrate the highly honourable, gentlemanly and manly manner in which apology may be demanded and reciprocal

explanations offered and ultimately afforded by men of sense and proper feeling without compromise of character for true courage nor forgetful of their reciprocal duties as Christians; whilst perhaps other misguided and ill-advised individuals might, in the same circumstances, have disgraced themselves and destroyed their own as well as their families' happiness by a precipitate duel.

plied with. It too frequently happens that erroneous friends will stimulate a person to sue in cases of this nature for the vindication of his character, and he is afterwards nonsuited for want of sufficient evidence or adequate cause of action, when a little more care would have avoided such disaster, which probably increases the injury. It has been held in a criminal case, that if the terms of a letter are doubtful as to the exact accusation the prisoner meant to threaten, his declarations subsequently made, on being asked what he meant to impute, are evidence to explain the meaning of the letter. (d) Many cases occur of libels and words of the most insulting, provoking and injurious tendency, but which are either too general or too ambiguous to be the subject of an action without some explanation or evidence of precise meaning, and which must be obtained before any action can be safely commenced. (e) Thus we will suppose that a person has said verbally, "that A. had so " misconducted himself as to render it unfit for any respectable " person to associate with him;" or has used some other general abuse exceedingly provoking and disparaging, but which are not actionable; the friends of A. will insist that if he do not prosecute this aspersion they will not associate with him, and yet he can neither sue with effect nor can justify a battery of the slanderer or any counter slander that would be really actionable. (f) In such case A. might, with propriety, address a letter to the slanderer referring to the slander, and stating that he is advised that, in point of law, he cannot sustain an action for such verbal abuse, and yet that it will be very injurious to his character unless it be contradicted or repeated in writing, or in such a manner as to enable him to sue and try the truth of the slander and establish its falsity. He may then require the slanderer to contradict the report, or may in express terms tell him that if he refuse he is required, as a measure of ordinary justice, to repeat his assertion in such a form as to enable A. to sue. One or more friends of A. should present such letter to the slanderer. If he be a man whose assertion is to be believed or of any weight he will thereupon either explain and refute or apologize, or if he believe the truth of the assertion he

(d) *Rex v. Tucker*, 1826, R. & M. C. C. 134; Car. Crim. L. 3 ed., 288, S. C.

(e) See *Robinson v. Jermyn*, 1 Price, 11; where it was held that these words, "Mr. A. and Mr. B., inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room;" published by posting a paper on which they were written, purporting to be

a regulation of a particular society, were held not to be a libel; when additional evidence of what the publisher said, upon being required to explain, might have subjected him to pay very considerable damages.

(f) *Stuart v. Lovell*, 2 Stark. R. 93; *May v. Brown*, 3 B. & Cres. 113; 4 D. & R. 760, S. C.

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will reiterate it, and state the circumstances and grounds upon which he made the assertion (and which repetition will not be considered as a *privileged communication*, whatever might have been his first statement); (*f*) and if he have a due regard for his own character he will not hesitate to reiterate it in writing; and if he should refuse to do either, he may then be justly treated by *A.* and his friends as a contemptible slanderer, whose assertion is not worthy of credit. And if he should decline to comply, then all the real friends of *A.* ought to disbelieve the report, and consider that *A.* has done every thing in his power to clear up his character; and *A.* will be justified in sending circulars to all his friends stating what has passed, but taking care to confine himself to the above narrative without using any libellous expression of the slanderer. (*g*)

Requiring explanation in other cases.

So in many of the cases adverted to in the last chapter, as where a wife, or child, or apprentice is retained, detained or harboured by a third party, his intention to commit any injury may be uncertain, and we have seen that it is necessary to serve a *notice* upon him and make a *request* of restoration before an action can be safely commenced; and although the measure may have already been adopted, yet, for the sake of securing evidence or rendering the party more deliberately guilty of the injury and enhance the damages, it may be expedient to repeat the measure in the presence of witnesses. (*h*)

3. Demand of restoration of a wife, child, apprentice or servant.

3. We have already considered the necessity or expediency of giving a general notice or caution against harbouring an apprentice or servant, and for appointing a time for fetching the same home. (*i*) We will now suppose it to be certain that a party has already wilfully abducted or harboured a wife,

(*f*) *Smith v. Mathews*, 2 Mood. & M. 151.

party slandered, or by his attorney or friend, but of course it must be adapted to the circumstances.

(*g*) The following may be the form of such letter, which may be written by the

Suggested form of letter in case of ambiguous slander.

Sir,
I am informed that you have used expressions materially prejudicial to my character (or the character of Mr. *A.*) as that "he has so misconducted himself as to render it unfit for any respectable person to associate with him," alluding to myself, or some words to that effect. My own feelings and those of my friends compel me to ascertain whether you made any such representation, or any and what assertion and in what precise terms; and if you did, that I should adopt legal measures to vindicate my character by disproving the truth of such calumny. Supposing that you have used any such expressions, or any others injurious to my reputation, I will not anticipate that you would act so unmanly as to deny the assertion or decline answering this communication, or that you will be so regardless of reputation as to deny me the means of establishing my innocence; and I therefore request you to repeat in writing the exact words made use of, so as to enable me to proceed by action for the slander, and in which the propriety or impropriety of your assertion may be fairly tried.

I am, Sir, your's, &c.

(*h*) *Ante*, 449, 450, 510.

(*i*) *Ante*, 449, 450, and notes.

child, apprentice or servant, but still, at least in the latter case, it will be necessary to be prepared to prove a formal demand of restoration before an action can be sustained, and that it has been so made as to constitute the party a wilful wrongdoer, (*k*) unless the plaintiff can prove an original illegal enticing away; (*l*) or as there may not be any legal obligation on the harbourer to incur the trouble or expense of sending home the relative, the prudent course will be in person or by agent to demand the return at the house of the harbourer, and at a time when he may reasonably be expected to have received the notice before suggested and to be ready to comply with its terms. (*m*) Accompanying the verbal demand, and in order to prevent any doubt or ambiguity as to what may have passed, it may be as well to produce and leave at the residence of the wrong-doer, and where the relative is harboured, a written demand to the effect stated in the note, (*n*) and wait a reasonable time until the demand has been positively refused or complied with; and if after such demand it be certain that the relative is in the house, and the outer door be open and entrance can be made without committing a breach of the peace, search may be made and the relative carried away. (*n*) But if any violent resistance should be apprehended, it will be better to proceed by *habeas corpus* or by the chief justice's warrant, excepting in the case of an apprentice, for whom that writ can only be obtained at his own instance and not on the application of the master, at least where he has been impressed. (*o*)

4. If a party have illegally taken away (*p*) or wrongfully

4. Demand of goods and notices of claims.

(*k*) *Fawcett v. Beaver*, 2 Lev. 63; *Winsmore v. Graenbank*, Willes, 582; *Fores v. Wilson*, 1 Peake, C. N. P. 55; *Eades v. Vandeput*, 5 East, 39.

(*l*) *Ashcroft v. Bertles*, 6 T. R. 652; *Gunior v. Aston*, 4 Moore, 12.
(*m*) See another form, *ante*, 450.

Sir,—Without prejudice to my immediate right to sue you for having enticed away and already harboured Mrs. E. B., my wife, [or my “child,” or “apprentice,” or “servant,” or my “journeyman employed by me on work still unfinished,”] I do hereby demand and require you immediately to deliver her [or “him”] up to me, [or “to Mr. G. H., the bearer,”] or if she is not now in your house, then that you will state to and inform me where she is to be found, and also that you do forthwith return her to me at, &c.; and I hereby give you notice, that if you shall refuse or neglect to comply with this notice and request, I shall forthwith commence an action against you for your harbouring and detaining from me my said wife, &c. and cause other proceedings to be instituted against you according to law. Dated this — day of —, A. D. 1833.

Demand of a wife, child, apprentice or servant illegally harboured.

To Mr. &c.

Your's, &c. A. B.

(*n*) See 3 Inst. 134; Hale. Anal. s. 46; 3 Bla. C. 4; *post*, chap. vii. But as respects “a servant,” such power of recaption only applies when the servant himself is willing to return, *id. ibid.*; Dalt,

Justice, ch. 121.

(*o*) *Post*, chap. viii.

(*p*) 2 Saund. 47, n. (*o*); *Bishop v. Viscountess Montague*, Cro. Eliz. 824; *Summersett v. Jarvis*, 6 Moore, 56.

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assumed the right to goods, (*q*) in a manner which in the very taking or mode of performance constituted a *conversion*, then no further step is in general necessary, because the right to sustain an action of trover is in that case already complete. (*q*) But in other cases, where the original taking was lawful, and the detention only illegal, it is absolutely necessary; (*r*) and it is in most cases advisable, in order to *secure* sufficient evidence of a tortious conversion on the trial, to give a formal notice of the owner's right to the property and possession, and to make a *formal demand in writing* of the delivery of such possession to the owner, and which should not be sent by the post, but actually delivered to the wrong-doer in person by the owner, or by a person named in the demand, and therein stated to have been authorized to demand and receive and carry away the goods, and this in the presence of a competent witness; and if it be doubtful whether the party has any lien, it will be proper to require a statement thereof, and to offer to pay it, upon the nature of the claim and the amount being communicated and ascertained to be just; and if there should be any doubt whether the claim of lien be sustainable, and the goods be perishable, or the possession be urgently required, then it may be safer to pay the amount under protest; for afterwards, if it be ascertained that there was no lien, or not so much as claimed, the money not justly due would not be considered as voluntarily paid, but might be recovered back. (*s*) The refusal to comply with such a demand would in general afford sufficient evidence of a *conversion*. The form of the demand may be as in the note. (*t*) It is a common doctrine, that

(*q*) *Moss v. Charnock*, 2 East, 405;
M'Combie v. Davies, 6 East, 540; *Lovell*
v. Martin, 4 Taunt. 799; *Granger v.*
George, 5 Bar. & Cres. 149.

(*r*) 2 Saund. 47, n. (*e*); 1 Chit. Pl.
179, 180.

(*s*) *Stone v. Lingwood*, 1 Stra. 651;
Green v. Farmer, 4 Burr. 2218.

Form of demand
to precede a
conversion.*

(*t*) Sir, [or Gentlemen,] -

I hereby give you notice, that the goods and chattels being, &c. [*here describe the articles fully and properly*,†] are my property, and not the property of — or of any other person whatever, and I hereby offer to produce to you all documents in my possession or power tending to establish that the said goods and chattels are my property as aforesaid. And I hereby demand and require you to deliver the said goods and chattels to E. F. the bearer, who is fully authorized by me to demand and receive the same from you. And if you have any lawful lien or claim upon the said goods and chattels, I hereby require you to state the same, and I give you notice that I am ready and willing to pay the same. And in case it should occasion you any

* If a sheriff or his officers, for taking a wrong party's goods under a *fi. fa.*, the demand is frequently entitled in the cause, but it should not by any terms, even impliedly, recognize the supposed *validity* of the commission of bankruptcy, writ or proceeding.

† See *Colegrave v. Dias Santos*, 2 Bar. & Cres. 76, post 567, note (*y*).

a demand and refusal are only presumptive evidence of a conversion, which may be rebutted, and therefore if it be at all uncertain whether the party upon whom the demand is made be then in actual possession of the goods, or whether it is in his power at *that time* to deliver them, (*u*) or he is merely an agent and his refusal be ambiguous, it may be necessary to make full inquiry into the facts, and to extend the demand to the supposed principals, or otherwise vary the demand according to particular circumstances. (*x*) The goods should be fully specified or described, so as at least not to mislead, and therefore a demand of fixtures, or a refusal to deliver fixtures, will neither constitute a demand or a conversion of detached furniture or goods, (*y*) but demands of "*payment or satisfaction*" for goods converted have been holden a sufficient demand of the goods themselves. (*z*) And if two distinct demands be made, one verbally and the other in writing, the claimant may rely upon either. (*a*) It has been supposed that the mere leaving a written demand at the residence of a party is sufficient, (*b*) and this may be so, if it be followed by a general and absolute refusal to deliver up the goods. But where there is no obligation on the party to incur the trouble or expense of removing or carrying or sending the goods from his house or warehouse, or elsewhere, to the claimant, it should seem that the party, after delivering the demand at the house, must afterwards see the party in possession, or attend at the place where the goods are, after a reasonable time for the party to give direction for the delivery of the goods, and then again verbally demand the delivery of the goods to him, and be ready to remove them, or must obtain an unqualified refusal to deliver them from some authorized person. (*c*)

inconvenience immediately upon the receipt hereof to deliver up the said goods, then I hereby give you notice that I will attend at the premises where the said goods now are, at any time you may appoint; and in default of your appointing, I then will attend on the — day of — next, between the hours of 11 and 12 o'clock in the forenoon, then and there to receive and remove the said goods. But in default of your compliance with this notice, by giving up and delivering to the said E. F. or to me, the said goods and chattels, on receipt hereof, or as aforesaid, I hereby give you notice that I shall immediately commence and prosecute an action against you for such your conversion and unlawful conduct. Dated this — day of — A. D. —.

Your's, &c.

(*u*) *Smith v. Young*, 1 Campb. 439.

(*x*) See *Alexander v. Southey*, 5 B. & Ald. 247; *Green v. Dunn*, 3 Campb. 215; *Cable v. Rogers*, 2 Bulst. 312. And see other cases collected, 1 Chit. Pl. 179 to 184.

(*y*) *Colegrave v. Dias Santos*, 2 Bar. &

C. 76.

(*z*) *Thompson v. Shirley*, 1 Esp. R. 31; *Coldwell's case*, Clayt. 122.

(*a*) *Smith v. Young*, 1 Campb. 439.

(*b*) *Logan v. Houlditch*, 1 Esp. R. 22.

(*c*) *Gibbs v. Stead*, 8 Bar. & Cres. 528.

See the form, note (*t*), *ante*, 566.

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5. Notice by
reversioner of
his interest in
goods seized by
sheriff.

5. So although in general a sheriff, who seizes goods under a writ of fieri facias, is bound, at his peril, to take care and ascertain whether the same are the property of the party against whom the writ was issued; yet in a late case it was held, that if a party has goods on hire for a term, and the sheriff seize them under an execution against him, the *reversioner*, who so let the goods, cannot support any action against the sheriff for selling the entire and absolute property of such goods, unless he show that "he gave the sheriff notice that the goods were hired for a term only, and that they were the property of the reversioner, and that the sheriff must only sell the limited or temporary interest;" and it appears to have been considered in the same case, that mere intimation to the sheriff's officer, that the goods were hired, would not be sufficient, and Bayley, J., said, "you should have informed the sheriff of the nature of your interest, and then he might have sold the hirer's interest only," and *per* Abbott, C. J., "it is very desirable that persons should give their notices correctly." (d)

6. Notices of
property being
in the house or
upon the land
of another, and
request to have
same restored,
or to permit
claimant to
enter to remove
same.

6. When by any lawful means the personal property of the owner is in the house or upon the land of another, the latter, before he can legally enter to bring it away, must (except, perhaps, where the occupier has wrongfully placed or detained it there,) first give notice of the circumstances under which the goods are there, and civilly request the occupier to restore them to him, or request permission to enter on purpose to remove them himself, and offer to pay any possible damage that would be occasioned by such entry; after which, in case of refusal, the owner might legally enter, or at least sustain an action of trover. (e) When by unavoidable accident trees are blown down, or fruit falls upon the land of another, or cattle enter by reason of the occupier's neglect to repair his fence, it should seem that such an entry would be legal, but it is expedient previously to give the suggested notice, at least in all cases where the occupier is not himself to blame; (e) for though the occupier may not have a right to the property which is on his premises under any such circumstances, yet it is but reason-

(d) *Dean v. Whittaker*, 1 Car. & P. 347, at Nisi Prius and afterwards in full Court, and see Tidd, 9 ed. 1003, *sed quare*. If the reversioner had not known of the execution, his neglect to give notice certainly then ought not to prejudice his remedy, for a sheriff seizes at his peril,

Tidd, 9 ed. 1008.

(e) See *Anthony v. Hany*, 8 Bing. 191, where circumstances of this nature were considered, and a plea held bad because it did not show *how* the goods were on the plaintiff's premises so as to justify the entry; see further next chapter.

able that he should first have an opportunity, at his own convenience, to remove them in his own way off the premises, and deliver them to the owner, without allowing the latter himself to enter. The form of the notice may be as subscribed. (*f*)

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7. Where the occupier of an house or land has *erected* or *continued* on his land something obnoxious, and which occasions a nuisance to another, it seems to be in general advisable (at least in the case of a mere *private* nuisance) to give him notice, or to request him to remove it, and to wait a reasonable time until after his neglect to remove, before the party injured should *enter* the house or land to remove such nuisance, because in these cases the occupier generally ought to have an opportunity of himself removing the matter complained of before another intrudes upon his land. (*g*) Such a request to remove is always essential before *an action* can be commenced against a mere *continuer* of a nuisance; (*h*) though in such a case it should seem that a notice left with one occupier to remove the nuisance will subject another person who comes into possession shortly afterwards to an action if he do not remove the injury. (*i*) It will be observed, that even in the case of public nuisances to highways, the highway act in general requires a notice to remove the nuisance before the surveyor can enter, or himself abate it. (*k*)

7. Notice to an occupier to remove any nuisance on his own land, but annoying the party giving such notice.

In a late case, (*l*) a distinction was taken in regard to the proceeding to remove nuisances by acts of *commission*, and those by *omission*; and it was considered that as nuisances by act of *commission* are committed in defiance of those whom such nuisances injure, therefore the injured party may abate them *without notice* to the person who committed them; but

(*f*) Sir,—A tree, recently growing in my field called —, has been blown down, and has fallen upon your field called —, and I am desirous of having the same removed back into my field, or into, &c. (describing the place), in the way and manner, and at a time least inconvenient and prejudicial to you, and I am willing to pay you for the reasonable trouble and expense of so removing the same, should you prefer to direct the removal yourself; but if not, then I will, at the time and in the manner I request you to fix, remove the same by my own servants, horses, and tackle; and in either case I am ready to make compensation for any damage you may have sustained. In case I should not hear from you to the contrary, I will attend with my servants, horses, wain, and tackle, on, &c., at the hour of, &c., and cause the said tree to be removed in the way and manner best calculated to avoid any increase of damage. I am, Sir,
Your's, &c., A. B.

Notice of a tree having been blown down on land of another, and of intention to remove same.

(*g*) *Earl Lonsdale v. Nelson*, 2 Bar. & C. 302, 311; 3 Dowl. & R. 556, S. C.; see form, *post*, 570, n. (*o*).

(*h*) *Winsmore v. Greenbank*, Willes, 583; *Brent v. Haddon*, Cro. Jac. 555; *Penruddock's Case*, 5 Coke's R. 100, 101; *Anon.* Jenk. 260; *Salmon v. Bensley*, Ry.

& M. C. N. P. 189.

(*i*) *Salmon v. Bensley*, Ry. & M. 189, *sed quære*.

(*k*) 13 Geo. 3, c. 78, s. 9, &c.; and see *post*, ch. vii.

(*l*) *Earl Lonsdale v. Nelson*, 2 Bar. & C. 302; 3 Dowl. & R. 556, S. C.

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that where the nuisance, even when public, is from *omission*, as in the case before noticed of an occupier suffering his trees to grow over his neighbour's land, or in the second case suffering a building in a public port to be out of repair, (m) then, under any circumstances, a notice to the wrong-doer must be given before any attempt be made to remove the nuisance. (m) In the case of a nuisance *immediately* and suddenly requiring abatement without any delay, no previous notice might be requisite. (m) And in general, pleas justifying the abatement of a private nuisance of *commission* do not aver any request or notice to remove. (n) But still in all cases, when time will allow, and no serious injury is likely to arise during the delay, it seems always prudent, as well in case of public as of private nuisances, to *serve a notice*, and to wait a reasonable time for the wrong-doer's compliance, and which notice may be in the form given in the note. (o)

8. Notices to
cease a per-
mitted nuisance.

8. In case also of a nuisance or easement, if it has been suffered to exist for a considerable time, and still more if it were erected with the leave of the party at length complaining, although a license is in general revocable, yet he must, before he commences an action for the continuance, formally request the

(m) *Earl Lonsdale v. Nelson*, 2 Bar. & C. 302; 3 Dowl. & R. 556, S. C.

(n) See *Raikes v. Townsend*, 2 Smith's R. 9; 3 Chitty's Pl. 5 ed. 1102, 1110, 1118, 1130.

(o) See *Raikes v. Townsend*, 2 Smith, 9.

Dated, &c.

Suggested form
of a notice to
remove a public
or private
nuisance, or
that the party
will himself
remove.

Sir,—Whereas I am possessed of a mill, land, and premises situate in the parish of —, in the county of —, and carry on therein the trade and business of a —; and I am entitled to the use of a watercourse running through a close called —, and another close called —, in the said parish, in your occupation, unto my said mill, and land and premises, for the supplying the same with water; and divers dams and obstructions have been illegally made, and are now continued in your said closes, or in some part of the premises in your occupation across or near to the said watercourse, and in consequence thereof I have been deprived of the use of the water thereof at my said mill, lands, and premises, and my said trade and business is thereby greatly obstructed and impeded, and several of my workmen are hourly prevented from working there as they otherwise would: Now, therefore, without prejudice to my right of action for the damages I have already sustained, or may sustain, in consequence of the premises, I hereby give you notice, and require you immediately to remove the said dams and obstructions, and to cause the water in, or which ought to flow along the said watercourse, to flow to my said mill, lands, and premises, as the same ought to do. And I further give you notice, that if the said dam and obstructions shall not have been removed, and the water caused to flow as aforesaid, before 12 o'clock at noon to-morrow, I shall, with such workmen as may be necessary, immediately, or soon after that hour, enter in and upon your said closes, lands, and premises, for the purpose of abating and removing, and I shall cause to be abated and removed, the said dams and all other obstructions so far as shall and may be necessary to cause the water to flow along the said watercourse as the same ought to do, to my said mill, lands, and premises, and the expense of which I shall require you to defray. If any other hour to-morrow for my attending with my workmen for the purpose aforesaid would suit you better than that above named, I will thank you to let me know, in order to alter the arrangement accordingly.

Your's, &c.

To Mr. —.

removal; (p) and, therefore, where a license had been given to put a sky-light over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window), it was held that such license could not be recalled at pleasure, after it had been executed at the defendant's expense, at least not without tendering the expenses he had been put to; and that, therefore, where no such offer had been made, no action could be sustained for such a private nuisance in stopping up the light and air, and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light. (q).

9. Before a person entitled to real property can support an action of ejectment or trespass against a person for retaining possession, he must be prepared at common law to prove that the possession is *adverse*; therefore, if the occupier has been *permitted* to occupy as a tenant, that *permission* must, in the case of a tenancy, be determined by a notice to quit, and if there be no tenancy but at sufferance, then a formal demand of possession should be made, so as to determine the owner's permission, and which, for the sake of certainty should be *in writing* as well as verbal, and may be made as in the subscribed form; (s) and the lord of a manor cannot sustain ejectment for an inclosure on his waste, made with his knowledge or acquiescence, without proving a previous demand. (t) And in some particular remedies given to landlords, as for double yearly value of premises held over, there must be a demand in writing of the possession; (u) and under the 1 Geo. 4, c. 87, s. 1, in order to entitle a landlord to security from the defendant in an action of ejectment, the latter must, by the express terms of the act, be served with a written demand. (x) But in general a mortgagee need not serve or give any notice or demand, verbal or written, before an ejectment against the mortgagor, or a

9. Entry and demand of possession of land. (r)

(p) *Ante*, 336 to 340, as to when a license cannot be revoked, and how it is to be revoked.

(q) *Winter v. Brockwell*, 8 East, 308.

(r) As to perfecting a disclaimer, *Doe d. Calvert v. Frowd*, 4 Bing. 557, and *ante*, 482; and as to perfecting a right of entry for non-payment of rent, *ante*, 480 to 482.

(s) *Doe d. Bruns v. Rawlins*, 10 East, 261; *post*, 573, note (h).

(t) *Doe d. Foley v. Wilson*, 11 East, 56.

(u) 4 G. 4, c. 28, s. 1; *Johnstone v. Huddleston*, 4 B. & C. 922, but it has been holden that a written notice to quit

before the expiration of the term is a sufficient demand; *Cutting v. Derby*, 2 Bla. R. 1075; *Wilkinson v. Colley*, 5 Burr. 2694, *sed quære* whether the statute did not intend to require a demand after the right to possession was complete, and the latter demand is recommended.

(x) In this case the tenant holding over must have held under a written demise or agreement; and see decisions as to the notice, *Doe d. Marquis of Anglesea v. Roe*, 2 Dow. & Ry. 565, and *Doe d. Marquis of Anglesea v. Brown*, Id. 688, &c. See the form of notice, *post*, 572, note (g).

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person who came into possession under him since the mortgage, (y) and who has not been acknowledged tenant by the mortgagee; (z) Nor is any notice or demand necessary when a person holds over after the expiration of a lease, or of a notice to quit, without any fresh agreement authorizing him to retain possession; (a) and a mere negotiation for a lease after a person has assumed or retained possession, will not render a notice or demand necessary; (b) nor is a notice or demand requisite when a vendee has been let into possession without a conveyance, and has neglected to pay instalments according to stipulation. (c) But where a vendee has been let into possession, and has complied with the terms in all respects, a demand of possession must be served, to make his possession tortious, before an action of ejectment can be sustained against him. (d) So an *actual entry* within twenty years is essential to prevent the statute of limitations barring an action of ejectment, unless that action be actually commenced within twenty years next after the right accrued; (e) and when the twenty years are nearly expiring, it is always prudent to make a formal entry and demand, for then the claimant need not, since the statute 4 & 5 Anne, c. 16, s. 15, commence his action of ejectment till within one year after such entry, so that his time for proceeding may by such entry be extended to nearly *twenty-one* years. (f)

The subscribed form of demand, under the statute 1 Geo. 4, c. 87, may be readily applied to any other demand of possession, (g) but another general form of entry is also sub-

(y) *Ante*, 258; *Thunder v. Belcher*, 3 East, 449; *Doe d. Roby v. Maisey*, 8 Bar. & Cres. 767; *Doe d. Fisher v. Giles*, 5 Bing. 421; 2 Moore & P. 749, S. C.

(z) *Doe d. Whittaker v. Hales*, 7 Bing. 322; *ante*, 258; *aliter* if mortgagee has accepted rent from subtenant, *id. ibid.*

(a) *Cobb v. Stokes*, 8 East, 358.

(b) *Doe d. Knight v. Quigley*, 2 Campb. 505; *Doe d. Bruns v. Rawlins*, 10 East, 261.

(c) *Doe d. Moore v. Lawder*, 1 Stark. R. 308; *Doe d. Leeson v. Sayer*, 3 Camp. 8.

(d) *Right d. Lewis v. Beard*, 13 East, 210; *Doe d. Newby v. Jackson*, 1 Bar. & Cres. 448; 2 D. & R. 514, S. C.

(e) 21 Jac. 1, c. 21, s. 1; 4 Ann. c. 16, s. 15; *Goodright v. Cater*, Dougl. 477, 485, n. 1; *Adams' Eject.* 3 ed. 102.

(f) *Id. ibid.*; *Adams' Eject.* 3 ed. 102, 103.

Demand of possession by landlord or his agent on statute 1 G. 4, c. 87, s. 1.

(g) Sir,—I do hereby (or, if given by an agent, "I do hereby, as the agent of and for A. B., your landlord, and on his behalf,") according to the form of the statute in such case made and provided, demand and require you forthwith to quit and deliver up to me (or, "to the said A. B.") the possession of the dwelling-house (or, "farm, lands and premises,") with the appurtenances, situate and being in the parish of —, in the county of —, and which were held by you as tenant thereof under a lease (or "agreement in writing,") bearing date, &c. (*date of lease or agreement*) for the term of — years, which expired on the — day of — last, (or, "from year to year, and which tenancy was determined by me," or, "by the said A. B.," or, "by you,") by a regular notice to quit on the — day of — last. Dated, &c.

Your's, &c.

A. B. (or, "E. F. agent for the said A. B.")

To Mr. C. D. tenant in possession.

scribed, (h) and reference to the directions in making an entry to avoid a fine may also assist.

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10. In certain cases, when it is known that a fine has been levied with proclamation, it is *necessary* (if it were operative) to make an actual entry to avoid it within *five* years after. (i) But if a fine that has been levied was wholly invalid or inoperative, then no entry to avoid it is necessary; as if a tenant for years, without making a feoffment, or a lessee for years of a tenant for life hold over, and afterwards levy a fine, then no entry to avoid it is necessary. (k) However, if the party levying a fine had previously gained a freehold, although tortiously and by disseisin, an entry to avoid his fine is in general required; (l) as if a man enter under a devise which is void, he by his entry gains the freehold by abatement, and a fine levied by him with proclamation may be used as a bar by non-claim, much however might depend upon the facts as to the leases then existing. (m) In that case, however, perhaps the judge went too far upon the facts proved, for the regress of the tenants perhaps restored the seisin. (n) In cases of the least doubt whether a valid fine has been levied, it is *always prudent* to make a formal entry, to avoid "all fines that may have been levied, if any such

10. Of a power of attorney to make entry and avoid a fine, and entry and proceedings thereon.

(h) I (or, "I, E. F. as the attorney and agent of and for A. B., and by him duly appointed and authorized,) do now make this entry into and upon this house and land and premises, in the name of the whole of the buildings, lands, tenements, hereditaments, and premises thereunto belonging, or therewith used, occupied, or enjoyed, with intent henceforth to resume and obtain, and keep the actual possession thereof for my own use and benefit (or, "for the use and benefit of the said A. B.") and to put an end to all and every subsisting tenancies or permissions to hold or occupy the same tenements, hereditaments, or premises, or any thereof, if any such there be or have been, and also to interrupt and prevent the operation of any statute or statutes of limitations, that otherwise might or would prejudice or affect my claim to the said tenements, hereditaments, and premises, or any part thereof; and I do now demand and require you, G. H. (the present occupier,) and all other persons and person whatsoever, immediately to give up to me the full, entire, and peaceable possession of these and all other the said tenements, hereditaments, and premises, with the appurtenances, or in default thereof, I shall forthwith pursue such proceedings as I shall or may be advised to adopt in the premises. Dated, &c.

Entry upon and demand of possession of land, &c. to determine any permission to occupy or a mere tenancy strictly at will or sufferance, or to prevent the operation of the statute of limitations, 21 Jac. 1, c. 16, s. 1.

Your's, &c. A. B.

To Mr. G. H. (the occupier) and all others whom the same doth or shall or may concern.

(i) *Doe d. Lee Compere v. Hicks*, 7 T. R. 433; *Id.* 727; *Doe d. Duckett v. Watts*, 9 East, 17; *Berrington v. Parkhurst*, 13 East, 489; *Doe d. Anderson v. Turner*, 1 Car. & P. 91; *Doe d. Davis v. Davis*, 1 Car. & P. 130; *Adams' Eject.* 93 to 103.

(k) *Doe d. Burrell v. Perkins*, 3 M. & S. 271; 2 Bla. C. 356, note 19. See 2 Bla. C. 357; *Doe d. Davis v. Davis*, 1 Carr. R. 130; *aliter* if a lessee for years make a feoffment and then levies a fine; in that case an entry to avoid it within five

years after, or rather within five years after the expiration of the demised term, is essential, *Hunt v. Bourne*, Salk. 339; *Pomfret v. Windsor*, 2 Ves. 472, 481; *Whaley v. Tankard*, 2 Lev. 52; *Adams*, 3 ed. 97.

(l) See cases *Adams' Eject.* 3 ed. 97, 98, and last note.

(m) *Hardman v. Clegg*, Holt's C. N. P. 657.

(n) Co. Lit. 324.

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there be ;" for on searching for such fine it may have escaped notice, and the entry can never prejudice.

The demise in a declaration in ejectment must be laid after the entry, (o) and mesne profits cannot be recovered antecedent to such entry. (p) But it must be remembered that such entry would be of no avail if more than twenty years have elapsed since the right accrued, because then the right of entry is in that case taken away by 21 Jac. 1, c. 26; and if more than five years have elapsed since a valid fine was levied, it is then too late to attempt to avoid it by entry. (q) We will now consider practically the mode of making entry, (r) and which may be collected from the following cases and forms.

In order that an entry to avoid a fine may be effectual for that purpose, it is requisite that the party entering, or for whom the entry is made, should have a *right of entry*, and not merely a *right of action*. (s) The claim must be by entry *upon* the land claimed, and must not be a mere casual entry, but an entry made *animo clamandi* with the express declared intention of claiming the land. (t) A fine having been levied, the lessor of the plaintiff proved that at the gate of the house in question, he said to the tenant he was heir to the house and land, and forbade him to pay more rent to the defendant, but he did not enter into the house when he made the demand. On which it was agreed, that the claim at the gate was not sufficient. Then it was proved that there was a court before the house which belonged to it, and though the claim was at the gate, yet it was on the land, and not in the street, and that was held good. (u) And the entry must be into and upon the land comprised in the fine, for an entry into other land, claiming that which is comprised in the fine, is held to be insufficient. (x) As the entry must be *actual*, (y) a mere fictitious entry will not suffice, and therefore the delivery of a declaration in ejectment does not amount to an entry to avoid a fine, though the defendant appear and confess lease, *entry* and ouster, for this is but a *supposed* entry for the purpose of making the demise, and in the case of fine, the actual entry must be made before the time

(o) *Berrington v. Parkhurst*, 13 East, 489; *Doe d. Lee Compere v. Hicks*, 7 T. R. 727.

(p) *Doe d. Lee Compere v. Hicks*, 7 T. R. 727; 1 Saund. 319, b.

(q) See Statute of Fines, 4 Hen. 7, c. 24. See exception, *ante*, 573, n. (k).

(r) Tidd, 9 ed. 1198, &c., and Adams' Eject. 3 ed. 100.

(s) *Stowell v. Lord Zouch*, Plowd. 358 ;

5 Com. Dig. 288, 2 ed.; 1 Prest. Conv. 246, 247.

(t) *Clerk v. Rowell*, 1 Mod. 10; *Ford v. Grey*, 6 Id. 44; *Williams d. Hughes v. Thomas*, 12 East, 186; *Doe v. Hicks*, 7 T. R. 433.

(u) *Anon.* Skin. 412.

(x) *Focus v. Salisbury*, Hardres, 400.

(y) *Doe v. Hicks*, 7 T. R. 433.

when the demise is laid. (z) Where there are several freeholds possessed by different tenants claiming the freehold, though tortiously, a separate entry must be made on each, but an entry in part will be good for all possessed by one tenant, and a special entry into a house with which lands are occupied, claiming the whole, is a good entry as to the land. (a) The claim must be of such a nature as corresponds with the estate, and consequently an entry on the land by a *cestui que trust*, or any other legal act, is not sufficient to avoid a fine, but it must be by a bill in Chancery. (b) If by force or violence the person claiming be prevented from making an entry on the land, he must make a claim as near to the same as he can, and which will then be equivalent to an actual entry. (c)

After claim or entry made, the party seeking to avoid the fine must prosecute his claim or entry by ejectment within one year from the time of claim or entry, (d) though he may make a new claim or entry and again prosecute the same within one year, but in both cases the ejectment must be commenced, though it is not required that judgment should be obtained, before the expiration of the five years. (e) The claim need not necessarily be made by the party entitled himself, but may be effected by any other person for him, either under a power previously given, or without any previous authority, provided an assent be subsequently given *within five years* from the time of levying the fine, which is essential; (f) but an entry or claim, to prevent the operation of a fine, is unavailing, unless the owner give authority before, or agree to it after it has been done, and within such five years. (g) The *power of attorney* to make entry to avoid a fine may be in the subscribed form. (h)

(z) 1 Saund. 519; *Berrington v. Parkhurst*, 2 Stra. 1086; *Oates v. Brydon*, 3 Burr. 1897; *Goodright v. Cator*, Doug. 480.

(a) 1 Lill. Ab. 516; 3 Cru. Dig. 501, 2 ed.

(b) *Glumdalclitch v. Leman*, 2 Bla. R. 993; 1 Cbit. Ca. 268, 278. *Sed quere*, see note by Atherly Shepp. Touch. 56;

1 Prest. Conv. 248.

(c) Lill. s. 419; 1 Inst. 253, b.

(d) 4 Ann. c. 16, s. 16.

(e) See 1 Prest. Conv. 245, 246.

(f) Co. Lit. 245, a.; *Fitchet v. Adams*, 2 Stra. 1128.

(g) Co. Lit. 258, a.; Shepp. Touch. 35, 36.

(h) To all to whom these presents shall come, I A. B. of, &c. Esquire, send greeting.

Whereas I am legally entitled to, &c. [*describe the manors, messuage, buildings, land and premises, and the local situation, with as much particularity as in a declaration in ejectment*,] and also unto divers other tenements, hereditaments and premises, situate and being in the same county, and also unto divers other tenements, hereditaments and premises, situate and being elsewhere in England, of which it is supposed that a fine has been levied by C. D. of, &c. for the purpose of barring my right of entry and title to the same. And whereas I am desirous that an entry should be made, for the purpose of avoiding the effect of the said supposed fine; and I am also desirous of avoiding

Power of attorney to make entry to avoid a fine.

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11. Oath, examinations and forms, connected with claims upon a *Hundred*.

11. In order to *perfect* a claim for *compensation* against an *Hundred* for damages committed by rioters, the 7 & 8 Geo. 4, c. 31, sects. 3 and 8, require certain preliminary steps, which

the effect of all and every other fines and fine that may have been levied adverse to my right to or interest in the said tenements, hereditaments and premises, or to the right or to the interest of any person under whom I may or might claim; and also of preventing the operation of any statute of limitation that may or might otherwise affect or prejudice my right or title or power or means of recovering the said tenements, hereditaments and premises. Now these presents witness, that I the said *A. B.* have made, nominated, constituted and appointed, and in my place and stead put, and by these presents do make, nominate, appoint and constitute, and in my place and stead put *E. F.* of, &c. my true and lawful attorney and agent, for me, and in my name and on my behalf, to make an actual entry and entries in, to and upon the said tenements, hereditaments and premises, or any part or parts thereof, and there to claim the freehold and possession of the same from and against the said supposed fine, and all and every such other fines and fine as aforesaid, and from and against all parties thereto, and from and against all persons whatsoever, and generally to do all such other acts and things whatsoever in and about the premises, in order and to the intent and purpose that an actual entry and entries may be made upon the said tenements, hereditaments and premises, in order to avoid the effect, if any, of any such supposed fine and other fines and fine as aforesaid, *in case of non-claim*, according to the statutes in such case made and provided, and that as fully and effectually, to all intents and purposes whatsoever, as I the said *A. B.* might or could do in my own proper person if I were personally present, and myself did the same. And also to make entry and entries in and upon all and every part of the said tenements, hereditaments and premises, to avoid and prevent the operation of any statute of limitations, that might otherwise affect or prejudice my right or claim to the same, and also to demand possession of and avoid and determine every subsisting tenancy or permission to occupy the said tenements, hereditaments and premises, if any such there be. In witness whereof I have hereunto set my seal, and subscribed my name, this — day of —, A. D. —.

Signed, sealed and delivered, by } *A. B.* (L. S.)
the said *A. B.*, in my presence, on } *G. H.*
the day and year aforesaid,

Entry and demand thereupon.

Words to be used in presence of witnesses at principal entrance door upon the premises on making such entry.

I *A. B.* [or *E. F.*, the attorney of and for *A. B.* of, &c. and by him lawfully constituted and appointed as his attorney and agent in this behalf, under and by virtue of a deed-poll duly made by the said *A. B.*, and bearing date the — day of —, A. D. —,] do now here declare and give this public notice, that I, on my own behalf, [or “as such attorney and agent as aforesaid, on behalf of the said *A. B.*”] have made and do now make this entry in and upon these premises, being, &c. [describe them as in power of attorney,] in order and to the intent and purpose to avoid the effect of a certain supposed fine, levied by *C. D.* of, &c. of the said premises, and also of all and every other fines and fine, and acts and act, and proceedings whatsoever, that have or hath, or may have been levied or made or done of the said tenements, hereditaments and premises, or any part or parts thereof, or in anywise relating to the same; and for the same purpose and intent I do now, on my own behalf, [or “as such attorney and agent as aforesaid, for and on the behalf of the said *A. B.*”] now here publicly and openly demand and claim the freehold and possession of the same tenements, hereditaments and premises, against the said supposed fine, and all and every other fines and fine, acts or act, or proceedings, if any such there have been or be against the said *C. D.*, and all and every other persons and person whatsoever “and whomsoever.” Dated this — day of —, A. D. —. Signed, *A. B.*

Memorandum of the entry and demand having been made, and which is to be indorsed on the original power of attorney.

Memorandum, That on this — day of —, A. D. 1833, I *E. F.* did, in pursuance and by force and virtue of the within written power of attorney in this behalf, make an actual entry into and upon the within-mentioned (premises), [or in and upon so much of the within-mentioned premises as were and are situate within the county of —,] and did there, in the name and on the behalf of the within named *A. B.*, claim the freehold and possession of the same (premises), against the said supposed fine, and all other fines and fine, and acts and act, and proceedings whatsoever, as within mentioned. Dated this — day of —, A. D. —.

Witness, &c.

E. F.

must be carefully observed. (g) Section 3 enacts "that no action or summary proceeding shall be maintained by virtue of that act for the damage caused by any of the said offences, unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall, *within seven days* after the commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders, if known, and shall submit to the *examination* of such justice touching the circumstances of the offence, and become bound by *recognisance* before him to prosecute the offenders when apprehended:" and the action must be brought within three calendar months after the commission of the offence. (g)

Upon the prior act it was decided that a *house*, part of which was occupied by the plaintiff as a shop, and the remainder by the lodgers, no part of the family sleeping therein, was a dwelling-house within the protection of the 1 Geo. 1, stat. 2, c. 5; (h) but a building intended as an house, but not completed nor inhabited, but in which straw was placed, is not a house or warehouse under the recent act; (i) and hustings erected to take the poll at a contested election for members to serve in parliament, were held not to be within the 57 Geo. 3, c. 19, s. 38, (k) and a gaol was considered as not within the last act. (l)

A *beginning to demolish* is within the act, (m) but there must be proof of an intention to demolish, at least in part; (n) a burning in part is in part demolition. (o) It must have been done *feloniously* by persons *riotously* and *tumultuously* assembled within the meaning of the other act of the same session, 7 & 8 G. 4, c. 30, sect. 2. (p)

The 7 & 8 Geo. 4, c. 31, s. 2, expressly directs that *full compensation* (not as before limited to £200,) shall be yielded, not only for the damage done to the buildings and machinery enu-

(g) See the enactment in 7 & 8 G. 4, c. 30, making the offence felony, and decisions thereon, *ante*, 172 to 174, 400. 410, 411; and see Chit. Col. Stat. tit. Hundred.

(h) *Rex v. Wood*, 2 Stark, 269.

(i) *Elsmere v. Inhabitants of St. Briavells*, 8 B. & C. 461.

(k) *Allen v. Ayre*, 3 Dowl. & Ry. 96.

(l) Western Circuit, 30 Jan. 1832.

(m) *Lord King v. Chambers*, 1 Stark. R. 195.

(n) *Id. ibid.*; *Sampson v. Chambers*,

4 Campb. 221; *Lord King v. Chambers*, *Id.* 377; *Smith v. Bolton*, Holt, C. N. P. 203; *Rex v. Thomas*, 4 Car. & P. 237.

(o) *Nesham v. Armstrong*, 1 B. & Ald. 146; Holt, C. N. P. 466, S. C.

(p) *Reid v. Clarke*, 7 T. R. 496; *Rex v. Thomas*, 4 Car. & P. 237; *Rex v. Inhabitants of Gainsbury*, 4 D. & R. 250; *Smith v. Bolton*, Holt, C. N. P. 203; *Burrows v. Wright*, 1 East, 615; *Beckwith v. Wood*, 1 Bar. & Ald. 487; 2 Stark. Rep. 263, S. C.; *Beaton v. Rushworth*, Marsh. R. 362; 7 Taunt. 45; 3 Price, R. 48, S. C.

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merated, but also for any *damage* which may *at the same time* be done by any such offenders, to any fixtures, furniture or goods in such buildings. It was holden on the prior act, that the hundred are only liable for things demolished by the rioters, or destroyed in the demolition of the house, and not for any goods *stolen* from the premises. (q)

It has been held that both the reversioner or landlord and the tenant in possession may respectively sue separately, the one for the injury to his possession and to his furniture or goods, and the other for the injury to his reversionary interest, and for the damage, rendering it necessary to repair. (r) Such an action is maintainable by a trustee, in whom the legal estate is vested for existing purposes, and as it seems even by a bare trustee of a satisfied term. (s)

The *seven days* allowed for making the oath and submitting to examination are to be calculated exclusive of the day on which the damage was committed. (t)

With respect to the *justice or magistrate before whom the oath and examination* should be made, it has been held upon another act, that the examination was sufficient if made by a justice who lived two miles from the place, although it was proved that there were many who lived nearer, as the act was only directory in this respect. (u) But the prudent course would be precisely to comply with the very words of the act, and as care is essential to disclose all the material facts, the party injured should, as soon as practicable after the felony has been committed, apply to an experienced attorney, who should examine the owner and servants and take down all the particulars, and then prepare a full affidavit or oath to the effect in the subscribed form, and as soon as convenient, and at all events before the seven days have expired, tender the oath and the proposed deponents to one of the nearest justices, and who would be bound, upon proper request, to take the oath and examination, or, in case of refusal, would be liable to a special action on the case, if by his neglect the party injured should lose his remedy against the hundred. (x) If there be several partners, all present or resident upon the damaged premises at the time of the

(q) *Smith v. Bolton*, Holt, C. N. P. 201; *Greasley v. Higginbotham*, 1 East, R. 636; *Ratcliffe v. Eden*, Cowp. 485; 2 Stark. Evid. tit. *Hundred*.

(r) *Pellow v. Inhabitants of Wonford*, 9 Bar. & Cres. 134; 4 Man. & R. 130, S. C.

(s) *Pritchett v. Waldron*, 5 T. R. 14.

(t) *Pellow v. Inhabitants of Wonford*, 9 B. & C. 134;

(u) Bul. N. P. 186.

(x) *Green v. The Hundred of Bucclechurch*, 1 Leonard's Rep. 223, 224; but *semble*, it is incumbent on the party injured to see that his oath, &c. are in due form.

felony, should be examined and make oath, and the oath of one of them would not suffice. (y) If the principal reside on the premises and be at hand when the felony was committed, it will suffice if *he* make the oath and be examined, and it is not also necessary for his servant or any other person to be examined, (z) though it would be otherwise if the principal were absent from home and a servant in charge. (a) With respect to servants, *all* those in charge should be examined; (b) and a steward residing at a distance, although he have the general superintendence, will not in that case be the proper person to make oath, if there were labourers on the spot having the actual care of the premises. (c) But it has been recently held upon the present act, that the servant or servants, who, in the absence of a master, have the *general care and superintendence* of the property, and who represent him in his absence, and *not all* who have the special care *under them* of *particular parts* of the property contained in a dwelling-house or manufactory, are the proper servant or servants who, by the 7 & 8 Geo. 4, c. 31, s. 3, are required to go before a justice and to state upon oath the names of the offenders, and to submit to examination touching the circumstances of the offence, and although there be even 160 other *sub-servants* having the care of particular parts, neither of *them* need appear before the justice, (d) though in extreme caution, it would be safer that *all* should make oath and tender their examinations.

With respect to the *oath itself*, it will be observed, that the act only requires the party making it to state the names of the *offenders, if known*, and therefore it is not now necessary to exclude or to swear negatively, that the deponent has no *suspicion* of the offender. (e) And although upon a prior act it was held that the oath should be in the *disjunctive*, that he did not know the offenders, *or any of them*, and that it would not suffice merely to state affirmatively, that the party swearing suspected that the offence had been committed by some person or persons to him unknown, without adding negatively, that he did

(y) *Neaham v. Armstrong*, 1 Bar. & Ald. 146; Holt, C. N. P. 466, S. C.

(z) *Rolfe v. Elthorne*, 1 Mood. & M. 185; *Pellew v. Wonford*, 9 Bar. & C. 134, a decision on 9 Geo. 1, c. 22, s. 7, now repealed.

(a) *Id. ibid.*

(b) *Duke of Somerset v. Mere*, 4 Bar. & Cres. 167; 6 Dowl. & R. 247, S. C.;

but see *Lowe v. Inhabitants of Broxtowe*, 3 Bar. & Adolph. 550.

(c) *Duke of Somerset v. Mere*, 4 B. & C. 167; 6 D. & R. 247, S. C.; *Rolfe v. Elthorne*, 1 Mood. & M. 185.

(d) *Lowe v. Inhabitants of Broxtowe*, 3 Bar. & Adolph. 550.

(e) *Pellew v. Inhabitants of Wonford*, 9 Bar. & Cres. 134.

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not know the offenders, *or any or either of them.* (f) But it has been held that it suffices, under the *present* act, to swear that the deponent doth not know the *offenders*, (in the *plural*) without adding in the disjunctive "*or offender.*" (g)

As to the *examination* itself, the act merely requires that the principal or servants shall *submit* to the examination of the justice touching the circumstance of the offence. So that although the act is *imperative* as to the *oath* (and which cannot be dispensed with), it is rather for the magistrates to put any other questions, than for the parties to prepare or give in an examination in any certain form. (h) However, it will be advisable, as well for the owner and occupier of the house and all servants, to press upon, or at least to tender to the magistrate a full and accurate disclosure and account of the circumstances, and the subscribed forms of *oath*, and *examination* and *recognition* may be adopted. (i) It has been held that the swearing before a justice to a deposition *previously* prepared, is a suffi-

(f) *Thurtell v. Inhabitants of Mutford*, 3 East, R. 400; *Rex v. Bishop's Sutton*, 2 Stra. 1247; *Trimmer v. Inhabitants of Mutford*, 6 D. & R. 10.

Bar. & Adolp. 550.

(h) See Lord Tenterden's observations in *Pellow v. Wouford*, 9 B. & C. 131; and *Lowe v. Inhabitants of Broxtowe*, 3 Bar. & Adolp. 550.

(g) *Lowe v. Inhabitants of Broxtowe*, 3

Suggested form of party's oath of a partial demolition of a dwelling-house and of damage to fixtures, furniture and goods.

(i) A. B. of, &c. maketh oath and saith, that a number of persons, exceeding twelve and more, being then and there riotously and tumultuously assembled together to the disturbance of the public peace, did, on the evening of Sunday last, the ninth day of —, instant, unlawfully make an attack upon the dwelling-house of, and then inhabited by, this deponent, situate in the parish of —, and within the hundred of —, in the county of —, and did then and there unlawfully and *with force* and *feloniously* in part demolish and destroy the same, by then and there unlawfully and *with force* and *feloniously* breaking — of the windows, and — of the window frames thereof, and greatly damaging and injuring the door-way and stone-work and — shutters of the said dwelling-house, and by then and there, &c. [*here describe very particularly any other act of part demolishing of the dwelling-house*]; and that the same persons so then and there riotously and tumultuously assembled, did then and there unlawfully and with force and feloniously at the same time as aforesaid, greatly damage 20 fixtures, 100 articles of household furniture and 100 other goods of this deponent, then and there being in this deponent's said dwelling-house, contrary to the statute in such case made and provided. And this deponent further saith, that the damage to the said dwelling-house, so caused by the said felony and offence, amounts to the sum of 39*l.* 7*s.* 6*d.*; videlicet, 33*l.* 16*s.* part thereof for the said damage so done to the said windows, window-frames, shutters, doors, door-way and stone-work, [and the sum of 5*l.* 11*s.* 6*d.* for boarding up the said broken windows on the following day after the said felony was so committed, to prevent the persons riotously and tumultuously assembled as aforesaid from getting into the said dwelling-house of this deponent.*] And this deponent further saith, that the said damage so feloniously done to this deponent's said fixtures, household furniture and other goods as aforesaid, then and still amounts to the sum of 40*l.* and upwards. And this deponent further saith, that he doth not know the names or name, or the person or persons of or any particulars of or relating to the said persons who so riotously and tumultuously assembled as aforesaid, or either of them; nor doth he know the name or names, or the person or persons, or any particulars of or relating to the said persons who so unlawfully and with force and feloniously so in part demolished his said house as aforesaid and committed the said other damages and offence, or any or either of them.

A. B.

Sworn at the Police-office in the town and county of the town of Nottingham aforesaid, this 15th day of Oct. 1831, before me, J. H. Barker, Mayor.

* *Seemle*, this damage, though included in the oath, is not recoverable under the act.

cient submission to examination within the meaning of the present act, if the justice require nothing further. (k)

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With respect to the *recognizance*, the party injured and his servant should take care to enter into such a recognizance, as under the terms of the act may be required by the magistrate, and which it should seem must be proved on the trial of an action against the hundred. (l)

The eighth section prescribes and gives the form of the *notice*

— to wit.—The examination of *A. B.* of —, Esquire, taken upon his submission, and upon his oath, this — day of —, A. D. —, before me, *E. F.* Esquire, one of his Majesty's justices of the peace in and for the county of — aforesaid, and residing near to and having jurisdiction over the place where the offence hereunder stated hath been committed, and also taken in pursuance of the statute in that case made and provided.

Suggested form of an examination taken before a justice of the peace.

Which said *A. B.* saith, that, &c. here the substance of the oath as in the above form must at all events be stated, together with his answer to all questions put to him by the magistrate connected with or likely to lead to the discovery and apprehension of the offenders, see sect. 3 of 7 & 8 Geo. IV. c. 31, and id. chap. 30, sect. 8; and *Lowe v. The Hundred of Broxtowe*, 3 Bar. & Adolph. 550. The deposition of the party should be stated as nearly as possible in the very words he has used. Then he should subscribe his name to the deposition, though that is not absolutely necessary.

Taken before me, the day and year above-mentioned.

E. F.

N. B. The following memorandum may as well be subscribed to the affidavit, and signed by the magistrate:—

Be it remembered, that the above-named *A. B.*, previously to making the foregoing deposition, expressed his readiness and submission to my examining him upon his oath touching the circumstances of the said offence, according to the statute in that case made and provided; and then became bound by recognizance before me to prosecute the offenders, when apprehended, in 50*l.* This 15th Oct. A. D. 1831.

Justice's memorandum of a party's readiness to submit to be examined on oath and of his having entered into his recognizance.

City of Coventry, (to wit).—Be it remembered, that on the — day of —, in the third year of the reign of our Sovereign Lord William the Fourth, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, &c. *A. B.* of, &c. ribbon manufacturer and housekeeper, personally came before us, *E. F.* and *G. H.*, Esqrs. two of the justices of our said lord the king, appointed to keep the peace within the said city and county of the same city, and acknowledged himself to owe to our said lord the king the sum of 40*l.* of lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements, to the use of our said lord the king, his heirs and successors, in case default shall be made in the condition following.

Form of a recognizance to prosecute for such felony in case the offenders should be apprehended.

Whereas divers persons unlawfully, riotously and tumultuously did, on the — instant, in the parish of —, in the said —, assemble together to the disturbance of the public peace; and being so unlawfully, riotously and tumultuously assembled together as aforesaid, did then and there unlawfully, feloniously and with force begin to demolish, pull down and destroy, and did feloniously in part demolish, pull down, and destroy and damage a certain dwelling-house of the said *A. B.*, there situate, contrary to the statute in such case made and provided. Now the condition of this recognizance is such, that if the above bounden *A. B.* shall and do prosecute, according to law, the offenders when apprehended for the said offence, then this recognizance to be void.

Acknowledged before us,

E. F.

G. H.

Town and County of the Town of Nottingham, to wit.—Take notice that you *A. B.* are bound in the sum of fifty pounds to prosecute, when apprehended, the person or persons guilty of demolishing or beginning to demolish your house and premises in the said town and county of the town of Nottingham, on the ninth day of October instant. Dated this fifteenth day of October, one thousand, eight hundred and thirty-one.

J. H. BARKER, Justice of the Peace.

Form of justice's notice to the party of his having entered into a recognizance to prosecute.

(k) *Lowe v. Inhabitants of Broxtowe*, 3 Bar. & Adolph. 550.

(l) *Noy*, 150; 2 Stark. Evid. 679.

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in writing of the claim of compensation according to the annexed schedule when the damages do not exceed *thirty pounds*.

II. Preliminary steps in cases of contracts, after inception of an injury. Notices, demands, &c. in cases of contracts.

Demand of goods of an infant or married woman.

II. We have in the last chapter stated some cases of contract, when it is necessary to *perform a condition precedent*, give *notice* of an event, or make a *request*, in order to complete a cause of action. There is another instance arising out of a contract, and when the defendant has refused to perform it, in which it may be necessary to make a demand, somewhat resembling that to constitute a conversion, and support an action of trover. Thus, if an infant have purchased goods not necessaries, and when applied to for payment they remain in his possession, and thereupon he sets up his infancy, and insists on that account that he is not obliged to pay for them; in such case, the vendor could not sue him upon the contract, but he may demand the goods, and support an action of *detinue* for the recovery of them or their value, and such demand may be in the form subscribed. (m) And the same doctrine would, it is assumed, extend to a contract for goods made by a married woman, and afterwards disaffirmed by her husband. (n)

Demand to create a forfeiture between landlord and tenant.

In general no actual entry or demand is necessary to take advantage of a forfeiture, (o) and by the 4th Geo. 2, c. 28, sec. 2, if half a year's rent be in arrear, and a clause of re-entry has been reserved, and there be no sufficient distress on the premises countervailing the arrears then due, an action of ejectment may be supported *without any formal demand* or entry, although required by the terms of the lease. (p) But an eject-

(m) *Mills v. Graham*, 1 New R. 148; it is advisable to declare in such action in detinue and debt, as defendant may have used some of the goods as necessaries, though purchased for trading, *Turberville v. Whitehouse*, 1 Car. & P. 94; and *Maddox v. Mills*, 1 M. & S. 738.

(n) Co. Lit. 351, b.; *Blackstone v. Martin*, 3 Bulst. 308. Thus if a feme

covert purchase goods, and her husband deny her authority, and his own liability, a demand should be made; and after evidence of his dissent, the goods may be retaken or recovered; and if wrongfully detained, the same would not afterwards be liable to be taken in execution for a debt of the husband.

Dated, &c.

Form of notice claiming return of goods from an infant.

Sir,—Whereas, on, &c. you obtained from me certain goods, viz. &c. (describing them) under colour and pretence of purchasing and paying for them, on, &c. and you have refused to pay for the same, under the pretence of your being, or having been an infant at the time you obtained the same, and you have refused to pay for the same, or to return them; Now therefore, I hereby demand and require you immediately to pay for the same, or in case you refuse to do so, and that you were or are an infant at the time you obtained the said goods, then I hereby demand and require you immediately to return, and now to deliver the said goods to me, or I shall immediately commence an action to recover the same or their value.

(o) *Goodnight v. Cator*, 2 Dougl. 477, ante, 480, 481, 482, 572, 573.

(p) *Doe d. Scholfield v. Alexander*, 2 Maule & S. 625; *Doe d. Lawrence v.*

Shawcross, 3 B. & Cres. 754; 5 D. & R. 711, S. C.; *Doe d. Harris v. Masters*, 2 B. & C. 490; 4 D. & R. 45, S. C.; and see Chitty's Col. Stat. 667.

ment founded on that statute cannot be maintained when there is sufficient distress on the premises; (q) and therefore, frequently when there is a clause of re-entry in a lease, in case the rent is not paid within 21 days, or other specified time, after a quarter day, the best course is to proceed at common law, by demanding the exact rent in arrear on the 21st day, for half an hour before sunset, at the door of the demised house, or other most notorious part of the premises, somewhat with the same form as in case of an entry to avoid a fine. (r)

The same rules and suggestions should be observed in *all* other cases of contracts, when it may be necessary or expedient to give any notice, or to make any request essential, to be afterwards proved. (s) Where a person is under a covenant or contract for good title, or for quiet enjoyment of sold or demised property, or is under an express or implied contract to *indemnify*, and a claim and proceedings have been instituted at the suit of a third person, against the covenantee or party so indemnified, to recover the estate, or otherwise to affect him, it is expedient and advisable, though *not absolutely necessary*, to give the covenantor notice of the adverse claim and proceedings, and require him to protect the title, and afford means of resisting the claim, or that he will ultimately be sued upon his covenant, and to compel compensation for all loss, damages, expenses, and trouble that the covenantee may sustain. (t) The purpose of giving notice, is not in order to give a ground of action, but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money. (u) In a recent case, where a vendor had conveyed premises to a purchaser, and covenanted for good title, and afterwards an action of formedon was brought against the purchaser by a party having a better title, and the purchaser compromised such suit for 500*l.*, it was held that such purchaser, in an action against the vendor for the breach of his covenant for good title, might recover the whole

Notices, &c. in other cases of contracts, and in cases of contracts to indemnify.

(q) *Doe d. Foster v. Wandless*, 7 T. R. 117.

(r) See directions, *ante*, 480.

(s) See the preceding chapter, *ante*, 493 to 499.

(t) *Duffield v. Scott*, 3 T. R. 374;

Smith v. Compton, 3 Bar. & Adolp. 407.

(u) *Per Buller, J. in Duffield v. Scott*, 3 Term Rep. 374; and *per Parke, J. in Smith v. Compton*, 3 Bar. & Adolp. 408, 409.

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sum so paid, and his costs as between attorney and client in the compromised suit, and this, notwithstanding he had not given notice to the vendor of the suit against him; because in an action on a general guarantee, the only effect of such want of notice to the indemnifying party, is to let in proof on his part, that the compromise was improvidently made, and it lies on him to establish that fact, which was not done in the then present case. (x) However, it is usual and proper to give an early notice of the adverse claim, and to advert to the covenant or contract of indemnity, and to require the party to afford evidence and assist in defence of the claim, or that otherwise the party giving notice will suffer judgment by default or resist the claim as he may be advised, and that he will proceed against the party to whom the notice is addressed, to recover indemnification and all costs and expenses that he may sustain, and such notice may be in the subscribed form. (y) And although the point has been disputed, (z) yet it seems that the party expressly or impliedly indemnified, although it be apparent that the adverse claim is well founded, may nevertheless resist it, especially if it

Form of notice
to an indemni-
fying party.

(x) *Smith v. Compton and others*, 3 Bar. & Adolp. 407.

(y) Sir,—Whereas by an indenture, bearing date, &c., and made between, &c. you conveyed to me an estate and premises, situate, &c., for and in consideration of the sum of — by me paid to you for the same, and you thereby covenanted that, &c. [*have copy the covenant for good title or quiet enjoyment, or state in like manner the other contract of indemnity express or implied.*] And whereas a claim of the said estate has been made by E. F. of, &c., and an action of ejectment hath been commenced and is depending against me by and at the suit of the said E. F. for the recovery of the possession of the said estate and premises, [*or whatever else may be the pending proceeding.*] Now, therefore, I hereby require you on or before the — day of —, inst., fully, and particularly, and satisfactorily to state to me in writing and otherwise, whether you are in possession of any and what facts or grounds of defence and evidence upon or under which I may be enabled effectually to resist the said claim, and successfully defend the said action, and whether or not it is your wish that I should defend the said action, and on what grounds and evidence; and in default of your compliance with this notice, and your stating and showing to me good and sufficient grounds for defending the said action with success, I hereby further give you notice that in order to avoid the inconvenience and loss that would result from my immediately submitting to the said claim and action, I shall endeavour to resist the same and retain possession of the said estate and premises as long as I may be enabled, or I shall take such proceedings, either by way of compromise, in case the said claim should appear to be well founded, or otherwise, as I may be advised in that behalf, and in case you do not immediately make an acceptable arrangement the whole of the damages, costs and expenses, that I may sustain must be borne and defrayed by you. And that if you require me to defend the said action I expect and require you, from time to time, to supply sufficient money and evidence for that purpose, and further that for whatever trouble, damage, expense or costs, or interest of monies, I shall or may have to bear, or expend, or disburse, I shall hold you responsible, and shall hereafter seek to recover compensation in an action against you upon your said covenant, (or, “contract,” or, “liability to indemnify me”). Dated, &c.

Your's, &c.

(z) *Gillet v. Rippon*, 1 Mood. & Malk. 406; *Knight v. Hughes*, Id. 247; *Roach v. Thompson*, Id. 487; *Spurrier v. Elder-son*, 5 Esp. R. 1, S. P.; see *Bladen v. Charles*, 7 Bing. 246.

be a debt of magnitude that he could not immediately pay, and he might even delay the payment by bringing a writ of error for delay and yet recover all the costs he may thereby sustain; for a party so indemnified is not to be expected or required to submit to an immediate execution when the party who has engaged to indemnify him neglects to come forward and perform his engagement. (a)

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(a) *Smith v. Compton*, 3 Bar. & Adolp. 467. According to *Chilton v. Whiffin*, 3 Wils. 13; *Sandback v. Thomas*, 1 Stark. R. 306; *Sparkes v. Martindale*, 8 East, 593; and *Ex parte Marshall*, 1 Atk. 262; *Chitty on Bills*, 8th ed. 349, even the

costs of a bill in equity, or a writ of error for delay, are recoverable; and see *Taylor v. Higgins*, 3 East, 169; *Sparkes v. Martindale*, 8 East, 593; *Ex parte Lloyd*, 17 Ves. 254; *Signall v. Andrews*, 7 Bing. 217.

CHAPTER VII.

OF REMEDIES BY ACTS OF PARTIES THEMSELVES WITHOUT ANY ASSISTANCE OF OFFICERS OF THE LAW OR OF LEGAL PROCESS, EITHER TO PREVENT, OR REMOVE, OR ABATE INJURIES, OR TO OBTAIN SATISFACTION; AND OF PARTIES APPREHENDING OFFENDERS, DISTREINING, &c.

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| <p>I. Of Preventive Measures, without Legal Assistance in general.</p> <p>II. Of Defence, Resistance, and Prevention of Injuries in particular.</p> <p> 1. What Defence of <i>Person</i>, and to what extent.</p> <p> 1. Against Felonies.</p> <p> 2. Against Misdemeanors and Assaults, &c.</p> <p> 2. What Defence of <i>Personal Property</i>.</p> <p> 3. What Defence of <i>Real Property</i>.</p> <p>III. When a Relation, Servant, Friend, or Stranger, may interfere, and how.</p> <p>IV. Of apprehending Offenders and their Utensils, &c.</p> <p> 1. By Private Individuals.</p> <p> 2. By Constables, &c.</p> <p> 3. Under Warrants, &c.</p> <p>V. Of Resistance of Process, Escapes, Rescues, Prison-breaking, and Pound-breach.</p> <p>VI. Of Re-capture of a Relation, or of Personal or Real Property.</p> | <p> 1. Of Person of a Relation.</p> <p> 2. Of Personal Property.</p> <p> 1. In general.</p> <p> 2. In case of Fraudulent Purchases.</p> <p> 3. Stoppage in Transitu.</p> <p> 3. Of Real Property.</p> <p>VII. Of Abatement and Removal of Nuisances and Injuries.</p> <p> 1. Private Injuries.</p> <p> 1. To Persons.</p> <p> 2. To Personal Property.</p> <p> 3. To Real Property.</p> <p> 2. Public Nuisances and Injuries.</p> <p>VIII. Of Distresses and Seizures.</p> <p> 1. Damage feasant.</p> <p> 2. For Rent, &c.</p> <p> 3. For Poor's Rates, &c.</p> <p>IX. Of Set-off, even by stratagem, in case of Debts.</p> <p>X. Setting-off of one Judgment against another.</p> <p>XI. Of Remedies by Retainer and Lien, &c.</p> |
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I. Of preventive and other remedies, without legal assistance in general.

IT is proposed in this chapter to consider those preventive and other remedies, of which *parties themselves, and their relatives and others*, may avail themselves *summarily*, and without the assistance of the law or its officers, either to *prevent* or *remove injuries*. It is obvious that in many cases the most speedy justice could not adequately supply the absence of such immediate and necessary remedies, nor indeed could the natural impulse of self-defence against sudden and immediate aggressions be restrained. (a) The law, therefore, permits parties to adopt certain modes of resistance, and merely interferes to modify and regulate the means to be employed. It has

(a) 2 Rol. Ab. 546; 3 Bla. C. 3, 4; and see per Littledale, J. in *Cubitt v. Porter*, 8 Bar. & Cres. 269.

indeed been observed that laws for prevention of injuries are even better than those for compensation or punishment, (b) for they *prevent* the loss to the individual, and the necessity for suing or prosecuting the wrong-doer, at the risk of his being wholly unable to make compensation still less to reimburse the expenses of legal proceedings. (b) *Preventive remedies* are principally divisible into, *first*, those *by the act of a party himself*, or his relative, or a stranger, without the aid of legal process, or any authorized officer; or *secondly*, they are, by the intervention of some *legal authority* or proceeding, either summary or by more formal proceeding. In the present chapter we will consider the former, and in the next the latter.

We will consider this very important branch of the law, 1st, As relates to the Prevention or Removal of Injuries to the *Person* of the Party himself or his relative; 2dly, As relates to *Personal Property*; and 3dly, As respects *Real Property*.

But before a party adopt either of these summary remedies, it is essential for him to keep in view the rule to which we have before adverted, viz. that if a party obtain redress by any such summary remedies of his *own*, he is not afterwards allowed to *sue* for the temporary injury, (c) and consequently that if the damages already sustained be considerable, and an adequate object of litigation, it is better to proceed by action. (d) It seems to be settled, at least in the case of a private nuisance, that a party has only an option, and cannot abate it and also sue for damages. (e) But that doctrine must be received with some qualification, for it would not extend to receiving back an apprentice after he had long been detained and voluntarily returned. (f)

When a party cannot adopt a preventive remedy and also an action.

Another caution is essential, namely, that *the means* adopted either by resistance, defence, or re-capture, must always be *proportioned to the occasion*, and that any excess of violence may subject the party to an action; and in case of unjustifiable, or unnecessary, or avoidable homicide, or mayhem, to punishment. These degrees vary according to the subject-matter, and to the felonious or other violence, or improper conduct of the aggressor, and the subject-matter injured or attempted to be injured; thus

Cautions as to the means of prevention.

(b) *Willcock v. Windsor*, 3 Bar. & Adolp. 43; *Venueghan v. Attwood*, 1 Mod. 202.

(c) *Ante*, 20.

(d) *Ante*, 20.

(e) *Baten's case*, 9 Co. Rep. 55; 3 Bla. C. 219, 220, and yet this is contrary to the doctrine in *Trover*, viz. that the mere re-

storage of the goods after a conversion only reduces the damages, and does not defeat the right of action, 1 Rol. Ab. 5, pl. 1; *Baldwin v. Cole*, 6 Mod. 212; Bul. N. P. 46; Bac. Ab. *Trover*, D. Accord, &c.; *Wyatt v. Blades*, 3 Campb. 396.

(f) See cases in last note.

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where a *felonious* attack is made upon the life of another, he may justify every homicide in self-defence, and a woman may justify homicide to prevent a rape; whereas in defence of goods or land against a mere *misdemeanor*, at most a battery would in ordinary cases be justifiable; and a wounding or mayhem, occasioned by the use of a deadly or *dangerous weapon*, would be highly criminal. In all cases where a *private* injury is to be prevented or abated, or the party complaining otherwise acts for himself, it is an established rule that he should do no more than the *necessity* of the case requires when the excess might be in any way injurious to another—a principle which pervades every part of the law of England, *criminal* as well as *civil*, and indeed belongs to all law that is founded on reason and natural equity and justice. (g) Supposing, therefore, the assailant should be too powerful to be resisted by ordinary means, the party wrongfully attacked cannot (excepting when his own death, or a felony, may reasonably be expected,) make up for the deficiency of his strength by resorting to *deadly* arms, except to intimidate, but should seek redress by the intervention of peace officers or other legal proceedings.

The *degrees* of force and *modes* to be adopted in resistance or removal of injuries require very particular attention, and should therefore be accurately defined. Many of the oldest cases, and most of the principles applicable throughout this subject, are admirably arranged and commented upon in Mr. East's excellent Treatise on Pleas of the Crown, in regard to criminal, or excusable, or justifiable homicide, and which may be readily applied to minor injuries, committed in defence of person or property; (h) for it is obvious that whenever a homicide might be justified or excused, a wounding or less degree of violence would also be legal or excused.

With respect to the *prevention* of injuries by a party's own act, the legal means to be adopted, whether defence of person, personal property, and real property, and whether of house or land, materially differ, as well with respect to the subject-matter expected to be injured, as to the nature of the expected injury. Thus in the necessary or prudent defence of *life*, or the resistance of any *forcible felony*, even the *killing* of another may be justifiable; thus, if an immediate burglary or the burning of an inhabited house be threatened, and reasonably appre-

(g) Per Dallas, J. in *Deane v. Clayton*,
1 J. B. Moore, 210, 232, 234.

392, and see id. tit. Mayhem. 392, and
tit. Assaults, 406.

(h) 1 East, P. C. title Homicide, 198 to

hended, the occupier may even kill the aggressor, when, if merely an assault be threatened, or a trespass to land, *mere self* defence or resistance is allowed. (i) And the modes and degrees of resistance or prevention must always be proportioned to the nature and value of the property, and the necessity for and propriety of the means of resistance. Lord Coke takes the distinction between the defence of the *person*, and defence of possession of goods or land. In defence of the *person*, even a mayhem, or wounding, may be justified; but in defence of *property*, at most only an assault or battery is legal; (k) and in the latter, the form of pleading always alleges that no more damage was done than was necessary for the purpose to be effected. (l) We will consider this subject as it relates to, 1. The Person; 2. Personal Property; and 3. Real Property.

II. The strongest justifiable act of defence is the *killing* the aggressor, and which of course includes battery, wounding, and mayhem. This is to be considered under two heads, *viz.* 1. Homicide to prevent crime; and 2. Homicide in self-defence. 1. Homicide committed for the *prevention* of any *forcible* and atrocious *crime*, which if completed would amount to *felony*, is *justifiable*; (m) and of course under the like circumstance, mayhem, wounding, and battery, would be equally justifiable. (n) A man may repel *force* by force in defence of his person, property, or habitation, against any one who manifestly intends or endeavours, by *violence* or *surprise*, to commit a *forcible felony*, such as *murder, rape, robbery, arson, burglary*, and the like. (n) In these cases he is not obliged to retreat, but may resist, and even pursue his adversary, until he has secured himself from all danger; and if he even kill him in so doing, it is called and considered *justifiable self-defence*; (n) and although this was formerly punishable in a degree, (o) yet now it is expressly enacted that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or

II. Of defence, resistance, and prevention of particular injuries.

1. Defence of the person in particular, and when even homicide may be excused.

(i) Shaking a man off a ladder, *Collias v. Renison*, Sayer, 138; cited in *Gregory v. Hill*, 8 Term Rep. 300.

(k) 2 Inst. 316.

(l) *Bird v. Holbrook*, 4 Bing. 633.

(m) Brayton, De Jure Goth. l. 3, c. 5;

4 Bla. Com. 180; 1 East, P. C. 271; 1 Hale, 445, 481, 484, 493.

(n) 1 East, P. C. 271.

(o) 4 Bla. Com. 188; Foster, C. L. 288; 1 East, P. C. 279.

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in his own defence, or in any other manner without felony. (p). So if *homicide* be threatened or reasonably expected from hearing a cry of murder in a house, not only the party in danger and his near relations, but any one may interfere to prevent it. Thus, if in any house, the outer door of which is shut, there be a cry by a woman of murder, any person may break open the outer door to prevent it; *per* Rook, J., "It is highly important that bystanders should know when they are authorized to interfere. In this case, the life of the wife was in danger from the act of the husband; the defendants, therefore, were justified in breaking open the house, and doing what was necessary for the preservation of her life." And *per* Chambre, J. "There is a great difference between the right of a private person in cases of intended *felony* and of breach of the peace. It is lawful for any private person to do any thing to prevent the perpetration of a felony." (q) But the fear or expectation of any of these offences, however well grounded, as that another lies in wait to take away the party's life, unaccompanied with any overt act indicative of such an intention, will not warrant him in killing that other by way of prevention, for there must be an *actual danger* at the time. (r)

There must also be a *felony intended*; for if one came only to *beat* another, or to take his goods merely as a trespasser, though the owner may justify the *beating* of him so far as to make him desist, yet if he *kill* him it is manslaughter; although if the other had come to *rob* him, or take his goods as a *felon*, and were killed in the attempt, it would then be justifiable in self-defence. (s) To justify homicide, the *resisted felony* must also have been of a *forcible nature*, or of such extraordinary degree of atrocity as not to allow of any delay; and therefore a party would not be justified in killing another who was merely attempting to pick his pocket; (t) though if one has actually picked my pocket, and I cannot otherwise take him, it has been supposed that the killing him to prevent his escape would be justifiable, for it is said this falls under the general rule concerning the arresting of felons. (u). Mr. Justice Blackstone also insists, that killing a person who attempts to break open

(p) 9 Geo. 4, c. 31. s. 10; see the section, *post*, 592, note (k).

(q) *Handcock v. Baker and three others*, 2 Bos. & Pul. 260.

(r) 1 East, P. C. 271, 272.

(s) 1 Hale, 485, 6; 1 East, P. C. 272.

(t) 4 Bla. Com. 180; 1 East, P. C.

273.

(u) See *post*, sect. iv., as to apprehending offenders without warrant. But this doctrine may on principle be questioned, as the utmost punishment even of the law would not in such a case have been capital.

any house in the *day time* is not justifiable; but he adds this qualification, "unless the act was accompanied with an attempt of robbery;" (x) but although such attempt were committed in the *day time*, yet if accompanied with *any* felonious intent, the killing would in point of law be justifiable homicide. (y)

If the party killing had *reasonable grounds* for believing that the person slain at the time had a felonious design against him, and under that supposition killed him, although it should afterwards appear that there was no such design, it will only be manslaughter, or even misadventure, according to the degree of caution used, and the probable grounds for such belief. (z) As where a sheriff's officer early in the morning pushed abruptly and violently into a gentleman's chamber in order to arrest him, not telling his business, nor using words of arrest, and the gentleman, not knowing that he was an officer, under the first surprise snatched down a sword and instantly stabbed him, this was holden to be only manslaughter. (a) And where a servant had recently introduced a person into her master's house, and afterwards the master, reasonably supposing that thieves were in the house, went down stairs, and the deceased hid himself in the buttry, and the master entered the same in the dark thrusting his sword before him, and killed him, this was ruled to be misadventure, and *justifiable*. (b) So if a violent assault and battery be committed by a person at the *same time* possessed also of a sword, which he drew as with intent to use it, and without any words of warning, the person assaulted having reasonable ground for fearing his life in immediate danger, may justifiably in self-defence throw a dangerous instrument, as a bottle, and kill him, to prevent the expected felony; (c) for in these cases, where an immediate personal injury endangering life is threatened, a party is justified in *immediately* killing the assailant, who might otherwise, in case of any delay, destroy the party attacked. (c) So where a *felonious* attack has been made upon the life of another, the latter, in self-defence or protection, may justify the *pursuit and killing* of the aggressor, until he himself is entirely out of danger, which he cannot be said to be so long as the assailant might immediately renew his attack. (d)

(x) 4 Bla. Com. 180.

(y) 1 East, P. C. 273; *Cooper's Case*, Cro. Car. 544.

(z) 1 East, P. C. 273.

(a) 1 Hale, 470; Fost. 299; and yet it has been observed that he ought first to have demanded his business, 1 East, P. C.

274.

(b) *Levet's Case*, Cro. Car. 538; 1 Hale, 42, 474; Foster, 299; 1 East, P. C. 274, 275.

(c) 1 East, P. C. 276.

(d) *Mawgridge's Case*, 9 State Trials, 63; 1 Hale, P. C. 278.

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But if it be clear that the offence committed or about to be committed did not amount to felony, and at most to an *indictable misdemeanor*, then no one can legally use a *dangerous weapon* either to wound or secure the offender. Thus to assume the appearance of a ghost and thereby even to frighten others and so work on their imaginations as to occasion death, or to call the feelings into such strong excitement as to produce a fatal malady, though a criminal misdemeanor, is not *felonious*; (e) and therefore where a person shot at and killed a party who before and at the time had assumed such appearance, it was held *murder*. (f)

The law justifies a woman killing one who attempts to ravish her. (g) And the husband or father may justify killing a man who attempts a rape upon his wife or daughter, though not if he take them in adultery by consent, for the one is forcible and felonious but not the other. (h) And Mr. Justice Blackstone expressed his opinion that the forcibly attempting an unnatural offence might be equally resisted by the death of the aggressor. (i)

2dly. *Self-defence when no felony was intended or apprehended*.—We are here to suppose that there has been no threat or apparent intention on the part of the assailant to affect the *life* of the party attacked or to commit any *forcible felony*. The defence in these cases is of two descriptions—1st. Where the assailant attempts to beat another and there is no mutual combat. 2dly. Where there is a mutual combat arising from sudden quarrel without premeditated malice. With respect to the *first*, or self-defence, if the death of the assailant or lesser injury ensue, without fault of the party attacked, he is wholly punishable. (k) The defence of one-self, or the mutual or re-

(e) 1 Hale, 449; 4 Bla. C. 197, note 17; Id. 201, note 25.

(f) 4 Bla. C. 201, note 25. Francis Smith was indicted for murder at the Old Bailey Sessions, January 13, 1804. The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost. The prisoner went out with a loaded gun with intent to apprehend the person who personated the ghost; he met the deceased, who was dressed in white, and immediately discharged the gun and killed him. Chief Baron Macdonald, Mr. J. Rooke and Mr. J. Lawrence were unanimously of opinion that the facts amounted to the crime of murder. For the person who represented the ghost was only guilty of a misdemeanor (a nuisance), and no one would have had a right to have

killed him even if he could not otherwise have been taken. The jury brought in a verdict of manslaughter, but the Court said they could not receive that verdict, if the jury believed the witnesses, the prisoner was guilty of murder; if they did not believe them, they must acquit. Upon this they found a verdict of guilty. Sentence of death was pronounced, but the prisoner was reprieved.

(g) 4 Bla. C. 181; 1 East, P. C. 271.

(h) 1 Hale, 485; 4 Bla. C. 181.

(i) 4 Bla. C. 181.

(k) 9 Geo. IV. c. 31, s. 10, which enacts that "no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony."

ciprocal defence of such as stand in the relations of husband and wife, parent and child, and master and servant, is sanctioned by law. In these cases, if the party himself or any of these his relations be *forcibly* attacked in his person or property, it is lawful for him to repel force by force, for the law in these cases respects the passions of the human mind, and makes it lawful in him, when *external violence* is offered to a man himself or those to whom he bears so near a connection, to do that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. (l) It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted to man immediately to oppose one violence with another. But care must be taken that the resistance does not exceed the bounds of mere defence and prevention, for if it do, then the defender himself would become an aggressor. (m) The battery in defence of self or a relation must be such only as is necessary for the preventing *future* purpose; for if it were excessive the prior assault will be no justification; thus a man cannot justify a mayhem for every assault, as if *A.* strike *B.*, the latter cannot justify drawing his sword and cutting off *A.*'s hand. (n) But if the first assault be very violent, continued by means either actually or apparently to the assailed party putting his *life* in danger, then even a mayhem may become justifiable or be excused. (o) So no man is required to remain defenceless and suffer another to beat him as long as he pleases without resistance, although it is evident that the other did not aim at his *life*, but he may lawfully exert so much force as is necessary to compel him to desist. It is not unlawful for a man to strike and beat with or use whatever force may be sufficient to prevent another from beating him (short of *intentionally wounding or killing him*, unless for the necessary preservation of his own life,) provided he cannot escape from the blows by any other less violent means, and did not bring upon himself such ill-treatment by his own illegal act. (p) And therefore it should seem that under such circumstances, if the stroke in self-defence be not given by a dangerous or improper weapon of defence, and death should unfortunately and accidentally ensue from

(l) 2 Rol. Ab. 546.

(m) 2 Rol. Ab. 546; 5 Bla. C. 3, 4.

(n) Cook v. Beal, 1 Ld. Raym. 177; Bul. N. P. 18.

(o) Butler v. Austin, 1 Rol. Rep. 19;

Drace v. Lucy, Sid. 246; Newman v. Smith, 2 Salk. 642; 3 Id. 46, 8. C.

(p) 1 East, P. C. 272, 286, 287.

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such mere self-defence, (and not from retaliation or after the assault was over, which is scarcely ever excusable,) (q) such death would be attributed to misadventure or misfortune and not punishable, being unintentional in the party striking, who was in that instance doing no more than he lawfully might. (r) It seems that the mere offer of a person to strike another is sufficient to justify the latter's striking him first, for he need not wait till the other has actually struck him. (s) It has been reported to have been resolved, that when a person is assaulted or beaten in a church or church-yard, it is not lawful for him to return blows in his own defence as he may elsewhere. (t) But at least as to the latter such a decision appears scarcely reasonable. (t)

But in cases of mere assault and battery, where the *life* of a party is not in danger, however unjustifiable the conduct of the assailant may have been, *no dangerous instrument* or means of defence, such as a sword, or knife, or a loaded pistol, should be even produced, except to intimidate, much less should be used; and if used, and the death of the assailant should ensue, the party killing will at least be guilty of manslaughter. (u) Therefore where a violent assault and battery were plainly intended merely *to chastise* the party for his supposed misbehaviour, and there appeared no intent to affect his *life*, his killing the assailant with *a knife* was holden not to be lawful or excusable under the plea of self-defence, but amounting at least to manslaughter. (x) And if *A.*, *without any weapon*, strike *B.*, and *B.* retreat to a wall and then stab *A.*, that will be manslaughter, for it cannot be inferred from the bare act of striking *without any dangerous weapon*, that the intent of the aggressor was to kill the party stricken. And *without* there be a plain manifestation of that or some other felonious intent, no assault however violent will justify killing the assailant. (y) So where a dispute had arisen relative to the payment of the rent of a house, and after a good deal of discussion, in the course of which the plaintiff had made use of some irritating expressions and had given the defendant a slight blow on the shoulder with his fist, and thereupon the latter took up a heavy bar of iron, weighing at least 20 lb., and struck the plaintiff a severe blow upon the

(q) *Burfoot v. Reynolds*, 2 Stra. 953.

(r) *Nailor's case*, 1 East, P. C. 286, 287; it is there put doubtfully, but the law seems clearly so.

(s) Bull. N. P. 18; 2 Roll. Ab. 547, l. 37.

(t) *Francis v. Ley*, Cro. J. 367; Hawk. P. C. c. 23, s. 28; see 5 & 6 Edw. VI.

c. 4, s. 2, as to striking, &c. in church or church-yard.

(u) *Nailor's case*, 1 East, P. C. 285, 286, 287, 276, 277; Bull. N. P. 18; *Cook v. Beal*, 1 Ld. Raym. 177.

(x) *Nailor's case*, 1 East, P. C. 276, 277.

(y) *Nailor's case*, 1 East, P. C. 276, 277, 273; 1 Hale, 484.

head, by which he was knocked to the ground and his life put in danger; it was held in the Scotch court that, although the plaintiff was the first aggressor, yet the slight blow which he had given could not justify the violent assault which was made in return, and that therefore the plaintiff was entitled to the recovered damages of 150*l.*, besides the amount of the surgeon's bill and expenses; and upon an appeal the House of Lords affirmed such decision; (z) and upon the same principle it has been held, that in answer to a plea of justification in defence of possession, it may be replied and proved that the battery was excessive. (a)

The cases of illegal arrest, or attempts to arrest a party under an illegal writ or warrant, or to break open an outer door, where the assailant was killed, and which will hereafter be fully noticed, are of this nature, for the party intended to be arrested knew that the aggressor meant only an illegal imprisonment and not an attack upon his life or other felony, and therefore he was guilty of manslaughter in shooting the aggressor, though he was acting manifestly unlawfully. (b)

In no case is the proof of a plaintiff's first assault in support of a plea of *son assault demesne* any excuse, if the retaliation by the defendant were excessive and bore no proportion to the necessity or to the provocation received. (c) In short, the *extent of the means of self-defence* depends on the occasion, and though it is not necessary or usual to plead that the defendant gently laid hands on the plaintiff to prevent his attack, yet the battery and resistance can no longer be used than whilst necessary to prevent the aggressor from repeating or renewing his attack at or about the same time; and if in self-defence there be an unnecessary or excessive wounding or battery more than necessary to resist the assailant, and prevent or disable him from further injury, the defendant himself will be liable to make compensation for his excess, (d) or may be otherwise punishable. (e) The plea justifying a battery or wounding in self-defence, must be that the plaintiff assaulted the defendant and *would* have (not *had*) beat and illtreated the defendant if he had not immediately defended himself against the plaintiff, and that therefore he did so defend himself and *in so doing* com-

(z) *Dowse v. Douglass*, 1 Shaw's Rep. 125.

(a) *King v. Tobbart*, Skin. 387; *Searle v. Darford*, Lutw. 1436; *post*, 600, n. (p).

(b) *Capt. Nestor's case*, *ante*, 34, n. (m); and *post*, as to resistance of illegal process.

(c) 1 East, P. C. 406.

(d) *Newman v. Smith*, 2 Salk. 642; *Cook v. Beal*, 1 Lord Raym. 177; Bul. N. P. 18; *Dale v. Wood*, 7 Moore, 33; Gilb. C. P. 154; *Weaver v. Bush*, 8 T. R. 81.

(e) 1 East, P. C. 293.

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mitted the battery and trespasses complained of; (e) and upon the traverse of such plea, or at all events upon a new assignment, (f) the jury will have to determine whether more violence was committed or continued by the defendant than was proper in self-defence; considering however that the aggressor made the first wrongful attack, and rendered defensive measures necessary, and excited the heat and resentment of the other, the degree of violence in self-defence will not be very nicely weighed and will in general be excused by a jury, unless the defendant has improperly and without reasonable fear of his own life being in danger, used dangerous weapons and has attacked the assailant when all occasion for forcible measures of defence has ceased.

Much less, as observed by Blackstone, will the natural right of defence imply or permit a right of attacking or retaliating; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice, either for sureties of the peace or by action or other proceedings for compensation; and they therefore cannot legally exercise this right of *preventive* defence but in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. (g) It is not every trifling assault that will justify a grievous and immediate mayhem, such as cutting off a leg or hand, or biting off a joint of a man's finger, unless it happen accidentally without any cruel or malignant intention, or whilst the blood was heated in the scuffle; but it must appear that the assault was in some degree proportionable to the mayhem. (h)

Secondly, *mutual combat upon sudden quarrel*. With regard to homicide in self-defence, where no felony was intended by the party killed, this occurs when death ensues from a combat between parties on a *sudden* quarrel and not premeditated. (i) When it is *premeditated*, as in the case of *agreed duels*, it is murder, (k) or if on an agreed boxing-match, it is at least manslaughter. (l) In order to reduce the offence from manslaughter to *self-defence upon chance medly* (now dispunishable, not even nominally,) (m) it is incumbent on the party to prove two things,

(e) See Pleas, Co. Ent. 644; 2 Saund. 5; Winch. 1121; Pleadings' Assist. 447; 1 Russ. C. L. 150; 2 Id. 56; Trem. 269, 270; Com. Dig. Pleader, 3 M. 15.

(f) Whether a special replication is necessary or not, see 1 Chit. Pl. 625, n. (a); *post*, 600, n. (p).

(g) 4 Bla. C. 184, 186.

(h) 1 East, P. C. 402; 1 Burn's J.

273; 3 Burn's J. 714.

(i) 1 East, P. C. 279; 4 Bla. C. 184.

(k) *Rex v. Phillips*, 6 East, 464; 1 East, P. C. 283, 284.

(l) *Hunt v. Bell*, 1 Bing. Rep. 2; 4 Bla. C. 183; *Rex v. Perkins*, 4 Car. & P. 537; *Rex v. Bellingham*, 1 M. & R. M. C. 127; *ante*, 36, n. (g).

(m) 9 Geo. 4, c. 31, s. 10, *ante*, 34, n. (n).

1st, that before a mortal stroke given he had declined any further combat, and had retreated as far as he could with safety; and 2dly, that he then killed his adversary through mere necessity, in order to avoid his own immediate death.(n)

With respect to defence against an attack of *animals*, if a dog, accustomed to bite mankind, attack a party, he may in self-defence shoot him, but only whilst in impending danger from the attack and not afterwards.(o)

If two persons be by misfortune in peril of life one may, if essential, adopt means to preserve his own life, though it will probably occasion the death of the other; as where two persons having been shipwrecked and getting on the same plank, which was not sufficient to save both, one may thrust the other from it though he be thereby drowned.(p)

2dly. A man may repel force by force in defence of his *Personal Property*, and even justify homicide against one who manifestly intends or endeavours, by *violence* or surprise, to commit a *known felony*, as robbery;(q) but as we have seen homicide cannot be justified in preventing a mere pickpocket, because that is not a *forcible felony*.(r) If a party come merely as a *trespasser* without any colour to take the goods of another, it is lawful to exert such force against him (even without previous request to restore the goods) as may be necessary to make him desist.(s) And a party may justify even a *battery* by showing that he committed it to restrain the aggressor from taking or destroying his goods,(t) or from taking or rescuing cattle or goods in his custody upon a distress,(u) or to retake personal property illegally taken away or detained.(x) But in so doing, no unnecessary degree of force should be used, for otherwise if the aggressor be killed it would be manslaughter,(y) or even murder, if a deadly or dangerous weapon were used.(z)

2dly. Defence
of *Personal Pro-*
perty,

A man cannot justify *maiming* another in defence of his possession, but only in defence of his *person*. This restriction however cannot be intended to extend to cases where a man defends himself against a *known felony*, threatened to be committed with *violence* against his property.(a) Lord Coke

(n) 1 East, P. C. 279, 280.

(o) *Clarke v. Webster*, 1 Car. & P. 106.

(p) 1 East, P. C. 294.

(q) 1 East, P. C. 271 to 273.

(r) *Ante*, 590, n. (i); 1 East, P. C. 273.

(s) 1 Hale, 473 to 486; *Green v. Goddard*, 2 Salk. 641; 1 East, P. C. 272, 288, 289; *Regina v. Manwrigde*, Kelinge, 132, cited in *Bird v. Holbrook*, 4 Bing.

628.

(t) 2 Rol. Ab. 549, b., 7.

(u) Id. L. 10; 2 Bro. Ent. 260.

(x) *Higgins v. Andrews*, 2 Rol. Rep. 56; *Masters and Poolie's case*, Id. 208; *Weaver v. Bush*, 8 T. R. 78.

(y) 1 East, P. C. 272.

(z) Id. 288.

(a) Id. 402.

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states the distinction between the defence of the person and defence of the possession of goods or land, and that in defence of the former a mayhem or wounding may be justified, but only an assault and battery in defence of property ; (b) and the plea in the latter should allege that no more damage was done than was necessary for the purpose to be effected. (c)

The 7 & 8 Geo. 4, c. 29, s. 63, and 7 & 8 Geo. 4, c. 30, s. 28, authorize the owner of personal or real property "about to be stolen, or illegally taken, or wilfully injured, and his servants, or any person authorized by him, to apprehend the offender *found committing* the offence," and it has been decided under the former enactment, that if the servant of the owner of property find a party actually committing an offence under that act and apprehend him, and whilst taking the offender to a magistrate such party kill him, this will be murder ; but that if the servant either did not see him in the actual commission of the offence, or be taking him to any other place than before a magistrate, the resistance would not be murder. (d) So as in the case of self-defence it is not lawful to repeat or make any blows after the wrongful attack is ended ; so in defence of personal property it is not justifiable to do any act which can no longer be of utility ; and therefore where a defendant in pleading justified *shooting a dog* because the dog was worrying his *fowl* and could not otherwise be prevented he must prove that the dog was in the act of worrying the fowl at the very moment he shot him ; and therefore where the shooting of the dog having been proved, the defendant's counsel said he should prove that just before the dog was shot, he being accustomed to chase the defendant's poultry, he was worrying the fowl in question, and that he had not dropped it from his mouth above an instant when the piece was fired ; Lord Ellenborough said this would not make out the justification, as it was necessary, to justify the shooting, to aver and prove that the dog was, at the time of shooting, *in the very act of killing the fowl* and could not be prevented from effecting his purpose by any other means ; (e) and where the owner of sheep which *had been* worried by a dog, shot the dog when in *another field*, and after the worrying was over, it was held that this was illegal, as not done in protection of his property. (f)

(b) 2 Inst. 316.
(c) *Bird v. Holbrook*, 4 Bing. 633.
(d) *Rex v. Curran*, 3 Car. & P. 397.
(e) *Tyson v. Brown*, 1 Campb. 41 ;
1 Carring. Rep. 106 ; *Wells v. Head*, 4

Car. & P. 568.

(f) *Wells v. Head*, 4 Car. & P. 568 ;
and see *ante*, 593, 594, as to the illegality
of continuing defence after the necessity
has ceased.

3. With respect to the defence or protection of the possession of *Real Property*, although we have seen that it is *justifiable* even to kill a person in the act of attempting to commit a *forcible felony*, as burglary, housebreaking, arson, or riotous demolition of a *house*, since such offences endanger also the person of the occupier; (g) yet this is only when the party in possession is wholly without fault; therefore, where *A.*, with many others, had, on pretence of title, *forcibly* ejected *B.* from his house, and *B.* on the third night returned with several persons to re-enter, and one of *B.*'s friends attempted to fire the house, whereupon one of *A.*'s party shot one of *B.*'s—this was held manslaughter in *A.*, because his entry and holding with force was illegal; though, if *A.* had been in possession by lawful means, the killing, in resistance of arson, would have been justifiable. (h)

When a forcible attack is made upon a dwelling-house of another, *without any felonious intent*, but barely to commit a *trespass*, although it is in general lawful to oppose force by force when the former was clearly illegal, (i) yet great caution must be observed; for before a person turns out or excludes another from entering a particular house or room, he must be well assured that himself has a *better right* to the possession than the party to be excluded, and that the latter has no right to be present; and therefore, if the exclusion be from a vestry-meeting, it must be certain that the meeting was duly holden. (k) In all these cases also much caution must be observed in the *modes of resisting* the intruder or in turning him out; (l) for if there be any excess, the party guilty of it may be liable to an action and to criminal punishment; and in answer to a plea justifying a battery in defence of possession, the plaintiff may reply and prove that the battery was excessive; (m) as if a trespasser being upon a ladder the occupier shake him off, and in the fall the plaintiff break his leg; (n) and a plea of *moliter manus imposit*, in order to turn the plaintiff out of the defendant's house, where he continued against his will, is no answer to a charge against the defendant of striking the plaintiff repeated blows, and with violence several times knocking

(g) *Ante*, 589; 1 East, P. C. 271, 287.(h) *Case of Drayton Basset*, 1 Hale, 440, 444; 1 East, P. C. 259, 277.(i) *Weaver v. Bush*, 8 T. R. 78.(k) *Dobson v. Fussey and others*, 7 Bing. 305.(l) *Cook's case*, 1 East, P. C. 287; Cro.

Car. 537, S.C.

(m) *King v. Tebbart*, Skin. 387; *Searle v. Darford*, Lutw. 1436; *Gregory v. Hill*, 8 Term Rep. 299; *Johnson v. Northwood*, 1 J. B. Moore, 420.(n) *Collins v. Kenison*, Sayer, 138, cited in *Gregory v. Hill*, 8 T. R. 300.

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him down; (o) and in trespass, for throwing water over the plaintiff and her apartment, it is no plea that she was endeavouring to obstruct the defendant's ancient window, and that he threw the water to prevent her from so doing. (p) So if *A.* in defence of his house kill *B.*, when he was only a trespasser, and endeavouring to make an unlawful entry, it is at least manslaughter, unless there were danger of *A.*'s life. (q) So where the prisoner, an officer in the army, shot a sheriff's officer whilst illegally breaking open an outer door of the prisoner's house to arrest him, he was convicted of manslaughter and sentenced to be transported for life, because the illegal act of the officer was a mere trespass. (r) But if *B.*, in the before-mentioned case, had entered the house, and *A.* had gently laid his hands upon him to turn him out, and then *B.* had turned upon him and assaulted him, and *A.* had killed him, (not being otherwise able to avoid the assault, or retain his lawful possession) it would have been justifiable in self-defence; and so it had been if *B.* had entered upon him and assaulted him first, though his entry were not with intent to murder him, but only as a trespasser to gain the possession. In such case, *A.* being in his own house, need not fly as far as he could, as in other cases of self-defence, for he of right had the protection of his house to excuse him from flying, as that would be to give up the possession to his adversary; but in these cases it is said the homicide is rather excusable than justifiable. (s) On the other hand, if the owner of a house be killed in a struggle between him and those who unlawfully resist his turning them out of his house, when they had no right to remain there, it will be murder. (t)

So, if one enter into my *land* without more than implied force, or what has been termed force in law, "I must first request him to depart, before I can lay hands on him to turn him out, and if he refuse, I (the occupier) can only justify so much force as is necessary to remove him, and should first endeavour to lay hands on him *moliter*, and if he persist in continuing on the land, then *gently* to push him out, and if he do not then depart, I may then beat him, and if he be too powerful, then I (the

(o) *Gregory v. Hill*, 8 T. R. 299; and see *Johnson v. Northwood*, 1 J. B. Moore, 420.

(p) *Simpson v. Morris*, 4 Taunt, 821. In a civil action in general, the excess should be replied specially; *Dale v. Wood*, 7 J. B. Moore, 33; *Sayer v. Rochford*, 2 Black. 1165; *Gale v. Dalrymple*, 1 Car. & P. 381; 1 Ry. & M. 118, S. C.; per

Abbott, J.

(q) 1 Hale, 445, 485; *Cooke's case*, Cro. Car. 537; 1 East, P. C. 287.

(r) *The King v. Nestor*, at Hertford, A. D. 1817, coram Best, J.

(s) 1 East, P. C. 287; Hawk. b. 1 c. 28, s. 23.

(t) *Rex v. Willoughby and another*, 1 East, P. C. 288.

occupier) must not use a dangerous weapon, but must first call in aid other assistance."(*x*) But in *burglary*, or *forcibly breaking* open a door or gate, it is lawful at once to oppose force to force; and if one break down the gate and come into my close *vi et armis*, I need not first request him to be gone, but may lay hands on him immediately, and turn him out; so if one come forcibly and take away my goods, I may immediately oppose him, for there may be no time to make a previous request, and if the owner be assaulted or beaten, he may, under circumstances, justify a wounding or mayhem in self-defence. (*x*) This distinction between an entry with *actual* force, and an entry only with *implied* force, with regard to a trespass on *land*, was laid down in an old report, and confirmed in subsequent cases; (*y*) and the distinction more strongly applies to an entry into an *house*. (*z*) If a person enter a church or a house and make a disturbance or noise there, he may be removed, but after he has been turned out, a subsequent imprisonment cannot be justified, unless the wrong-doer be guilty of a breach of the peace in view of a peace officer, and be taken by him before a justice on that account. (*a*)

It is a common doctrine that a party may justify a *battery*, by showing that he committed it in defence of his possession, as for instance to remove a trespasser out of his close or house, (*b*) or to prevent him from entering it, (*c*) or to restrain him from taking or destroying his goods, (*d*) from taking or rescuing cattle or goods in his custody upon a distress, (*e*) or to retake personal property improperly detained or taken away. (*f*) But the term *battery* must here be limited to only that degree of violence, and the use of such weapons only that may be absolutely essential to effect the object, and no more.

(*x*) *Per cur.* *Green v. Goddard*, 2 Salk. 641; *Weaver v. Bush*, 8 T. R. 78, 357; 2 Rol. Ab. 548, l. 35, 45; *Tully v. Reid*, 1 Car. & P. 6; and see *per Best, J.*, in *Hots v. Wilkes*, 3 Bar. & Ald. 304; *Bird v. Holbrook*, 1 Moore & P. 607; 4 Bing. 628, S. C.

(*y*) *Green v. Goddard*, 2 Salk. 641, and other cases last note.

(*z*) *Tully v. Reed*, 1 Car. & P. Rep. 6; *Searle v. Darford*, Lutw. 1435; Hard. 358, S. C.

Tully v. Reed, 1 Car. & P. 6. This was an action for assaulting and beating the plaintiff, in which the defendant pleaded the general issue, and a special plea of *molitor manus impositus*.

Evidence was given of the assault on the part of the plaintiff, and evidence in support of the special plea was given on the part of the defendant.

Park J. laid it down as clear law, that if a person enters another's house with force and violence, the owner of the house may justify turning him out, (using no more force than is necessary,) without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out, without a previous request to depart. Verdict for the defendant.

(*a*) *Williams v. Genister*, 2 B. & C. 609; 4 D. & R. 217, S. C.; *Price v. Severn*, 7 Bing. 316.

(*b*) *Searle v. Darford*, Lutw. 1435; Hard. 358; *Tully v. Reed*, 1 Car. & P. 6.

(*c*) 2 Rol. Ab. 548, l. 25.

(*d*) *Id. ibid.*

(*e*) *Id. l. 10*; 2 Bro. Ent. 260.

(*f*) *Higgins v. Andrews*, 2 Rol. Rep. 56; *Masters and Poolie's case*, *Id.* 308; *Weaver v. Bush*, 8 T. R. 78.

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In general, when the *trespass* is barely against the *land* of another or the property thereon, the law does not admit the force of provocation sufficient to warrant or excuse the owner in making use of any *deadly or dangerous weapon*; as if upon the sight of one breaking his hedges, the owner take up an hedge stake, and knock him on the head; and kill him, this would be *murder*, because it was an act of violence much beyond the proportion of the provocation; and still more where such or the like violence is used after the party has desisted from the trespass; but if the beating (though unlawful at all) were with an instrument or in a manner not likely to kill or wound, it would only amount to *manslaughter*; and it is even *lawful* to exert such a degree of force against a trespasser, who comes without any colour to take the goods of another, as is necessary to make him desist. (g) Lord Coke, as has already been observed, takes the distinction between the degree of force that may be used in defence of the person and in defence of goods or land; in the former, a mayhem or wounding may be justified, but in the latter only an assault and battery. (h)

It was recently held that a person set to watch a yard or garden is not justified in shooting one who comes into it in the night time, even if he should see him go into his master's hen-roost, for he was not in the actual commission of a felony; but that if, from the conduct of the party, he have fair ground for believing *his own life* in actual and immediate danger, he might then be justified even in shooting him. (i) And we have seen, that if a stranger, having entered without any felonious design, conceal himself in an house at night, and there be an alarm of thieves, the occupier will be wholly excused in killing him, upon the supposition that he was a thief. (k) If a party be seen entering an out-house at night, with intent to commit a felony, and the owner immediately afterwards apprehend him concealed in a neighbouring garden, with a drawn sword in his hand, and the offender cut and wound the owner, it was held that he was guilty of a felonious cutting under Lord Ellenborough's Act. (l) But the throwing down a ladder upon which a mere trespasser is standing on the land of another, is not justifiable, and therefore, where the defendant to an action

(g) 1 East, P. C. 288, 289; Fost. 291; 1 Hale, 473, 486. See *Simpson v. Morris*, 4 Taunt. 821; ante, 600, n. (p), as to the illegality of throwing water over a party attempting to obstruct an ancient light.
(h) 2 Inst. 316.

(i) *Rex v. Scully*, 1 Car. & P. 319.
(k) *Levet's case*, Cro. Car. 538; 1 Hale, 42, 474; 1 East, P. C. 274.
(l) *Rex v. Howard*, Car. Crim. L. 231; 333; Ry. & M. C. C. 207, S. C.

of trespass, for shaking plaintiff from a ladder and breaking his leg, pleaded that the ladder and the plaintiff were wrongfully on his land, and that he *gently shook the ladder*, and the plaintiff thereby fell and broke his leg, upon demurrer Denison, J. said, as only the ladder was in the present case *damage feasant*, it was no more lawful to throw this down whilst the plaintiff was upon it, than it is to distrain a horse *damage feasant* whilst a man is upon the horse's back, which is illegal. (m)

So, though it is legal, after a civil request to depart, to push or pull a trespasser from a messuage or land, (n) yet all force, and particularly imprisonment without warrant, must cease immediately that object has been effected, or the occupier and others assisting him will be trespassers; as where the plaintiff irreverently made a disturbance in a church during divine service, and the defendant, a constable, took him out of the church, and continued to detain until the sermon was over, it was held that the latter imprisonment was illegal. (o) So, where the plaintiff had violently entered a public house after the proper hours, and the defendant sent for a constable, and forced him out, but also subsequently detained him, it was held, that as the constable had no view of a breach of the peace, and the plaintiff had not committed *a felony*, the imprisonment was illegal. (p)

With respect to the *Prevention* of Trespasses on *Land*, the general rule is, that as far at least as civil rights are concerned, every man may guard his own land from trespasses and encroachments by any means he pleases, provided he do not thereby invade or interfere with the rights of others; (q) and although it is another maxim that he must so use his own as to do no harm to others, that only means no harm to their *legal* rights, and subject to that qualification, he may occupy or use his own land as he pleases. (r)

So every person has a right to keep a *dog* for the protection of his house and yard, and for that purpose may let it loose *at night*, and if a person incautiously go into the yard after it has been shut up, and he be hurt, he has no remedy. (s) But if

What *preventions* may be placed upon land to prevent trespasses; and what notice must be given.

(m) *Collins v. Renison*, Sayer's Rep. 138, cited in *Gregory v. Hill*, 8 T. R. 300.

(n) *Green v. Goddard*, 2 Salk. 641; *Weaver v. Bush*, 8 T. R. 78.

(o) *Williams v. Genister*, 2 Bar. & Cres. 699; 4 Dowl. & R. 217, S. C.

(p) *Rose v. Wilson*, 1 Bing. 353; 8 J. B. Moore, 362, S. C.; and see *For v. Gaunt*, 3 Bar. & Adolp. 798; *post*, 619,

of apprehending offenders.

(q) *Per Gibbs, J.* in *Deane v. Clayton*, 1 J. B. Moore, 241.

(r) *Id.* 242.

(s) *Pocock v. Copeland*, 1 Esp. R. 203; *Deane v. Clayton*, 1 Moore, 209, 225, 245; *Bird v. Holbrook*, 4 Bing. 642; *M'Kone v. Wood*, 5 Car. & P. 1, *post*.

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the owner knew the dog to be ferocious, and leave his yard gate open, he must not let the dog loose in the day time, or let him have a chain so long as to be able to reach and hurt a person entering the yard, and he should give a verbal, or written, or printed caution against coming too near, or he will be liable for any damage. (t) In one case it was held, that where a fierce and vicious dog is kept chained for the defence of premises, and any one incautiously or not knowing of it should go so near as to be injured by it, no action can be maintained by the person injured, though he was seeking the owner, with whom he had business. (u) In a still later case it was held that a person is not entitled to recover compensation for an injury received from the bite of a dog placed in a yard for the protection of outhouses, unless he had such reasonable and justifiable cause for being in the place where the dog was as might be pleaded in answer to an action of trespass. But that if he had such cause, the circumstance of there being a notice on a board, in large letters, warning persons to "*beware of the dog*," will not be an answer to an action by him for the injury, if it appear that he was not able to read, and that if no suspicion be thrown upon the plaintiff by the defendant; in such a case it may be taken that he had such cause, and he is entitled to recover, provided the dog be put in a place forming part of one entrance to the house of the defendant, although there may be other entrances of a more public description, by which the plaintiff might have proceeded; and the plaintiff, in the particular case, having been injured by the dog whilst proceeding to the defendant's house for a lawful purpose, recovered a verdict for 70*l.* damages. (x)

(t) See *ante*, 455.

(u) *Bates v. Crosbie*, M. T. 1798, K.B. MS.; 3 Bla. C. by Chitty, 154, note 7.

(x) *Sarch v. Blackburne*, 4 C. & P. 297; per Tindal, C. J.; and see *M'Kens v. Wood*, 5 Car. & P. 1.

Tindal, C. J. said, you cannot alter the law by the mode of framing the declaration; you must show that the dog was accustomed to bite, and that the defendant knew it, before you can throw upon him the responsibility of keeping it from doing so. If a man puts a dog in a garden, walled all round, and a wrongdoer goes into that garden, and is bitten, he cannot complain to a court of justice of that which was brought upon him by his own act. The difficulty is in saying whether, in the particular place, the means

adopted by the defendant were sufficient. We must see first whether the plaintiff had a justifiable and reasonable cause for being on the spot, whether he was there without any notice, having such cause as would justify him, if he had an action brought against him as a trespasser for being on the defendant's premises. It seems that there are three different entrances to the premises, one of them more public than the rest, having a spring gate, another, called the middle entrance, across a field, the third an entrance across the cow-yard, and through a private gate, and another yard to the house. The plaintiff must have gone through one of the last two. Undoubtedly a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation, in the way of ac-

So though it has been considered that an occupier has a right to place a *mischievous bull* in his own close when properly fenced, if no other person have a right of entry to use a way or otherwise be therein, and that if a trespasser be hurt, he will not be entitled to any compensation; (y) yet if there had been a right of common or of way, or even if a way there had been previously permitted, though not legally claimable, and the use of it had not been duly countermanded, it would be otherwise. (z)

In general, if there be a dangerous animal or other danger in a close, through which there is a footpath, the occupier should at least give notice of such danger, or he will be liable to an action, even admitting he had a right to place such danger there. (a) Indeed in case of a dangerous animal or instrument likely to do mischief to another in a private close, it should seem that public notice thereof should be given, although no one has any right to enter. (b) And it should seem to be illegal to sink a deep and dangerous pit in a close through which a person has habitually trespassed, in order that he might fall therein and be injured; and that unless he had had express notice of such particular danger he might prosecute, if not sue for the injury. (c)

It has however been held, that the owner of a waste, although uninclosed and near a highway, may dig a pit for the better enjoyment of his land, and if cattle of others stray from the

cess to his house, that a person innocently coming for a lawful purpose may be injured by it. I think he has no right to place a dog so near the door of his house that any person coming to ask for money, or on other business, might be bitten. And so with respect to a footpath, though it be a private one, a man has no right to put a dog, with such a length of chain, and so near that path, that he would bite a person going along it. As to the notice, it does not appear to me that a *printed* notice is sufficient, unless the party is in such a situation in life as to be able to avail himself of it. It does not appear to me that this notice is sufficient so as to bar the action, if the plaintiff had any right at all to be on the spot, for it seems that he was not able to read. Then was there any thing in the appearance of the dog which would lead the plaintiff to suppose that the dog would bite him? It seems that this injury happened in the middle of the day, in the month of July, and that the plaintiff was a person employed as a watchman in the neighbourhood, and as no suspicion has been thrown

upon him by the other side, you may presume that he was going to the house for a lawful purpose. The only way in which I can leave the question (which I admit is one of considerable nicety) for your consideration is to leave it to you to say on which side was the negligence upon this occasion. If there was negligence on the part of the plaintiff, he cannot recover for an injury which he has in part brought upon himself; but if there was no negligence on his part, and there was negligence on the part of the defendant, then the plaintiff will be entitled to your verdict.—Verdict for plaintiff—damages, 70*l*.

(y) *Brooke v. Copeland*, 1 Esp. R. 203; *Deane v. Clayton*, 1 J. B. Moore, 225, 245; *Bird v. Holbrook*, 4 Bing. 642.

(z) *Id. ibid.*; *Deane v. Clayton*, 1 Moore, 234, 235, 244.

(a) *Per* Holroyd, J. in *Hott v. Wilks*, 3 B. & Ald. 316, and *Bird v. Holbrook*, 4 Bing. 642, and *Deane v. Clayton*, 1 Moore, 234, 235, 244.

(b) *Semble*, *per* Bayley, J. in *Hott v. Wilks*, 3 B. & Ald. 312, 313.

(c) *Quere*.

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way and fall in and perish, he will not be liable to any action, because the digging of the pit was lawful, and there was no obligation to fence against trespassers. (*d*)

So the owner of a several fishery with the soil, may place hooks in the bed of the stream to destroy the nets of persons endeavouring unlawfully to fish therein; (*e*) or the occupier of a field may fix bushes there, as a guard against those who shall attempt, without his leave, to draw nets over it for game, (*e*) although at common law he could not, whilst a trespasser was fishing or poaching, directly cut the nets, nor can now do so, unless under authority of particular acts of parliament. (*f*)

As the common law recognizes that *poultry* are a valuable property, it is actionable at common law to throw poisoned corn on a party's own land, and thereby poisoning a neighbour's fowls. (*g*) But it has been suggested that a man might corrupt water in his own land, and that if cattle should escape into such land and be injured in consequence of drinking the water, the owner could not sue the former. (*h*) And before the present game act, a person might with impunity throw poisoned corn on his own land, and thereby kill the game of his neighbour, the law not considering game any valuable property when off the land of a person to which they usually resorted. But it is now expressly declared illegal maliciously to put any lime or other noxious material in any water, with intent thereby to destroy any of the fish therein; (*i*) and the placing poison or poisoned ingredients on any land, with intent to destroy or injure the game, subjects the party to a conviction in 10*l.* penalty. (*k*) At common law, if a person keep glandered horses in his stable, so near to that of another as to cause infection, he is liable to an action; (*l*) and before the statute of Anne, a person who negligently let his own house take fire, and it extended and burnt that of others, he was liable to make compensation. (*m*)

A person may justify killing a dog in a *warren* whilst pursuing the rabbits there, or whilst pursuing deer in a park,

(*d*) *Blyth v. Topham*, Cro. Jac. 158; 1 Rol. Ab. 88, pl. 4; *Deane v. Clayton*, 1 J. B. Moore, 216, 224, 225, 234, 235.

(*e*) Per Gibbs, C. J. in *Deane v. Clayton*, 1 J. B. Moore, 242.

(*f*) See cases 607, note (*p*).

(*g*) *Sears v. Lyons*, 2 Stark. R. 317.

(*h*) Per Gibbs, C. J. in *Deane v. Clayton*, 1 J. B. Moore, 244. *Sed quare*, see *Sears v. Lyons*, 2 Stark. R. 317; see 7 & 8 Geo. 4, c. 30, s. 15; 1 & 2 W. 4, c. 32,

s. 3; and see Burn's J. Surety for good Behaviour, where Dalton, J. required surety on a similar account.

(*i*) 7 & 8 Geo. 4, c. 30, s. 15; *ante*, 193.

(*k*) 1 & 2 Wm. 4, c. 32, s. 3; *ante*, 404; and see *Sears v. Lyons*, 2 Stark. R. 317.

(*l*) Bul. N. P. tit. Action, Case.

(*m*) 6 Ann. c. 31; Chit. Col. Stat. 365, and notes.

if he cannot otherwise prevent the destruction of the rabbit or deer, but if he could, then he must not kill the dog. (n)

But neither the occupier of other lands, nor the lord of a manor, or his gamekeeper, has any right directly to shoot or seize a dog illegally pursuing a hare when *self-hunting*; (o) though before the late Game Act, if the dog were at the time illegally used by an unqualified person, as the same might have been seized for the use of the lord, so he might be killed, as in fact after the seizure he became the property of the lord. (p) The seizure of a dog, or taking any engine for destroying game, appears now only to be legal when they are used to destroy deer, (q) or in illegal night poaching. (r) The Court of Common Pleas were equally divided, and no judgment was given on the question, whether an occupier of land can legally place dog spears on his land, to protect game and kill dogs in pursuit thereof, even after public notice of having done so; (s) and in a subsequent case it appeared to be considered that such instrument to kill (and not merely catch or impede) a dog could not be set, even with notice, at least when woods communicate with each other without any fence, (t) still less is it legal to tempt dogs by trailing meat from an high road towards an engine where they are injured. (u)

(n) 1 Saund. 84; *Keck v. Halstead*, 2 Lutw. 1494; *Wadhurst v. Damme*, Cro. Jac. 44; 2 Rich. C. P. 435; *Vere v. Lord Cawdor*, 11 East, 568.

(o) *Vere v. Lord Cawdor*, 11 East, 568; *Deane v. Clayton*, 1 J. B. Moore, 218; *Carpenter v. Adams*, Comb. 183; *Athill v. Corbett*, Cro. Jac. 463; as to shooting a dog which has worried sheep; *Wells v. Head*, 4 Car. & P. 568. *Redish and another v. Watson and another*, Lancaster assizes, March 27, 1833. Trespass, for shooting a greyhound bitch by the defendants. Pollock for plaintiff, and Williams for defendant.

The defendants were two gamekeepers of a Mr. Horton, of Bald-hall. The greyhound had been sent by the plaintiffs to be kept by Tickell, who farmed land about half a mile from Bald-hall. On 18th of January, 1833, the greyhound, together with a little dog belonging to Tickell, got away from home, and were seen in a clover field at some distance. The two keepers crept along the hedge as if to near the dog. One of them, when at a distance of 11 yards, put his gun to his shoulder and fired; the dog yelled and fell; the other then discharged his gun at the animal then lying on the ground. Two witnesses spoke as to the value of the animal; one of them said he had heard 20l. offered to the plaintiffs for the

dog, and he thought it worth from 40l. to 50l.; the other witness stated the worth to be from 20l. to 30l.

The learned judge, in summing up, told the jury that the only question for them to consider was that of the value, for it was quite clear that if the defendants had destroyed the dog, as had been stated, they must be amenable for the damage they had done. The dog might or might not have been hunting for game, and if he had done mischief his owner was liable for it, but that would be no justification of the defendants in killing it as they had done.

The jury, after a short deliberation, returned a verdict for the plaintiff.—Damages, 20 guineas.

(p) *Kingsworth v. Bretton*, 5 Taunt. 416; 1 Marsh. 106, S. C.

(q) 7 & 8 Geo. 4, c. 29, s. 29.

(r) 9 Geo. 4, c.

(s) *Deane v. Clayton*, 2 Marsh. R. 577; 1 J. B. Moore, 202; 7 Taunt. 489; Burrough, J. and A. Park, J. against the right; Dallas, J., and Gibbs, C. J. in favour of it.

(t) *Per Best, J. and Park, J.*, in *Bird v. Holbrook*, 4 Bing. 642, 643; and see *Sears v. Lyons*, 2 Stark. 317.

(u) *Townsend v. Walhem*, 9 East, 277; *Deane v. Clayton*, 1 J. B. Moore, 235, 245.

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Though it is a maxim that a man cannot legally do indirectly that which he could not do directly, *quando aliquid prohibetur ex directo prohibetur et per obliquam*, (x) and it is admitted that a person could not legally directly run spikes or glass bottles into a man, to deter him from entering his close, (y) or shooting a dog for the same purpose; (y) yet it is admitted that he may, to prevent persons from getting over his wall into a garden, place such spikes or glass bottles at the top, and if the party be injured he has no remedy. (z) And it should seem, that admitting that a party might at common law be *criminally* responsible for adopting too dangerous a mode of protecting his property, not being himself present, and thereby occasion injury to the person of another, yet that if the party injured were a trespasser, and had *notice* of the measure adopted, he cannot sustain a *civil action* for the injury; (a) and accordingly it was holden before the late act, prohibiting the setting of spring guns, (except in a house at night,) that a trespasser, having knowledge that there were spring guns in a wood, although ignorant of the particular spots where they are placed, could not maintain an action for an injury received, in consequence of his accidentally treading on the latent wire, communicating with the gun, and thereby letting it off. (b) But now, as the setting of a spring gun, man-trap, or other engine, calculated to destroy human life or inflict grievous bodily harm, and with that intent, is an indictable misdemeanor (with an exception as to such guns or traps as may have been usually set with the intent of destroying *vermin*, and as to spring guns, man traps, and other engines set in a dwelling-house for the protection thereof from sunset to sunrise); (c) consequently, since that act,

(x) Wingate, 680; *Deane v. Clayton*, 1 J. B. Moore, 219.

(y) *Vers v. Lord Cawdor*, 11 East, 568; *Deane v. Clayton*, 1 J. B. Moore, 222, 223; *per Dallas, J.*, *per Gibbs, C. J.* Id. 247; and *per Holroyd, J.* in *Ilott v. Wilkes*, 3 Bar. & Ald. 314.

(z) Id. *ibid*; 1 J. B. Moore, 247, 248.

(a) *Per Gibbs, C. J.* in *Deane v. Clayton*, 1 J. B. Moore, 249.

(b) *Ilott v. Wilkes*, 3 Bar. & Ald. 304.

(c) 7 & 8 Geo. 4, c. 18, "Whereas it is expedient to prohibit the setting of spring guns and man traps, and other engines calculated to destroy human life, or inflict grievous bodily harm;" be it therefore enacted and declared by the king's most excellent majesty, by and with the advice and consent of the lords

spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, if any person shall set or place, or cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith; the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor.

II. Provided always, and be it further enacted, that nothing herein contained shall extend to make it illegal to set any gin or trap such as may have been or

it has been decided, that it being illegal to set a spring gun elsewhere than in a house at night, a person whose property in a walled garden had been stolen, and who set the gun there in the day time to protect his property *without giving notice*, was liable to an action for an injury to a person who got over the wall to catch an escaped peacock, though a trespasser without license; (d) and perhaps he would now be liable, even if he had giving notice, on the ground that it is inhuman to catch a *man* by means which may maim him or endanger his life; (e) and that as it is a misdemeanor to set them, it is not to be believed that in fact the guns had been set as pretended; besides, the party injured might not be able to read or might not have read the notice. (f)

When a spring gun or other dangerous instrument has been set in a house, under the exception in this statute, the notice thereof should be qualified accordingly; and when any traps have been set in woods and grounds to kill *vermin*, instead of a notice in the form used in *Deane v. Clayton*, (g) if a dog-spear, trap or instrument, likely to injure a dog, be placed there, (the right to do which, it will be recollected, is questionable,) the notice should be framed as suggested in the note. (h) And the instrument set should be at least adapted to the de-

may be usually set with the intent of destroying vermin.

III. And be it farther enacted and declared, that if any person shall knowingly and wilfully permit any such spring gun, man trap, or other engine as aforesaid, which may have been set, fixed, or left in any place then being in or afterwards coming into his or her possession or occupation, by some other person or persons, to continue so set or fixed, the person so permitting the same to continue shall be deemed to have set and fixed such gun, trap, or engine, with such intent as aforesaid.

IV. Provided always, and be it further enacted, that nothing in this act shall be deemed or construed to make it a misdemeanor, within the meaning of this act, to set or cause to be set, or to be continued set, from sunset to sunrise, any spring gun, man trap, or other engine which shall be set, or caused or continued to be set, in a dwelling-house for the protection thereof.

V. Provided always, and it is hereby

further enacted and declared, that nothing in this act contained shall in any manner affect or authorize any proceedings in any civil or criminal court, touching any matter or thing done or committed previous to the passing of this act.

VI. Provided always, and be it further enacted, that nothing in this act contained shall extend or be construed to extend to that part of the United Kingdom called Scotland.

(d) *Bird v. Holbrook*, 4 Bing. 628; *Jay v. Whitfield*, cited 3 Bar. & Ald. 308.

(e) *Bird v. Holbrook*, 4 Bing. 643. Formerly it was, it seems, the practice upon such occasions to give public notice in the adjacent market towns, per Burrough, J. in *Bird v. Holbrook*, 4 Bing. 644, 645; and *semble* that practice might still be expedient, because printed boards may not be seen or read.

(f) See *Serch v. Blackburne*, 4 Car. & P. 297, as to notice in fact of a ferocious dog, *ante*, 604, 605, note (x).

(g) *Deane v. Clayton*, 1 J. B. Moore, 206.

(h) "Take notice that guns and traps and other instruments are set in these woods and grounds to destroy foxes and vermin, and which if dogs should be suffered to enter may be injurious to them."

Suggested form of notice of traps, &c. having been set on grounds.

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struction of foxes and vermin, and not peculiarly calculated to injure dogs. A small spring trap, in the nature of a rat-trap, might be placed so as to spring upon the lower part of the leg of a fox, and maim or catch him, and have the same effect upon dogs, without the possibility of injury to man, because too small to receive his foot and ankle. (i)

It was held that any proprietor of land, exposed to the inroads of the *sea*, may endeavour to *protect* himself by erecting a *groyne*, or other reasonable defence, although he may thereby render it necessary for the owner of the adjoining land to do the like. (k) But it has been held in the House of Lords, (varying the judgment of the Court of Sessions,) that an heritor was not entitled to erect a bulwark or any other work on the banks of the *river Tay*, which might have the effect of diverting the stream of the river in times of flood from its *accustomed* course, and throwing the same upon the lands of an opposite proprietor, although it was alleged that the bulwark was intended to protect the heritor's land from the flood; (l) and it was considered in the same case, that the Roman law and the law of England is in this respect the same. (m) But a party may erect such a bulwark or a bank to prevent an apprehended *alteration* of the *old* channel. (n) And where a public canal navigation had been established by act of parliament, it was held that occupiers of land adjoining could not legally, though for the protection of their own lands, heighten their artificial banks so as to prevent the flood water overflowing their lands, and if they so doing would injure the banks of the canal, and that if they did, they were liable to an indictment. (o) So a person may even justify the necessarily pulling down a neighbour's house to prevent the progress of a fire which would otherwise consume both. And a person may legally, with a proper dog, drive sheep off his own ground into that of another, from whence they escaped, if he cannot otherwise get them off his own. *Per* Crew, C. J., "It seems to me that he might drive the sheep out of his own ground with the dog, and he could

(i) See exception in sect. 2 of 7 & 8 Geo. 4, c. 18, *ante*, 608, 609, note (c).

(k) *Rex v. Pagham*, 8 B. & Cres. 355; approved of in *Rex v. Trafford*, 1 B. & Adolp. 888, where the difference between protecting against inroads of the sea and rivers is taken.

(l) *Mensies v. Earl Breadalbane*, 3 Wils. & Shaw, 235; and see *The King v. Lord Yarborough*, 1 Dow. Rep. N. S. 178; and see *Wright v. Howard*, 1 Sim. & S. 190;

and *Williams v. Morland*, 2 Bar. & Cres. 910, *ante*, as to what may be done with a watercourse in general, &c.

(m) *Mensies v. Earl Breadalbane*, 3 Wils. & Shaw, 243.

(n) *Id.* 245; *Farguharson v. Farguharson*, A.D. 1741, cited *Id.* 244; and see Lord Tenterden's observations in *Rex v. Trafford*, 1 Bar. & Adolp. 888.

(o) *Rex v. Trafford and others*, 1 Bar. & Adolp. 874.

not withdraw his dog when he would in an instant; (q) but the chasing of another person's sheep should be by a *small* dog or one that would not wound or injure them. (r)

So if my house require repairing or rebuilding, so as to render it necessary to pull down a wall on my land near the house of another, I may pull it down after giving him notice of my intention, so as to allow him time to shore up his own house; after which, if I do no more than is essential for rebuilding my own house, I am not liable to compensate any damage to the neighbour by the falling of his house for want of support; for he ought to have built his house on his own land so independently as to prevent any ill consequence from what I may legally execute on mine, or to have shored up in due time. (s) But with respect to houses within the bills of mortality, the building act contains some regulations to be previously observed in this respect. (t)

A person may legally shoot *Rooks* on his own land, and even so near to a rookery as to disturb the birds in building their nests and breeding there; for however unneighbourly such an act may seem, the law acknowledges no valuable property in rooks, nor affords any civil or criminal remedy in respect of them. (u) But with regard to *Pigeons*, if any person unlawfully and wilfully kill, wound, or take any house-dove or pigeon under such circumstances as shall not amount to larceny at common law, such offender, being convicted thereof before a justice of the peace, shall forfeit, over and above the value of the bird, any sum not exceeding two pounds; (x) and therefore although no action may be sustainable against a person for shooting my pigeon on his ground, yet he would incur this penalty. (y) And for shooting upon a person's own land near to a *Decoy*, so as to frighten away wild fowl, an action on the case is clearly sustainable; (z) and if he fire so that the shot fall on my land, then trespass lies. (a) *Rabbits*, when in a warren, or ground

(q) *Miller v. Fandrye*, Poph. 161; *Sutton v. Moody*, 1 Lord Raym. 250, 14; *Churchyard v. Studdy*, 14 East, 249; *Anthoney v. Haney*, 8 Bing. 189.

(r) *Blockley v. Slater*, Latch. 119, 120, he should use "*un petite chien*."

(s) *Peyton v. Mayor of London*, 9 Bar. & Cres. 725; and *Brown v. Windsor*, 1 Crompt. & J. 20; and see *Wyatt v. Harrison*, 3 Bar. & Adolp. 871.

(t) 14 Geo. 3, c. 78.

(u) *Hannam v. Mockett*, 2 Bar. & C. 934; 4 Dowl. & R. 518, S. C.; *ante*, 189.

(x) 7 & 8 Geo. 4, c. 29, s. 33.

(y) *Dewell v. Sanders*, Cro. Jac. 492; 2 Burn's J. Game, Pigeons, 939.

(z) *Keble v. Hickringill*, 11 Mod. 74, 130; 11 East, 374, S. C.; *Carrington v. Taylor*, 11 East, 571; 2 Campb. 258, S. C.; *ante*, 118, 188.

(a) *Pickering v. Rudd*, 4 Campb. 220; 1 Stark. 58, S. C.; *Keble v. Hickringill*, 11 Mod. 74, 130; *Gregory v. Piper*, 9 Bar. & C. 591; *Lawrence v. Obee*, 1 Stark. R. 22.

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lawfully used for the breeding or keeping rabbits, are protected by the 7 & 8 Geo. 4, c. 29, s. 30, which enacts that if any person shall unlawfully and wilfully, in the night time, take or kill any hare or cony in any warren or ground lawfully used for the breeding or keeping of hares or conies, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be punished accordingly; and if any person shall unlawfully and wilfully, in the day time, take or kill any hare or cony in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or conies, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, not exceeding five pounds, as to the justice shall seem meet: Provided always, that nothing herein contained shall affect any person taking or killing in the day time any conies on any sea bank or river bank in the county of Lincoln, so far as the tide shall extend, or within one furlong of such bank.

If rabbits are out of the warren, and escape into the ground of another, he has the property therein whilst there *rationis soli*, and may lawfully kill them, but he could not sue the owner of the warren for the damage done by them. (b) So it was formerly held that a commoner might kill rabbits depasturing a common and injuring the pasture there, though he could not sue the lord. (c) But it was afterwards decided, that if the lord surcharge the waste with rabbits, the commoner may sue him for the consequential injury to his common right, and cannot legally kill the rabbits, or destroy the burrows; and this latter decision seems to be law. (d)

With respect to *Foxes* and *Fox-hunters*, (e) and *Stag hunting*, (f) although the pursuit is generally tolerated and permitted, yet it is in law illegal, and the hunters may be warned off like any other trespassers; (g) and a master or huntsman stimulating the hunt is liable for the aggregate damages committed, though he do not himself trespass on the grounds. (h)

(b) *Boulton's Case*, 5 Coke, 104.

(c) *Boulton v. Hardy*, Cro. Eliz. 548;
Hadden v. Grynet, Cro. Jac. 195;
Hinsley v. Wilkinson, Cro. Car. 388.

(d) *Cooper v. Marshall*, 1 Burr. 259.

(e) See the *Earl of Essex v. Capel*,

Christian's Game Law, 114; and *Chitty's Game Law*, 31, S. C.

(f) *Baker v. Berkley*, 3 Car. & P. 32.

(g) See note (a).

(h) *Hume v. Oldacre*, 1 Stark. R. 531;

Baker v. Berkley, 3 Car. & P. 32.

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III. When a relation, servant, friend or stranger may interfere in defence of person or personal or real property, and how.

III. The principles and rules which allow self-defence of a party's *own person* are extended to certain *relations*. Thus husband and wife, parent and child, master and apprentice, and master and servant, are legally excused, and sometimes even justified in *killing* an assailant about to commit a *forcible felony* upon the other, when such homicide has been committed in the necessary or lawful defence of each other respectively; the act of each of those relations *being then construed the same and equally permitted as the defence of the party himself*. (i) When indeed a *felonious attack* is made upon an *individual* or his *habitation*, then *any other person*, though not a relation, may lawfully interfere to prevent the mischief intended, and if in so doing death ensue, he will in that case be justified. Thus in the instance of arson or burglary, a lodger may lawfully kill the assailant in the same manner as the owner himself might do; and it seems there is no difference between the acts of the principal and of any third persons in resisting such *forcible felonies*. (k)

But with regard to *mere trespasses*, there is a very material difference between the interference of certain *relations* and of mere *strangers*. The former may justify immediate resistance *with force* when necessary, but a stranger can only interfere *moderately* and *moliter manus* to *prevent* the wrong. Thus a husband, a parent, or a master, and the wife, the child, and the apprentice and servant, may justify the defence of the person of each other, and of the personal or real property of the superior, and this even *with force* in the first instance, the same as the party assailed himself might do. (l) It is the natural disposition and the duty of such near relations to protect each other, and it is the right of the master to defend his servant, because he has an interest in him not to be deprived of his service, and the servant may defend his master because it is part of his duty in respect of his employment and wages to stand by and defend his master. (m) It has been observed that the law permits those who stand in the relations of husband and wife, parent and child, master and apprentice or servant, when the superior is forcibly attacked in his person or property, or the inferior in his person, to repel force by force; (n) because the law respects and indulges the passions and natural affections of the human mind, and when external violence is offered to a man himself or to one to whom he bears so near a

(i) 1 Hale, P. C. 448; 4 Bla. C. 186. *dick*, Owen, 151; 3 Bla. C. 3, n. 2.
(k) 1 East, P. C. 289, 290. (m) 1 Bla. C. 429.
(l) Rol. Ab. 546; *Seaman v. Cupple-* (n) 2 Rol. Ab. 546.

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connection, makes it lawful to do that immediate justice to which he is prompted by nature, and which no prudential motives would be strong enough to restrain. But in each of these cases, as in mere self-defence, care must be taken that the resistance does not exceed the bounds of mere *defence and prevention*, (o) for otherwise the defender would himself become an aggressor. (p) However, in the near relation of parent and child much indulgence is allowed for the feelings of each relative, and when a man's son was beaten by another boy, and the father went near a mile to find him and then revenged his son's quarrel by beating the other boy, of which he afterwards died, it was held to be only manslaughter and not murder, such indulgence does the law show to the frailty of human nature and the workings of parental affection. (q)

It has been said that a *master* cannot justify an assault in defence of his *servant*, because he might have an action *per quod servitium amisit*. (r) But such interference is clearly lawful; (s) and Lord Hale said, that "the law had been for a master killing in the necessary defence of his servant, the husband in defence of his wife, the child of the parent or the parent of the child, for the act of the assistant shall have *the same construction* in such cases as the act of the party assisted should have had if it had been done by himself, for they are in a mutual relation one to the other." (t) And it has been considered that a master shall not forfeit a recognizance of the peace for beating another in defence of his servant, nor the servant for beating another in defence of his master. (u)

Interference of
friends.

With respect to the interference of *friends*, it has been observed that upon the whole, although Lord Hale and others appear sometimes to have intimated a distinction between the cases of *servants and friends* and that of a mere *stranger*; yet that the distinct limits between each are no where accurately defined. It should seem that there is no *legal* distinction between friends and strangers, (x) and that the nearer or more remote connection of the parties with each other, as regards friendship,

(o) As to which, see *ante*, 595, 596.

(p) 3 Bla. C. 3, 4; 1 Bla. C. 450.

(q) *Kowley's case*, Cro. Jac. 296; 1 Hawk. P. C. 83; 1 Bla. C. 450. The homicide amounted to manslaughter and was not justifiable, because even if the son himself had killed the aggressor after he thus ceased to beat him, it would not have been justifiable.

(r) *Leewerd v. Basilee*, 1 Salk. 407; 1 Ld. Raym. 62; S. C. Bull. N. P. 18.

(s) 2 Rol. Ab. 546, D. pl. 2; *Seaman v. Cuppledick*, Owen, 151; Bac. Ab. Master and Servant, P.; *Ticket v. Read*, Loft, 215.

(t) 1 Hale, P. C. 484.

(u) Hawk. B. 1, c. 60, s. 24.

(x) But see *Rex v. Tooley*, 2 Ld. Raym. 1296; 1 East, P. C. 325; where the five judges appear to have classed friends with relations as to the effect of provocation.

is more a matter of observation to the *jury* as to the probable force of the provocation and the motive which induced the interference of a third person, than as furnishing any precise rule of law grounded on any such distinction. (y) With a jury the circumstance of the third person interfering being an old and intimate friend of the person attacked will generally have weight, but in point of law it should seem that the interference of *friends* is to be decided upon by the same rules as *strangers* in their motives for and mode of interfering; and that in strictness friends can, in point of law, only interfere to preserve the peace, and not to take the part of either; and certainly any plea of justification by a *friend* must be framed precisely as if he were a mere stranger; and a friend cannot (as a relation or servant may) justify defence *with force* but only *moliter manus*, the same as any other stranger. (z)

A mere *stranger* (though he may justify even a forcible entry and breaking open the outer door of a house upon a cry of *murder* from within, to prevent the commission of that offence (a) or any other *felony*,) cannot justify an interference *with force* in the first instance to prevent battery of a third person or any other trespass or civil injury, where death or any *felony* is not likely immediately to occur, but must proceed more moderately, and should previously *declare* or signify that he interferes merely to preserve the peace and not as a partisan, and he can only justify the gently laying on of his hands to prevent a breach of the peace; (b) though afterwards, if he be himself attacked by either party, he may then defend himself with the same degree of force as if he had been originally illegally assailed. (b)

With respect to the interference of *strangers*, where the *process turns out to be illegal*, it seems to have been considered by seven judges against five, that the illegal restraint of *any one's liberty* is a sufficient provocation to bystanders, or as Lord Holt expressed himself, *a provocation to all the subjects of England*. The five judges who held the particular homicide to have been murder, thought that it would have been a sufficient provocation to a *relation* or *friend*, but not to a *stranger*. (d) Mr. Justice Foster, however, afterwards objected to the opinion of the seven judges, and insisted that the provocation which

Interference of
strangers.In cases of ille-
gal restraint of
liberty. (c)

(y) 1 East, P. C. 292.

(z) *Barfoot v. Reynolds*, 2 Stra. 954.(a) *Handcock v. Baker*, 2 Bos. & P. 260.(b) *Barfoot v. Reynolds*, 2 Stra. 954;2 Hale, 484; 1 East, P. C. 290, 306.
See form of plea by a stranger, 3 Chit. Pl. 1070.(c) See further *post*, section v. as to resistance of process, rescue, &c.(d) *Rex v. Tooley*, 2 Lord Raym. 1296; 1 East, P. C. 325, 326; and see *Rex v. Osmer*, 5 East, 308; *Pedley's case*, 1 Leach, 245.

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extenuates homicide into manslaughter, must be a *sudden provocation immediately* felt by the party *himself* at the time of the fact, and not a resentment suggested by reflection or political reasoning, for an injury done to a *stranger*, and the consequence of that injury to the public in general; and that on such occasions as these, a *general submission to the known badges of authority, exacted from all strangers* to the party supposed to be injured in his cause, would greatly conduce to the stability of government, on the fate of which all private rights are invested; and certainly the five judges thought it of dangerous consequence to give any encouragement to private men, when strangers to the injury, to take upon themselves to be the asserters of *other* men's liberties, and to become *partizans* to rescue them by force from wrong, especially in a nation where there are good laws for the punishment of all such injuries; and one great end of law is, to right men by peaceable means, (as by habeas corpus,) and to discountenance all endeavours even of parties to right *themselves* by force, much less *other* men who were strangers. (e) And when a man is apprehended and in the custody of officers of justice, and a third person espouses his cause and encourages the prisoner to resist, the officers may imprison such third person; and Lord Kenyon is reported to have said, that *when a man is in the actual custody of the officers of justice, no other person has a right to interfere*. If he were taken *illegally*, the officers must answer it at their peril, (f) and an habeas corpus may be obtained, and this is certainly the safer rule, unless in most violent and gross violations of liberty.

However, subsequent and modern decisions support the decision of the seven judges, and establish that even a stranger's interference, and even his killing the officer, when the imprisonment was illegal, would only constitute manslaughter, and not murder. (g) And in a modern case, where a person arrested another, and it did not appear that he was strictly authorized by the process to do so, it was held that an indictment against a *stranger* for rescuing him could not be supported; (h) and in an indictment against a person for rescuing a person from the house of correction, it was held that it must appear that the latter was *legally* imprisoned there. (i)

(e) Fost. C. L. 312, 317; 1 East's P. C. 326 to 329.

(f) *White v. Edmonds & others*, Peake's Rep. 89, 90.

(g) See *Mary Adey's case*, 1 Leach, C. L. 189, 206, 245, 253; 1 East's P. C. 329,

note (b).

(h) *Res v. Omer*, 5 East, 304, 308; 1 Smith's R. 555, S. C.; and see *Res v. Freeman*, 2 Strange, 1226.

(i) *Res v. Freeman*, 3 Stra. 1226.

In case of a libellous caricature, causing a person to become an object of ridicule, it has been considered justifiable in the party libelled even to destroy the picture, and even excusable in a *near relation* to do so, (k) but the safer course is to take the libel to a magistrate. (l)

We have seen that a parent or guardian, or a master, may *prevent* any injury in that character, and may interfere and even by force defend his child, his ward, or his apprentice or servant, (m) although a stranger could only interfere to preserve the peace. (n) So a parent or guardian of a female under age, who had eloped without his knowledge, is justified in detaining her clothes; and a carrier, to whom they had been delivered for the purpose of conveyance, is justified in delivering them over to the parent or guardian, and by so doing he cannot be considered as having been guilty of an illegal conversion. (o)

Defence and prevention of injury to relative rights.

IV. One of the most immediate and effectual means of preventing an injury, or securing punishment for its completion, is the *apprehension and detainer* of the wrong-doer "*found committing*" or *whilst committing* the offence; or in the case of *felony* when he is escaping; and also of seizing his engines about to be used and then using for the wrongful purpose. It will be obvious that in many instances, if it were necessary to wait until a magistrate's warrant could be obtained, or even for the interference of a peace officer, many unknown and transient offenders would escape, and therefore the common law and numerous modern statutes authorize parties themselves, who have been or are likely to be injured, and others on their behalf or for the security of the public, to interfere of their own accord, and apprehend the offender *whilst found committing* an offence, or *flagrante delicto*, or *very shortly after* the offence has been committed, and then to deliver the offender to a peace officer, or to convey him before a justice of the peace; but these powers were not intended to encourage the apprehension without a regular justice's warrant of known *substantial inhabitants* in the neighbourhood, in every case of petty offence. (q)

IV. Of apprehending and detaining wrong-doers and their implements, &c. (p)

(k) *Du Bos v. Beresford*, 2 Campb. 511; *Earl Lonsdale v. Nelson*, 2 Bar. & Cres. 311; *Anon.* 5 Coke's R. 125, 126; and *post*, Abatement of Nuisances.

(l) *Anon.* 5 Coke's R. 125, b.

(m) 2 Rol. Ab. 546; *Seaman v. Cupple-dick*, Owen, 151; Bac. Ab. Master and Servant, P.

(n) *Barfoot v. Reynolds*, 2 Strange, 953.

(o) *Baker v. Taylor*, 1 Car. & Payne, 101.

(p) See in general 1 Chit. Cr. L. 11 to 71; Burn's J. tit. Arrest—Constable—Police—Vagrant—Warrant, 7 & 8 Geo. 4, c. 29, 30.—N. B. The 9 Geo. 4, c. 31, contains no provision for apprehending offenders.

(q) *Per Tindal, C. J. in Hanney v. Boulton*, 2 Mood. & M. 15; 4 Car. & P. 350, S. C.; see *post*, 625.

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When a private person or constable may apprehend a wrong-doer at common law without warrant.

In cases of mere civil injuries without force, or even of a *breach of the peace*, as an assault or battery, no private individual can in general at *common law* arrest, apprehend or imprison the wrong-doer, but can at most *remove* him from his dwelling-house without any imprisonment; (r) and in the case of an importunate beggar, who refuses to quit a party's premises, the latter can only legally turn him out, and cannot imprison him unless he comes within the provisions of the vagrant act. (s) Nor can a private person at *common law* apprehend or imprison another for a *misdemeanor* or *breach of the peace* after it is over without a warrant; nor can a constable do so at common law, *unless he had view of such misdemeanor or breach*. (t) And though a person may push or force a person out of his house, or from a church, when making a disturbance there, yet we have seen that, after he has removed the party, he cannot, without warrant, apprehend or imprison him even for the purpose of conveying him before a magistrate. (u)

But *private* individuals are not only permitted but *enjoined* by law to arrest an offender when present at the time a *felony* is committed or dangerous wound given, on pain of fine and imprisonment if the wrong-doer escape through their negligence. (x) And the same duty exists where a person is detected in the attempt to commit a felony; (y) and although the offender ran away and give over his intention of committing the felony, still it seems on fresh pursuit he may be apprehended by any one. (z) And when it is certain that a *felony* has in fact been committed *by some one*, any private individual, though not particularly interested, is excused in imprisoning a person who turns out to have been wholly innocent, if he can prove that he had *reasonable* or *probable cause* for suspecting that he was the felon, and in such a case he may himself apprehend, or direct a peace officer to apprehend, the party whom he so supposes to have been guilty. (a) But if it should turn out that *no felony* had been committed *by any one*, then (excepting in the case of

(r) *Williams v. Glenister*, 2 Bar. & Cres. 699; 4 D. & R. 217, S. C.; Burn's J. Arrest, II. (II.)

(s) *Price v. Severn*, 7 Bing. 316.

(t) Hawk. B. 2, c. 12, s. 20, 21; 1 East's P. C. 300; Bac. Ab. Trespass, 3 D.; *Rex v. Dyson*, 1 Stark. R. 246; *Fox v. Gaunt*, 3 Bar. & Adol. 798.

(u) *Williams v. Glenister*, 4 D. & R. 217; 2 Bar. & C. 699, S. C. *supra*. It was therefore also doubted whether a sexton could legally, without a warrant, apprehend a person in the act of stealing a dead body in a church yard, that not be-

ing a *felony*, R. & R. C. C. 365.

(x) 1 Hale, 587; 1 East, P. C. 298, 304; Hawk. b. 2, c. 12, s. 13; *Rex v. Hunt*, R. & M. C. C. 93; Selw. N. P. 3 ed. 830.

(y) *Rex v. Hunt*, Ry. & M. C. C. 93; *Rex v. Howarth*, Id. 207.

(z) *Rex v. Howarth*, R. & M. C. C. 207.

(a) *Ledwith v. Catchpole*, Cald. 291; *Samuel v. Payne*, Dought. 359; *Mure v. Kay*, 4 Taunt. 34; *Guppy v. Brittlebank*, 5 Price, 525; *Davis v. Russell*, 5 Bing. 364; 4 Inst. 144.

arrest upon hue and cry) (b) he would have no defence to an action for false imprisonment, although he had probable cause for suspecting the guilt. (c) Therefore, in a plea of justification, he must aver not only that a felony had been committed by some one, but also state the particular facts or causes inducing him *reasonably* to suspect the party imprisoned to have been guilty of that particular felony. (d) And although persons who *merely assist* a constable may give in evidence the grounds of their defence under the plea of general issue, a person who gives charge, and first induces such constable to act, must plead the circumstances specially. (e)

In cases of *Misdemeanors* it has recently been decided, that *suspicion* that a party has on a former occasion committed a misdemeanor, though accompanied with proof of the offence having been committed by *some one*, is no justification for giving the former in charge to a constable *without a justice's warrant*; and that there is no distinction in this respect between one kind of misdemeanor and another, as breach of peace and obtaining goods by false pretences. (f)

In cases of *mere breach of the peace*, before any charge has been made to a *peace officer*, and before he acts upon it without a justice's warrant, the latter must himself have had *actual view* of the breach of the peace, or the arrest without warrant would be illegal. (g) And where *A.* went to a house at night, demanding to see the servant, and he was told to depart, and he would not, and thereupon a constable was sent for, and *A.* went from the house to the garden, and when the constable arrived, *A.* told him that if a light appeared at the windows he would break them, upon which the constable took him into custody,

(b) Hawk. b. 2, c. 12, s. 16.

(c) *Samuel v. Payne*, Dougl. 359; *Beckwith v. Phillip*, 6 Bar. & Cres. 637; *Ledwith v. Catchpole*, Cald. 291; *Stonehouse v. Elliott*, 6 Term R. 315; *White v. Taylor*, 4 Esp. R. 81; *Flewster v. Royle*, 1 Campb. 187; *Hobbs v. Branscomb*, 3 Campb. 420; *Mure v. Kay*, 4 Taunt. 34; 1 Hale's P. C. 610.

In *Beckwith v. Phillip*, 6 Bar. & Cres. 625, Lord Tenterden stated, "that in order to justify a *private person* in imprisoning on suspicion of felony, he must not only make out a reasonable ground of suspicion, but must prove that a felony has actually been committed by some person though unknown; but a *constable* having reasonable ground to suspect that a felony has been committed, may, upon the charge of another, detain the suspected party, although it turn out that no felony had been committed." The case of *Adams v. Moore*, Selw. Ni. Pri. 4 ed. 865, is not

law to the extent reported. But *semble*, that if a constable of his *own head* take a party into custody on suspicion of felony, and it turn out that no felony has been committed, he will be liable to be sued for the imprisonment, *Hobbs v. Branscomb*, 3 Campb. 420.

(d) *Id. ibid.*; *M'Cloughan v. Clayton*, Holt's C. N. P. 479; *Davis v. Russell*, 5 Bing. 364; 2 Moore & P. 590, S. C. The question of *probable cause* is a mixed question of law and fact, *Id. ibid.*

(e) *Hough v. Marchant and another*, 1 Mood. & M. 510.

(f) *Fox v. Gaunt*, 3 Bar. & Adolp. 798.

(g) *Sharrock v. Hannemer*, Cro. Eliz. 375; *Hardy v. Murphy*, 1 Esp. R. 294; *Coupey v. Henley*, 1 Esp. R. 540; *M'Cloughan v. Clayton*, Holt, C. N. P. 479; *Rogers v. Jones*, R. & M. C. C. 132; *Stobbs v. Branscomb*, 3 Campb. 420; 2 Hale, 90.

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it was held that as at most this amounted only to a *threat* to commit a breach of the peace, and did not constitute an actual breach in his view, the constable was not justified in so doing, and A. was acquitted upon an indictment for resisting the apprehension. (g)

It is safer, therefore, in all cases of the least doubt, for private individuals, especially when time will allow, rather than thus acting for themselves, to apply to a *magistrate for a warrant*, because, whenever an arrest takes place under such a warrant, the party imprisoned cannot sue in *trespass*, nor can he sustain even an action on the *case* for the malicious charge occasioning the imprisonment, although it should turn out that no offence whatever had been committed, unless he can prove that the party who obtained the warrant acted maliciously and without probable cause. (h)

It would be beyond the limits of this work to attempt to enumerate all the instances in which, by the *common law*, or by *general or local* statutes, private persons and officers are authorized, either with or without warrant, to apprehend supposed offenders. (i) The general rule is, that a private person, in order to justify or excuse his giving charge to a peace officer who has not had actual view of a breach of the peace, must be prepared to prove that a *felony* had been committed by some one, and that he had *reasonable grounds* upon facts to suspect that the party apprehended was the guilty person. (k) But a *constable*, or other proper officer, is justified in acting upon the charge of felony made by another, if he have reasonable grounds for suspecting that the party charged was guilty of the felony, though he turn out innocent, and although no felony whatever has actually been committed, (l) and if such officer have such reasonable suspicion, he may justifiably cause the party, though aged, and a resident in the place, even to leave his bed between ten and eleven at night, and go into prison till the next morning. (m) But he must not handcuff a person unless he has reason to fear an escape. (n)

Under the Metropolitan Police Act, 10 G. 4, c. 44, s. 7.

There are many regulations of a local nature; as those relating to "*the metropolitan police district*," and extending over the metropolis and its vicinity and the river Thames, and also Middlesex, Surrey, Hertford, Essex, and Kent, viz. the

(g) *Rex v. Bright*, 4 Car. & P. 387.

(h) *Leigh v. Webb*, 3 Esp. R. 166; *Belk v. Broadbent*, 3 T. R. 185; *Cooper v. Boot*, 1 T. R. 535, *post*, 630, note (g).

(i) See the general common law rules fully stated, 1 Chitty's Crim. L. 16 to 71, and Burn's J. tit. Arrest.

(k) *Davis v. Russell*, 5 Bing. 366; *Fox v.*

Gaunt, 3 Bar. & Adolp. 798.

(l) *Id. ibid.* 354; 2 Moore & P. 590, S. C.; *Beckwith v. Phillip*, 6 B. & Cres. 637.

(m) *Davis v. Russell*, 5 Bing. 365.

(n) *Wright v. Court*, 4 B. & Cres. 596; 6 D. & R. 623, S. C.

3 Geo. 4, c. 55; (o) 6 Geo. 4, c. 21; and 10 Geo. 4, c. 44, (p) and c. 45, and which authorize any man belonging to *the police force*, during the time of his being on duty, to apprehend certain suspicious persons, as "all loose, idle, and disorderly persons whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of evil design, and all persons whom he shall find, between sunset and the hour of eight in the forenoon, lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves, and to deliver any person so apprehended into the custody of the constable appointed under that act." (q) The prior act, 3 Geo. 4, c. 55, s. 21, authorized, besides police officers, (r) "*other persons*" to apprehend every *such* suspected person, or *reputed thief*, and to convey him before a justice. But it was held that that provision only applied to the apprehension of persons of *general* bad character as rogues and vagabonds, and not to arrest on suspicion only of a particular felony. (s) Some powers of this nature were also given by the *metropolis paving act*.

There are some acts extending over the *whole* kingdom, and which, on account of their *general* importance, we will more particularly consider. The *vagrant act*, 5 Geo. 4, c. 83, extends over the whole of England, and after defining, but in very general terms, who shall be deemed *idle and disorderly persons*, and who *rogues and vagabonds*, and who *incorrigible rogues* (and under which three heads almost every kind of suspicious person seems to be included,) (t) it authorizes "any

Under General
Vagrant Act,
5 Geo. 4, c. 83.

(o) Sec. 19, 21, 25, 29, 32.

(p) Sec. 17. See the statutes, Burn's J. Police, Metropolis.

(q) 10 G. 4, c. 44, s. 7.

(r) As the power of *other persons* to apprehend was not repeated in 10 G. 4, c. 44, s. 7, it may be collected that it was considered dangerous to continue that power, and perhaps in respect of the case

mentioned in the next note.

(s) *Cowles v. Dunbar*, 1 M. & M. 37; 2 Car. & P. 565, S. C., decided on the preceding act, 3 G. 4, c. 55, s. 2.

(t) See Vagrant Act, 5 G. 4, c. 83, s. 3, 4, 5; see them well analyzed and stated, Burn's J. 26 ed. tit. Vagrant, and *infra*.

The 5 G. 4, c. 83, s. 3, enacts—1. "That every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family, whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township, or place;"

2. "Every person returning to and becoming chargeable in any parish, township, or place, from whence he or she shall have been legally removed by order of two justices of the peace, unless he or she shall produce a certificate of the churchwardens and overseers of the poor of some other parish, township, or place, thereby acknowledging him or her to be settled in such other parish, township, or place;"

3. "Every petty chapman or pedlar wandering abroad and trading, without being duly licensed, or otherwise authorized by law;"

4. "Every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner;"

5. "And every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing, or procuring, or encouraging any child or children so to do;"

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person whatsoever to apprehend any person *who shall be found offending* against that act," (as *inter alia* "*being found in or*

6. [And every person asking alms under a certificate or other instrument prohibited by the act, s. 16;]

" Shall be deemed an *idle and disorderly person* within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by his own view, or by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month."

By the 5 Geo. 4, c. 83, s. 4, it is enacted, " that every person committing any of the offences hereinbefore mentioned, after having been convicted as an idle and disorderly person ;"

2. " Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of his majesty's subjects ;"

3. " Every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself ;"

4. " Every person wilfully exposing to view, in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition ;"

5. " Every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female ;"

6. " Every person wandering abroad, and endeavouring, by the exposure of wounds or deformities, to obtain or gather alms ;"

7. " Every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence ;"

8. " Every person running away and leaving his wife, or his or her child or children, chargeable, or whereby she or they, or any of them, shall become chargeable to any parish, township, or place ;"

9. " Every person playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game, or pretended game of chance ;" *

10. " Every person having in his or her custody or possession any picklock key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable, or outbuilding, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument with intent to commit any felonious act ;" †

11. " Every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose." ‡

12. " Every suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse, near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony ;"

13. " And every person apprehended as an idle and disorderly person, and violently resisting any constable or other peace-officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended ;" §

" Shall be deemed a *rogue and vagabond*, within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months; and every such picklock key, crow, jack, bit, and other implement, and every such gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, and every such instrument as aforesaid, shall, by the conviction of the offender, become forfeited to the king's majesty."

By the 5 Geo. 4, c. 83, s. 5, it is enacted, 1. " That every person breaking or escaping out of any place of legal confinement before the expiration of the term for which he or she shall have been committed or ordered to be confined by virtue of this act ;"

* In *Rex v. Clarke*, 1 Cowp. 35, it 207.

was held, that playing bowls was not within the 17 Geo. 2, c. 5, s. 2.

† See *Rex v. Howarth*, R. & M., C. C.

‡ And see 4 Geo. 4, c. 64, s. 7.

§ See another instance in s. 15.

upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, *for any unlawful purpose*," (u) and forthwith to take and convey him before a justice of the peace, to be dealt with as therein mentioned. (u) Upon the vagrant act it has been held that a man may be arrested without warrant, as a person "*found in a dwelling-house, for an unlawful purpose*," if he have been *seen* in the house, although before apprehension he has got out, and was afterwards taken on fresh pursuit; and that it makes no difference that he was not seen getting out of the house, if he was found concealing himself to avoid being apprehended, and that to make such arrest legal, it is not necessary that the person should have at the time he was arrested a *continuing* purpose to commit a felony, and that he may be arrested, though the unlawful purpose had wholly ended; and it was also held, that where the circumstances are such that a man must know why he is about to be apprehended, he need not be told why, and his resistance of arrest will be illegal. (x)

The statute against *larcenies and petty takings* of personal or real property, (y) contains special provisions, enabling the person entrusted with the care of *Deer*, and for any of his assistants, whether on his premises or not, to demand from any person who has entered into the grounds therein mentioned, with intent unlawfully to take deer, any gun or engine in his

Apprehension under the act against larcenies and petty takings, 7 & 8 G. 4, c. 29.

2. "Every person committing any offence against this act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be, and duly convicted thereof;"

3. "And every person apprehended as a rogue and vagabond, and violently resisting any constable or other peace-officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended;"

"Shall be deemed an *incorrigible rogue* within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him, by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses,) to the house of correction, there to remain until the next general or quarter-sessions of the peace; and every such offender who shall be so committed to the house of correction shall be there kept to hard labour during the period of his or her imprisonment."

(u) Id. s. 6. See the very able and acute observations on the Vagrant Act by Mr. Adolphus, published A. D. 1824, showing the undefined, unlimited, and dangerous powers given by that act, and the indiscreet or malevolent exercise of which so frequently give rise to the most vexatious imprisonment and subsequent litigation. It will be found that, under that act, the *mere suspicion* of a *propensity* to commit a trifling offence is punishable, by a single magistrate, with three calendar months' imprisonment, without the power of obtaining release upon finding the most satisfactory sureties for his

good behaviour. And this power is too frequently enforced. If the occupier of an area should, even in the day time, discover a person there without his leave, for a temporary purpose, or courting his servant, or otherwise, as a trespasser, he might, under this act, apprehend him, and a magistrate might commit him absolutely to prison for three calendar months. What a monstrous power to vest in private individuals, or even in a magistrate!

(x) *Rex v. Haworth* R. & M. C. C. 207; and see *Hanway v. Boulbee*, 2 Mood. & M. 15, fully stated, *post*, 625.

(y) 7 & 8 G. 4, c. 29.

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possession, and any dog *there brought* for hunting such deer, and in case the same be not *immediately* delivered up, to take the same from him *in any of the places named*, or *upon pursuit made* in any other place to which he may have escaped therefrom, for the use of the owner of the deer. (x) Another section (a) enacts, that if any person shall at any time be *found fishing in the waters* enumerated, and against the provisions of that act, it shall be lawful for the owner of the ground, water, or fishery, where such offender shall *be so found*, his servants, or any person authorized by him, to demand from such offender any rods, lines, hooks, nets, or other implements for taking or destroying fish, which shall then be in his possession, and in case such offender shall not *immediately deliver up the same*, to seize and take the same from him for the use of such owner, but provides that any person angling in the day time, against the provisions of the act, from whom any implements used by anglers shall be taken, by whom the same shall be delivered up as aforesaid, shall, by the taking or delivering thereof, be exempted from the payment of any damages or penalty for such damages. (b)

Then follows a general provision (c) for the apprehension without warrant of offenders *found committing* any offence punishable under that act, either by indictment or a summary conviction, excepting only angling in the day time, and which apprehension, it is provided, may be made without warrant by any peace officer, or by the *owner of the property*, on or with respect to which the offence shall be committed, *or by his servant or any person authorized by him*, and the offender is forthwith to be taken before some neighbouring justice to be dealt with according to law.

Apprehensions
under the act
against mali-
cious injuries to
property, 7 & 8
Geo. 4, c. 30, s.
28.

The 7 & 8 Geo. 4, c. 30, s. 28, *against malicious and wilful injuries to property*, contains a power to apprehend any person "*found committing*" any offence against that act, whether punishable by indictment or upon summary conviction, and by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him. (d) To justify the apprehension by a private individual without warrant, under this act, the offender must, in general, be *found* by him in the *actual commission* of the offence, and taken at the

(x) 7 & 8 Geo. 4, c. 29, s. 29. It will be observed, this act extends to assistant keepers, and requires a demand, which the prior act did not. See *Rez v. Amy*, Russ. & Ry. 500.

(a) 7 & 8 Geo. 4, c. 29, s. 35.

(b) See 2 Barn's J. 760, &c.

(c) 7 & 8 Geo. 4, c. 29, s. 63.

(d) See cases on this act. 3 Barn's J. 741, 742, 36 ed.

time, (e) and the party must be then doing *actual damage*; and it has been held that the mere fact of a man's treading down the grass by walking in a field out of a lawful footway, is not sufficient to justify an apprehension or conviction, (f) and the offender must at least be acting *wilfully*. (g) But if the offender be taken upon fresh pursuit his apprehension would be legal. (h) Under the last-mentioned section there is a recent decision (h) affording a useful construction of the words "*found committing*" any offence in this or any other act. It was held, that if a person unreasonably beat and *materially* injure a small dog, under colour or pretence of self-defence against the dog's barking at him, such injury is wilful, within the meaning of the 24th section, and, that although he had gone off to the distance of a mile, yet upon *immediate pursuit*, he might be legally apprehended and taken before a magistrate; and Tindal, C. J. said, "with respect to this question, the words of the 7 & 8 Geo. 4, c. 30, s. 24 & 28, certainly differ materially from those of 1 Geo. 4, and were obviously meant to restrict the powers given by that act. The object of the legislature seems to have been to allow the immediate apprehension of a party taken in the commission of a crime of this nature, *because otherwise such offences would frequently be committed by persons passing through, or having no fixed domicile in the place, and they would therefore entirely escape, if the party injured were obliged to wait for the formalities of a charge before a magistrate, or a warrant.* Where the offender is fixed in the country, so that he can be found and apprehended at a subsequent time, there is no reason why that apprehension should not be after a regular proceeding; and the statute therefore differs from 1 Geo. 4, c. 56, (i) and does not allow a *stale* apprehension on an old charge without a warrant. Still the words of the present statute must not be taken *so strictly* as to defeat its reasonable operation. Suppose a party seen in the act of committing the crime were to run away, and immediate and fresh pursuit to be made, I think that would be sufficient; so in this case, the party is actually seen in the commission of the act complained of; as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence

(e) See *Rex v. Curran*, 3 Car. & P. 397, and *Rex v. Howarth*, R. & M. C. C. 207; *Beechey v. Sides*, 9 Bar. & C. 806, as to the words "*found committing*," *Attorney-General v. Delano*, 1 Price, 383; and *Hanway v. Boulbee and Wife*, 2 Mood. & M. 15.

(f) *Butler v. Turley*, 2 Car. & P. 585; *Dewey v. White*, M. & M. 54, 56.

(g) *Rex v. Turner*, R. & M. C. C. 239.

(h) *Hanway v. Boulbee*, 2 Mood. & M. 15; 4 Car. & P. 350, S. C.

(i) Repealed by 7 & 8 Geo. 4, c. 27.

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Apprehensions
under 9 Geo. 4,
c. 69, s. 2,
against Night
Poachers.

could be required, and that being the case, I think it must be treated as an "*immediate apprehension*," for an offence which the plaintiff (supposing under the circumstances that it was an offence at all) was "*found committing*." (k)

The 9 Geo. 4, c. 69, sect. 2, against *Night Poaching*, provides, "that where any person shall be *found* (l) *upon any land committing any such offence* as is hereinbefore mentioned, (m) it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for the gamekeepers or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant to seize and apprehend such offender upon such land, or in case of *pursuit* being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace." The act provides against assaults and resistance of such apprehension, (n) by enacting "That in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor," and on conviction be transported for seven years, or imprisoned, with hard labour, for not exceeding two years. But under this clause it has been held, that a stick or bludgeon *not taken out* by the offender for the purpose of attack, is not *an offensive weapon* within the meaning of the act. (n)

It has been decided under this act, that if gamekeepers attempt to apprehend persons armed with offensive weapons, who are poaching in the night, and one of the gamekeepers be shot by one of the poachers, this will be murder in all, unless it be shown that either of the poachers separated himself from the rest, so as to show that he did not join in the act; (o) and

(k) *Supra*, 625, note (h).

(l) In *Attorney General v. Delano*, 1 Price Rep. 383, the word "*found*" means "having been seen or discovered," and see *ante*, 625, note (h), and *Rex v. Barkart*, R. & M. C. C. 151 : 10 Bar. & C. 89, S. C.

(m) See the sections, *ante* 401 to 403. The act is confined to *Night Poaching*, therein defined.

(n) See enactments, *ante*, 401 to 403;

and see 2 Burn's J. 26 ed. 927, &c.; and see Carrington's Criminal Law, 147. It has been held that a stick or bludgeon, not taken out for the purpose of attack, is not an "offensive weapon" within that act, *Rex v. Palmer*, 2 Mood. & M. 70.

(o) *Rex v. Edmeads*, 3 Car. & P. 390; *Rex v. White*, Russ. & Ry. C. C. 99.

where gamekeepers had seized two persons who were poaching in the night, and they having surrendered, called to a third, who came up, and he killed one of the gamekeepers, it was held to be murder in all, though the two struck no blow, and though the gamekeepers had not announced in what capacity they had apprehended him. (*p*)

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The *Game Act*, 1 & 2 Wm. 4, c. 32, s. 31, enables the person entitled to the game, or any person by his order, to apprehend and detain for not more than twelve hours, and take before a justice, "any person *found on any land in search or pursuit of game*, and refusing to tell his real name or place of abode, or by giving so general a description as to be illusory for the purpose of discovery, or by wilfully continuing or returning upon the land; (*q*) and *game fresh killed* in the possession of such a trespasser whilst trespassing, may be seized for the use of the owner of the game. (*r*)

Apprehension of
trespassers
under the Game
Act, 1 & 2 Wm.
4, c. 32, s. 31,
ante, 405.

It will be observed that many of these acts also give power to *seize* guns, nets, fishing tackle and dogs for the use of the owner of the property injured by the offence. In such a case, after the seizure, the property may be destroyed, because the new owner may do what he pleases with it, and he may therefore kill a dog so seized; (*s*) but if the property is merely to be seized or to be taken as a distress, then at common law any injury to it would render the party seizing a trespasser *ab initio*, as where a party cuts nets which he had taken damage feasant. (*t*)

It will be found that the principle of these modern acts authorizing private persons to apprehend offenders is not new, but will be found in the ancient acts respecting offences in forests and parks, and in the General Highway Act, (*u*) Turnpike Act, (*x*) and in most of the local Paving and Police Acts, in order to secure transient offenders.

Besides the particular protections sometimes expressly given by each of these several acts to persons *lawfully* apprehending offenders, the general act for the protection of the person, 9 G. 4, c. 31, s. 12, expressly enacts, "that if any person shall unlawfully "and maliciously shoot at any person, or shall by drawing a "trigger or in any other manner attempt to discharge any kind "of loaded arms at any person, or shall unlawfully and maliciously stab, cut or wound any person, with intent to maim,

General protection to persons
apprehending
offenders afforded by 9
Geo. 4, c. 31,
s. 12, against
criminal resistance.

(*p*) *Rex v. Whilorne*, 3 Car. & P. 394.

1 Marsh. 106, S. C.

(*q*) 1 & 2 Wm. 4, c. 32, s. 31.

(*t*) *Tyler v. Wall*, Cro. Car. 228.

(*r*) *Id.* sect. 36.

(*u*) 13 Geo. 3, c. 78, s. 60.

(*s*) *Kingsnorth v. Bretton*, 5 Taunt. 416;

(*x*) 3 Geo. 4, c. 126.

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"disfigure or disable such person, or to do him some other
"grievous bodily harm, or with intent to resist or prevent the
"lawful apprehension or detainer of the party so offending,
"or of any of his accomplices, for any offence for which
"he or they may respectively be liable by law to be appre-
"hended or detained, every such offender and every person
"counselling, aiding or abetting such offender, shall be guilty
"of felony, and being convicted thereof *shall suffer death as*
"*a felon.*" But then the act provides "that in case it shall
"appear on the trial of any person indicted for any of the
"said offences, that such acts of shooting or of attempting to
"discharge loaded arms, or of stabbing, cutting or wounding
"as aforesaid, were committed under such circumstances that
"if death had ensued therefrom the same *would not in law*
"*have amounted to the crime of murder*, in every such case the
"person so indicted shall be acquitted of felony." (y)

When parties
apprehending
offenders are
not protected.

It has been held that the powers given by acts of this description authorizing the taking of certain description of persons, or to search by warrant suspected houses of a certain description, are *strictly confined to such persons and such houses*, and that if a person be taken not answering the description, then the arrest, even under a general warrant against such persons or houses, will be illegal, and subject the parties to an action of trespass. (z) And even killing in resistance of the arrest would, in that case, only be manslaughter and not murder. (a) Therefore where a writ of assistance was addressed to certain officers therein mentioned, and under the 6 Geo. 4, c. 108, s. 40, directed them to enter and search any house, shop, &c. where smuggled goods were or were suspected to be concealed, it was held that such writ did not confer a general and absolute authority to enter and search all houses for smuggled goods, but that such entry and search

(y) It has been correctly observed, that it is rather to be regretted that in indictments for these offences, the legislature did not give the jury a power of finding the party guilty of the stabbing, &c. and that if death had ensued, the crime would have been *manslaughter*, and then have subjected the offender to a *smaller punishment*; for at present if a person is tried for stabbing, &c. and it appears that if death had ensued, it would have been only an aggravated case of manslaughter, the prisoner is *acquitted* and gets discharged from custody without *any punishment whatever*. It is true that an indictment for *an assault* might be preferred against him, but as the grand jury are

generally discharged before the trial takes place on the capital charge, such an indictment is in practice never preferred. See Carr. Crim. L. 3d edit. 339; and see *The King v. Edwards*, post, 629, n. (d); and *The King v. Newell and others*, post, 629, n. (e); *Rex v. Curran*, 3 Car. & P. 397.

(z) *Rex v. Adey*, 1 Leach, 208; and see *Cowles v. Dunbar*, 1 M. & M. 37; 2 Car. & P. 565, S. C.; Hawk. b. 2, c. 13, s. 31; *Handcock v. Baker*, 2 Bos. & Pul. 262; *Bell v. Oakley and others*, 2 M. & S. 261; *Brady's case*, 1 Leach, 329.

(a) 1 East, P. C. 303, 313, 325; *Tooley's case*, 2 Ld. Raym. 1296, 1301; 2 Hale, 89.

must be justified by reference to the event, or at least to probable cause, and that if there appeared to be no probable cause the entry was illegal and might be resisted, and the officers legally obstructed. (b)

So in a late case it was held, that although the Game Act, 1 & 2 Wm. 4, c. 32, authorizes the apprehending and detaining for twelve hours persons *found trespassing* in pursuit of game in the day time, when he refuses to communicate his name, any apprehension in *the day time* in *other* cases would be illegal, and that if the party making it should be resisted and hurt, the trespasser would not be indictable under the 9 Geo. 4, c. 31, s. 12, for his resistance and occasioning them grievous bodily harm, and if death had ensued, the offence of killing would not have amounted to *murder*; (c) and that, consequently, the cutting, &c. was not an offence within 9 Geo. 4, c. 31, s. 12. (d)

So in another recent case, where the prisoners were indicted under the 9 Geo. 4, c. 31, s. 12, for feloniously cutting the prosecutor, and it appeared that they had been seen by the prosecutor under suspicious circumstances coming out of a cattle shed, and the prosecutor thereupon went into his house to fetch his pistols, and the prisoners in the mean time having got off the premises into *an adjoining field*, and they, upon being challenged, gave fictitious names, and thereupon he attempted to seize them there and they cut him, it was held that under the Vagrant Act he was only justified in apprehending the prisoners *when found in the shed* and *not in the field*, and that, consequently, their cutting in resistance of the illegal apprehension was not indictable. (e)

(b) *Rex v. Watts*, 1 Bar. & Adolp. 166; and see *Warne v. Valley*, 6 T. R. 443, as to the strictness required in construing statutes which give power of search and seizure.

(c) *Ante*, 627, 628.

(d) *Rex v. Edwards*, 8 March, 1833, cor. Lord Lyndhurst, at Hertford; and see observations in Carr. Crim. L. 3d edit. 239; *ante*, 628, note (y); see also *Rex v. Curran*, 3 Car. & P. 397.

(e) *The King v. Newell and J. and E. Speller*, Chelmsford, 7th March, 1833, cor. Tindal, C. J. The prisoners were indicted under 9 Geo. 4, c. 31, s. 11 & 12, for feloniously cutting *P. Felton*. The facts of the case were these:—The prosecutor was sitting at his father's house on the night of the 17th of January, when, about ten at night, the yard-dog barked violently. He immediately went out, and from the circumstance of the dog continuing to

bark he was convinced that some person was about the premises. He called out several times, and then saw the three prisoners come forth from the cattle-shed. They were all armed with bludgeons, and had each a bag under his arm. He insisted on knowing their names, but they refused to tell him. The prosecutor perceiving that there were three persons armed, and that he could not attempt to cope with them unarmed, returned into the house to get his pistols. Having procured them, he went out into the yard. The prisoners had then gone off the premises, and were in a field through which a foot-path ran. He went up to them and insisted on knowing their names. Two of them gave pretended names, and the third did not speak. At this time the brother of the prosecutor came up. The latter then attempted to take one of the prisoners. On this they called out that

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Preferable to
obtain a war-
rant.

Protection of
persons appre-
hending from
actions.

In all cases, therefore, when it is doubtful whether the party has committed a felony, and when it is doubtful whether he comes within the general description either in the acts referred to or in the warrant, the safest course is to wait until a *particular* warrant has been obtained against the particular person, in which case, although it should afterwards appear that he was innocent, he cannot maintain any action unless he can prove that the charge was maliciously made against him without any reasonable cause, whereas when the proceedings have been without warrant, he may *prima facie* support an action of trespass; (f) and if the magistrate should erroneously issue a warrant when he ought not, the party procuring it would not be liable. (g)

However, in general, not only officers but private persons who apprehend supposed offenders without warrant, have *adequate protections* against or means of getting rid of *civil actions* for any irregularity, when they have acted *bonâ fide* without malice, but have either mistaken the offence, or the person, or the regularity of their proceeding; we have already adverted to the protection in general afforded by the acts against larceny and other offences of that nature, and against malicious or wilful injuries to property, (h) and other acts professedly passed for the *protection* of persons acting *in the execution* of the respective acts, and which terms have been construed to protect persons in the *bonâ fide*, though mistaken, exercise of the powers given by the particular act, and not to be confined to persons who have strictly acted as authorized, who would in that case not require any protection. (i) These require a *notice of action*

they would not be taken, and a severe blow was struck at the prosecutor on the back of his neck. This brought him to the ground, and there he was struck several times. When he got up he fired both pistols, but neither of the balls took effect. He and his brother were then beaten so unmercifully that they were unable to see for the streaming of the blood of their heads into their eyes. They remained senseless for some time, and on recovering, the prisoners were gone.

Lord Chief Justice Tindal thought, that although under the 5th of Geo. 4, c. 83, (the Vagrant Act,) the prisoners might have been seized *on the premises* of the prosecutor, it was not competent for him to seize them when they were *off the premises and in a field through which there was a path*. The resistance which the prisoners had made, though excessive, and the subject of an indictment for an assault, would not come within the statute, 9 Geo,

4, c. 31, s. 12; for if death had ensued, the prisoners' offence would not have amounted to *murder*.

The jury, under his lordship's direction, returned a verdict of *not guilty* as to all the prisoners; see also *Rex v. Curran*, 3 Car. & P. 397.

(f) 7 & 8 Geo. 4, c. 29, s. 75.

(g) *Leigh v. Webb*, 3 Esp. R. 166; *Belk v. Broadbent*, 3 T. R. 185; *Boote v. Cooper*, 1 T. R. 535; but see *Else v. Smith*, 1 Dowl. & R. 97; 2 Chit. R. 304; as to the liability to an action on the case for *maliciously* inducing a magistrate improperly to issue a warrant.

(h) 7 & 8 Geo. 4, c. 30, s. 41; *Wright v. Wales*, 5 Bing. 336; 2 Moore & P. 613, S. C.; and as to costs, 3 Moore & P. 96, S. C.

(i) *Bretching v. Sides*, 9 Bar. & C. 806; *Cook v. Leonard*, 6 B. & C. 355; *Wright v. Wales*, 5 Bing. 336; 2 Moore & P. 613; 3 Moore & P. 96, S. C.; see the

and other formal steps on the part of any person suing them, and authorize a *tender of amends* on the *payment* of the amount *into court*, and deprive the plaintiff of costs although he should recover a verdict, unless the judge should certify his approbation of the action and also of the verdict obtained thereupon. (k)

It may be objected that these are strong measures against the liberty of the subject, allowing *private individuals* of their own accord to imprison others, and then imposing such qualifications upon the remedy in case of false or irregular imprisonment as to render recovery very hazardous; but on the other hand it will be remembered, that in a crowded and demoralized population there are so many transient offenders who would escape if not immediately apprehended, that it is absolutely essential for the protection of property that such apprehensions should be allowed; (l) and supposing there should be any mistake, error or irregularity, the party imprisoned ought to be satisfied by a tender of sufficient amends; and admitting that he has been maliciously, hastily or otherwise improperly apprehended, and that he has thereby really sustained considerable damage, there is no danger of a jury's not giving him adequate compensation, or of a judge declining in such a case to certify his approbation of the action, and also of the verdict obtained thereupon, when given temperately and not for excessive damages.

Consideration of the expediency of these powers of apprehension.

However, notwithstanding these strong powers and protections, it is for the reasons just urged recommended that where time will allow, the party be proceeded against by regular warrant, founded upon information of the offence taken on oath, especially when the offender is known and might afterwards be apprehended under a warrant and by regular officers, who would probably better know how to effect a capture, and who being known officers would probably prevent resistance. (n) It may be expedient that offenders should know that they are at night and at all times liable to be apprehended when they are *found committing* an offence, and that they will be guilty of felony if they wil-

Better to act under a special warrant. (m)

older cases, *Greenway v. Hurd*, 4 T. R. 555; *Weller v. Took*, 9 East, 364; *Briggs v. Evelyn*, 2 Hen. Bla. 114. But where a watchman being authorized under a local act to apprehend all *vagrants found wandering*, apprehended not the person but the animal conducted by him, after it had ceased to be a nuisance in the street and when the same was in a stable; it was held, that the watchman was not entitled to the protection of the act, being so gross a deviation from the authority given as not

to be *bona fide* done; *Cook v. Leonard*, 6 B. & C. 355; and see *Morgan v. Palmer*, 2 B. & C. 729; *Gaby v. Wilts Canal Company*, 3 M. & S. 580; *Irving v. Wilson*, 4 T. R. 485.

(k) See 7 & 8 Geo. 4, c. 29, s. 75; and *Id.* c. 30, s. 41.

(l) *Per Tindal, C. J.* in *Hanway v. Boulton*, 2 Mood. & M. 15, and 4 Car. & P. 350, S. C. *ante*.

(m) *Ante*, 630.

(n) *Per Tindal, C. J. ante*, 625, note (h).

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fully injure a person in resisting apprehension; but it deserves much consideration whether it can be morally proper that, for the sake of preserving game or other property from any offence less than burglary or arson, man, especially when armed, should, without formal warrant, be placed in personal competition and conflict with man.

Of the necessity for notifying the ground or reason for the apprehension.

Whenever an officer or a private individual acts, with or without a warrant, he should *in all cases* take care to *notify* in the first instance his authority to the party about to be apprehended, for otherwise his resistance might be excused, excepting in the case of a *known* constable or peace officer, or where the ground of the arrest is already sufficiently known to the offender, *(n)* as where he is found in an inclosed area or yard for an unlawful purpose. *(o)* It was therefore held to be no offence within the clause in Lord Ellenborough's Act, 43 Geo. 3, c. 58, against maliciously cutting, with intent to resist lawful apprehension, if the cutting took place in an attempt to apprehend the prisoner previous to *any notification* being made to him of the purpose for which he was laid hold of; and *per* Lawrence, J. "If death had ensued it would only have been manslaughter. Had a proper notification been made before the cutting, the case would have assumed a different complexion. *(p)* Every officer should, when attempting to apprehend a supposed felon, declare that he is an officer, and the object of his proceeding, for otherwise a forcible resistance may not be criminal, or so criminal as it otherwise would be; thus it was holden not felony under the 43 Geo. 3, c. 58, to cut an officer about to arrest the party, but who did not declare his business. *(q)* But if a constable, acting within his district, where he is *generally known*, produce his staff of office, the law will presume that the party to be apprehended had notice of his intent without any express verbal notice; and it is sufficient for a constable to say, he arrests *in the king's name*. *(r)* And where the party knows the officer and his business, the law requires no express notice to be given; as where the prisoner drew his sword upon a bailiff, who came to arrest him, and said, "stand off, I know you well enough—come at your peril;" and upon the bailiff immediately taking hold of him, without using words of arrest or showing any warrant, the prisoner killed him, this was holden to be murder. *(s)*

(n) *Mackally's case*, 1 Hale, 583, 589; 1 East, P. C. 315; 9 Co. 69, S. C.; *Rex v. Howarth*, Ry. & M. C. C. 907.

(o) *Rex v. Howarth*, R. & M. C. C. 207; but see 1 East, P. C. 306.

(p) *Gordon's case*, 1 East, P. C. 315.

(q) *Rex v. Richets*, 3 Campb. 68.

(r) 1 Hale, 583.

(s) *Pew's case*, Cro. Car. 183.

When a private person has apprehended an offender at common law for a supposed felony, he should immediately, or as soon as practicable, deliver over the prisoner to a constable, or convey him before a magistrate, or to any gaol in the county. (t) But the preferable course is to see that he be taken as soon as practicable before a magistrate. (u) A constable must take any prisoner before a magistrate to be examined as soon as possible. (x) But if the apprehension be at night, and during the hours of rest, then the prisoner may be taken out of his home and placed during the night in a secure prison until the earliest hour of business the next morning. (y) But the party must not be handcuffed, much less beaten, unless there be resistance or real danger of rescue. (z) And where there has been an arrest without warrant for a mere assault, and not for a felony, the constable may, if the party be well known and there be no danger of absconding, take his word. (a) Where the apprehension has been by a private person or officer, under the expressed powers of the foregoing acts, they sometimes particularly direct what shall be done with the person apprehended, (b) as "that he shall be *forthwith* taken before some neighbouring justice of the peace, to be dealt with according to law;" (b) or in the Game Act, "as soon as conveniently may be, and at all events within twelve hours after the first apprehension. (c) And the Vagrant Act is in the alternative, that the party "shall be forthwith taken before some justice of the peace, or be delivered to a constable or peace officer of the place where taken by him, to be conveyed before a justice." (d)

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What to be done by a private person or constable immediately after the apprehension.

V. Where persons having *lawful* authority to arrest, apprehend, or imprison, or otherwise to advance or execute the public justice of the kingdom, either civil or criminal, and using the proper means for that purpose, are resisted in so doing, not only is such resistance of itself illegal and punishable at common law, (e) but if the party illegally resisting, or any other assisting him, be killed in the struggle, such homicide is *justifiable*; (e) whilst on the other hand if the party having such authority, and executing it properly, happen to be killed, it will

V. Of resistance of imprisonment, and when an escape, rescue or prison-breaking is lawful, and when if death or personal injury ensue, the same will be punishable, and how.

1. By party himself.

(t) 1 Hale, P. C. 589; 2 Hale, 77.

(u) Id. ibid.; *Rex v. Hunt*, R. & M. C. C. 93; *Rex v. Curran*, 3 Car. & P. 397; *Davis v. Capper*, 10 Bar. & Cres. 28.

(x) *Wright v. Court*, 4 Bar. & Cres. 596; 6 Dowl. & R. 623, S. C.

(y) *Davis v. Russell*, 5 Bing. 354.

(z) *Wright v. Court*, 4 Bar. & Cres. 596; 6 Dowl. & R. 623, S. C.; 2 Hale,

119 to 126, 195.

(a) *Hardy v. Murphy*, 1 Esp. R. 295; *Arrowsmith v. Le Masurier*, 2 New R. 211; 1 Chit. Cr. L. 59.

(b) 7 & 8 Geo. 4, c. 29, s. 63, and c. 30, s. 28.

(c) 1 & 2 Wm. 4, c. 38, s. 31.

(d) 5 Geo. 4, c. 83, s. 6.

(e) 1 East, P. C. 305.

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at common law be murder in all who take a part in such resistance. (f) Several acts have from time to time been passed in affirmance of such common law rule, and defining and prescribing the punishment of the resistance of lawful authority, (g) and we have seen that the 9 Geo. 4, c. 31, s. 12, in particular, punishes *with death*, as a capital felony, various *malicious injuries* to the person, committed in resistance of *lawful* imprisonment, although death do not ensue. (h)

But it will be found that the common law, and all these acts, either expressly or implied, suppose that the arrest or imprisonment has been *lawful*, (i) and therefore an indictment or prosecution for the resistance, (k) or rescue, or prison breaking, must show the nature and cause of the imprisonment from which the party escaped or was rescued, in order that it may appear that the escape or rescue was illegal. (l) Therefore, where upon an indictment upon the 16 Geo. 2, c. 31, for facilitating the escape of another, it appeared that the latter was committed and imprisoned only upon *suspicion* of felony, the judges after conviction held the case not within that act, which related only to commitment for treason, or *felony clearly and plainly* expressed in the warrant; (m) and which decision occasioned the 1 & 2 Geo. 4, c. 88, making it punishable to rescue, or assist in rescuing, any person whether imprisoned for felony or *suspicion thereof*. So in a recent case the judges were of opinion, upon an information for assaulting and obstructing officers of the customs in the execution of their duty, in attempting to enter a house and search it for smuggled goods under a writ of assistance, that the defendants must be acquitted, if the officers had not at least probable cause for suspecting that smuggled goods were there. (n)

It seems, therefore, to be clearly established, that if an officer, or person endeavouring to make an arrest or enter a house, had not *legal authority* for that purpose, or if in certain cases he abuse such authority, and do more than he was authorized to do, or if it turn out in the result that he had no right to enter, (o) then the party about to be imprisoned, or

(f) Fost. 270, 308; 1 Hale, 457; 1 East, P. C. 305.

(g) 1 & 2 Geo. 4, c. 88; 4 Geo. 4, c. 64; 5 Geo. 4, c. 54, s. 3; 9 Geo. 4, c. 31; ch. 83, s. 5; see Burn's J. titles Escape, Prison Breaking, Rescue; *Rex v. Haswell*, R. & R. C. C. 458.

(h) See sect. 12; *ante*, 627, 628.

(i) 1 & 2 Geo. 4, c. 88; 4 Geo. 4, c. 64; 5 Geo. 4, c. 54, s. 3; *Id.* c. 83, s. 5; 9 Geo. 4, c. 31; Burn's J. Escape,

Prison Breaking, Rescue; *Rex v. Haswell*, R. & R. C. C. 458; *Rex v. Stokes*, 5 Car. & P. 148; *Rex v. Bright*, 4 Car. & P. 387.

(k) *Rex v. Bright*, 4 Car. & P. 387.

(l) Hawk. c. 21, s. 5.

(m) *Rex v. Walker*, 1 Leach, C. L. 97; *Rex v. Greenruff*, 1 Leach, C. L. 363.

(n) *Rex v. Watts*, 1 B. & Adolp. 165.

(o) *Cooke v. Birt*, 5 Taunt. 765; *Rex v. Watts and others*, 1 B. & Adolp. 166.

whose house is about to be illegally entered, may resist the *illegal imprisonment* or entry by self defence, not using any deadly or dangerous weapon, and may escape or be rescued, or even break prison; (*p*) and others may assist him in so doing. (*q*) And although he would not be *justified* in killing the officer, unless he threatened him with immediate loss of life or forcible felony, yet the homicide in resisting the unlawful imprisonment or forcible trespass in the house will only be manslaughter. (*r*)

So if the warrant were illegal, the officer is not guilty of an escape by suffering the prisoner to go at large; and it seems to be a good general rule, that wherever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape. (*s*)

There are also other cases where imprisonment may be safely resisted; as if it be well ascertained that the process to arrest has had the name of the party or of the officer inserted without authority by an improper person, and after the delivery of the

(*p*) 1 East, P. C. 295; 1 Hale, 457, 464, 465, 583, 599; and see the words of 1 & 2 Geo. 4, c. 88, as to rescue from *lawful* imprisonment.

(*q*) *Rex v. Osmar*, 5 East, 304, 308; 1 Smith's R. 555, S. C. An indictment for an assault, false imprisonment, and rescue, stated that the judges of the court of record of *P.* issued their writ directed to *T. B.*, one of the serjeants at mace of the said town and county, to arrest *W.*, by virtue of which *T. B.* was proceeding to arrest *W.* within the jurisdiction of the said court, but that the defendant assailed *T. B.* in the *due execution of his office*, and prevented the arrest; and it was held that such indictment was bad, it not appearing that *T. B.* was an officer of the court; and that there could not be judgment after a general verdict on such a count as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated, which cause appears to have been, that the officer was attempting to make an *illegal arrest* of another, which being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it. Lord Ellenborough, C. J. "If a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose, and nothing further appears in this case to have been done;" the other judges agreed, and therefore the judg-

ment was arrested.

In *Cole v. Hindson and three others*, 6 Term Rep. 234, 236, it was held, that a plea of justification by an officer (to trespass for taking the goods of *A. B.*), that he took them under a *distringas* against *C. B.* (meaning the said *A. B.*) to compel an appearance, with an averment that *A. B.* and *C. B.* are the same persons, cannot be supported; and Lawrence, J. observed, "In *Foster*, C. L. 312, it is said, if the process be defective in the frame of it, as if there be a mistake in the name or addition of the person on whom it is to be executed, or if the name of such person or the officer be inserted without authority, and after the issuing of the process, or the officer exceed the limits of his authority and be killed, this will amount to no more than manslaughter in the person whose liberty is so invaded;" evidently showing that in such cases the officer is a trespasser.

Housin v. Barrow, 6 T. R. 122, the sheriff having directed a warrant to *A.* and all his other officers to arrest *B.*, *A.* afterwards inserted the name of *C.*, and it was held that the warrant was illegal, and the arrest by *C.* consequently void, 2 Wils. 47, S. P.; *Rex v. Stockley*, 1 East, P. C. 310, S. P.

(*r*) 1 East, P. C. 295; 1 Hale, 457, 464, 465, 583, 599; and see the words of 1 & 2 Geo. 4, c. 88, as to rescues from *lawful* imprisonment; and see *ante*, 634, note (*m*).

(*s*) Hawk. b. 2, c. 19, s. 1 & 2.

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process to the inferior officer to be executed, and such officer, in attempting to execute it, be killed, this is only manslaughter in the party whose liberty is invaded. (t) So if a person, not an officer of an inferior court, attempt to arrest a party under its process, a third party may with impunity rescue the person arrested, he doing no more than was necessary for that purpose. (u) So if the process be defective in the frame of it, as if there be such a mistake in the name of the party to be arrested as renders it illegal to execute it, and the officer be killed, it would only be manslaughter. (x) So where an escape warrant had been issued in blank, and afterwards the proper name was inserted by a person not legally authorized, and the officer was killed by the party to be arrested, it was held that he was only guilty of manslaughter. (y) And in an action on the case for the rescue of a person arrested under mesne process, it is necessary to aver and prove that the process was legal, although perhaps a general averment that the party was legally in custody might suffice. (z)

So no action of debt for an escape after judgment can be supported against the marshal or other officer, unless the party escaping were legally in his custody. (a) So if an officer abuse the process; as if he attempt to break open the *outer door* of the defendant's house in order to arrest him on mesne process, and not for a breach of the peace, and the latter, knowing the officer's purpose, fire through the door and kill him, that would only amount to manslaughter. (b) But it is no objection to the legality of a writ of *habere facias possessionem*, or other process, that the names of the officers to whom it is directed were inserted by interlineation after the writ was sealed, but while it remained unexecuted in the hands of the under-sheriff. (c)

We have seen that a person can only justify the shooting at or killing another when a *forcible felony* is about to be com-

(t) *Housin v. Barrow*, 6 T. R. 122; ante, 635, n. (q); *Pedley's case*, 1 Leach, 245; *Rex v. Osmer*, 5 East, 308; 1 East, P. C. 310; *Bertshem v. Fern*, 2 Wils. 47, S. P.

(u) *Rex v. Osmer*, 5 East, 304, 306; 1 Smith's R. 555, S. C.; ante, 635, n. (q).

(x) *Cole v. Hindson*, 6 T. R. 234; Foster, 312; ante.

(y) *Rex v. Stockley*, 1 East, P. C. 310; *Housin v. Barrow*, 6 T. R. 123; *aliter*, if the proper name was filled in after signed or sealed but by the proper officer, *Bertshem v. Fern*, 2 Wils. 47, S. P.; but see *Rex v. Harris*, 2 Leach, C. L. 929, *infra*, note (s).

(z) See Forms, 8 Wentw. Index,

XXIV.; *Bentley v. Donnelly*, 8 T. R. 127; Com. Dig. Rescous, D. 2; Bac. Ab. Rescue; *Kent v. Lewis*, Cro. Jac. 242; *Hodges v. Marks*, Id. 485; 2 Saund. 305, b.; *Brasier v. Jones*, 8 Bar. & C. 124; *Nightingale v. Wilson*, 10 Bar. & C. 202.

(a) 1 Saund. 37; *Fox v. Jones*, 7 Bar. & C. 80; *Brasier v. Jones*, 8 Bar. & C. 129; Bul. N. P. 65; *Weaver v. Clifford*, Cro. Jac. 3; *Barton v. Egre*, Id. 288.

(b) *Rex v. Nestor*, Hertford Assizes, Best, J. MS. 1 East, P. C. 321; what is an outer door, see *Hopkins v. Nightingale*, 1 Esp. R. 99.

(c) *Rex v. Harris*, 2 Leach, C. L. 929.

mitted; and as in the before-mentioned case of the illegal attempt to arrest by breaking open the outer door, the officer did not attempt a *felony*, the killing therefore was not justifiable, but punishable as manslaughter; although a mere battery of an officer, not using a dangerous weapon, in order to make him desist from any such illegal arrest, would be justifiable and defensible. (c) The same rule applies to criminal proceedings; but as the general and particular powers to apprehend without formal warrant, given by various statutes to officers of the customs and excise, (d) and to other officers arresting for felony, or suspicion of felony, (e) and under the vagrant act, and other acts against larceny and malicious injuries even to private persons, (f) are now so extensive, it very seldom occurs that any one can safely resist an apprehension, but should merely protest, and afterwards contest the legality of the imprisonment before the magistrate, or by writ of *habeas corpus*, or find bail, as in general the only safe course.

But in all these cases, whether of arrest for a supposed debt, or apprehension for a supposed crime, it is a general rule that the *falsity of the charge*, that is, the real injustice of the demand in the one case, or the party's innocence in the other, will afford no excuse for resisting the process, or the officer employed in enforcing it, when specific and express to take a particular party; and resistance, escape, or rescue, is only justified or excused where the process itself, or the conduct of the officer, is illegal, admitting the existence of the debt, or the guilt of the crime; for every man is *bound to submit himself to the regular course of justice*, and should wait the *ultimate decision* on the claim or the imputed crime. And therefore, although there be no debt, nor any just pretence for obtaining the warrant, yet if the process in itself be formal and sufficient, then resistance would be illegal, and if the resistance should occasion the death of the officer, it will be *murder*. And even a battery, or mere resistance of the officer, are in general punishable, as well at common law, (g) as under the provisions of various acts of parliament now extending to almost every case that can arise. (h) Thus, where a serjeant at mace had falsely sworn

Of the necessity for submitting to *lawful* imprisonment, without inquiring into existence of debt, or truth of the charge.

(c) *Rex v. Harris*, 2 Leach, C. L. 929.

(d) 6 Geo. 4, c. 108, Customs; 7 & 8 Geo. 4, c. 53, Excise.

(e) 1 & 2 Geo. 4, c. 88, s. 1 & 2.

(f) 7 & 8 Geo. 4, c. 29, s. 63, larceny and petty thefts; 7 & 8 Geo. 4, c. 30, s. 28, wilful or malicious injuries

to personal or real property; 1 & 2 Wm. 4, c. 32, game act; and various other statutes; *ante*, 620 to 627.

(g) 1 East, P. C. 309, 310; *Id.* 299, 300; 2 Inst. 590; Foster's Cr. C. 135; 1 Hale, 610.

(h) See several acts, *ante*, 620 to 627.

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The imprudence of resistance.

before a justice that he had been authorized by process to arrest Dixon, when his name was not in such process, and that Dixon had rescued himself, and thereby induced the justice to grant *an escape warrant* against Dixon, and the latter killed the officer in attempting to apprehend him, this was holden murder, because the escape warrant was in itself valid and sufficient, though it had been obtained by false swearing to the rescue. (i) So if a person be imprisoned by *lawful* warrant for a supposed felony, if he break prison he is equally guilty of the offence of prison breaking, whether or not a felony had been committed. (k)

Upon the whole, it appears to be very hazardous to resist the execution of any process or arrest having the least semblance of a legal proceeding, as the powers to *arrest* in *civil* cases and to *apprehend* in *criminal* are most extensive; and it is in general merely an accidental and subsequent discovery of the defect in the proceeding turning up in favour of the party resisting, than any certain ground upon which he should in prudence act; and as relief from the illegal imprisonment may in general be speedily obtained by *habeas corpus*, or by motion to the court, and afterwards compensated by action for false imprisonment, in which full costs are recoverable, the wisest course is not only to protest against, but to submit for the time to the illegal imprisonment, rather than by hazarding a resistance being subjected to the serious consequences that sometimes ensue.

This inconvenience may, however, result from submitting to an unlawful arrest under illegal process, namely, that *third* persons may, pending the imprisonment under it, lodge detainers, from which the party arrested would not be discharged; but if the original process be afterwards set aside, the party imprisoned would be discharged from all other imprisonment at the suit of the *same* plaintiff, or in collusion with him or his attorney. (l) But in a late case, where a party, against whom a true bill for perjury had been found in England, was illegally apprehended abroad at the instance of the prosecutor, upon the chief justice's warrant, which did not extend to a foreign country, and was brought over here in custody, and committed to prison for want of bail, the court refused to

(i) Foster's Cr. L. 135.

(k) 2 Inst. 590; 1 Hale, 610.

(l) *Barclay v. Faber*, 2 Bar. & Ald.

743; 1 Chit. R. 579, 580, S. C.; *Wells v. Gurney*, 8 Bar. & Cres. 769; Tidd, 9th ed. 210; Id. Supplement, 75.

discharge her, on the ground that she had been improperly apprehended in a foreign country, as the prosecution was on the part of the king, and not like a civil suit, for the benefit of the prosecution. (m)

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VI. Having thus considered the *resistance* and *preventions* of injuries, and when illegal process may be resisted, we will proceed to the consideration of the *Rights of Recaption*. This occurs when a husband, parent, or master, has been illegally deprived of the custody of his wife, child, or apprentice or servant, or the owner of his personal or real property. And in each case the law, under circumstances, allows the recaption of the person of the relative, and of the property, where either may happen to be, provided he can do so without occasioning a breach of the peace, or an injury to a third person who has not been party to the injury. (n) The *principle* upon which such recaption is allowed is, that it might frequently happen, if that right were not allowed by law, that the owner would have that only opportunity of doing himself justice, for his relative might otherwise be concealed or removed from the kingdom, or his goods might be conveyed away or destroyed, or his lands wasted, if he were not allowed a speedier remedy than the ordinary process of law affords. (o) If, therefore, he can contrive to regain possession of his relative or property without undue force, the law favours and will justify his proceeding. But as the public peace is a superior consideration to the private rights of any individual, and as, if individuals were allowed to use their own force as a remedy for private injuries, all social justice would cease, and the strong would prescribe law to the weak, and every man would revert to a state of nature, therefore the law declares that this natural right of recaption shall never be exerted when it would probably occasion strife or bodily contention, and endanger the peace of society. If, for instance, an horse be taken away, and it be found by the owner upon a common, or in a fair, or in a public inn, he may lawfully seize him; but he could not legally break open a private stable, or enter the grounds of a *third* person to take him, unless where he has been feloniously stolen, but must have recourse to an action at law. (p) Many

VI. Of recaption of a relative, or of personal or real property.

(m) *Ex parte Scott*, 9 Bar. & C. 446; Parke, J. dissentiente.

(n) 3 Inst. 134; Hal. Anal. p. 46.

(o) *Per* Littledale, J. in *Cubitt v. Porter*, 8 Bar. & Cres. 269.

(p) *Higgins v. Andrews*, 2 Roll. Rep. 55, 56; *Masters and Poole's Case*, Id. 208; 2 Roll. Abr. 565, 566; 3 Bla. Com. 5; and *per* Tindal, C. J. in *Rich v. Woolley*, 7 Bing. 661, *post*.

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1. Recaption of
the person of a
relative.

of the cases connected with this right have already been considered when examining the *resistance* of injuries, but some remain, and require to be noticed more distinctly under this separate head.

1. When a wife, a child, or an apprentice, or, according to Blackstone, a servant, (but that must be limited to a servant who *assents* to the recaption), (*q*) has been taken away wrongfully by the party withholding either; the person entitled to the custody may at once, and without any formal request or demand, peaceably enter the house of the wrong-doer, the outer door being open, and carry away the party wrongfully detained. (*r*) But where the party harbouring was not concerned in the original abduction, then it should seem that there should be a demand and refusal before an entry into the house of the wrong-doer can be legally made, and in a plea justifying the immediate entry, the facts rendering it legal must be specially stated. (*s*) But in neither case can the recaption be legally effected in a riotous manner, or attended with a breach of the peace; (*t*) but though, if a forcible entry be made, the party might be indicted for such breach of the peace, yet unless some actual injury were committed to the person or property of the original wrong-doer, he could not sustain any civil action in respect of the forcible manner of regaining the wife, child, or apprentice. If the recaption be resisted with force, then recourse must be had to a court or judge for an *habeas corpus* on behalf of the husband, (*u*) parent, or guardian, (*x*) or on behalf of the apprentice, (*y*) or for the chief justice's warrant; (*z*) or recourse may be had to a court of equity to compel the return of a child or ward to his studies, or to an appointed place. (*a*) And if a wife elope with an adulterer or another, the husband may legally with force retake her; and if they escape to France, their separation may by the local law be enforced, and the adulterer imprisoned for a year. (*b*)

With respect to an *apprentice or servant*, it is said that if he depart out of his master's service and the master happen after-

(*q*) *Post*, 641, (*c*); *Dalt. J. c.* 121.
(*r*) 3 *Inst.* 134; *Hal. Anal.* p. 46; 3 *Bla. Com.* 4.
(*s*) *Scumble, Anthony v. Haneys*, 8 *Bing.* 186.
(*t*) 3 *Bla. Com.* 4, and reasons, *Rich v. Woolley*, 7 *Bing.* 661, 662.
(*u*) *Rex v. Doherty*, 13 *East*, 173; *Rex v. Middleton*, 1 *Chit. R.* 654.
(*x*) *In re Pearson*, 4 *Moore*, 366; *Rex v. Hopkins*, 7 *East*, 579.

(*y*) *Ex parte Landsdown*, 5 *East*, 38, only on application of apprentice.
(*z*) *Rex v. Edwards*, 7 *T. R.* 745.
(*a*) *Duke of Beaufort v. Berty*, 1 *P. Wms.* 702; *Eyre v. Countess of Shaftesbury*, 2 *P. Wms.* 117; *Ex parte Warner*, 4 *Bro. C. C.* 101; 2 *Forst.* 5th ed. 232; *Tremaine's Case*, 1 *Str.* 167; *Hall v. Hall*, 3 *Atk.* 721; *Storke v. Storke*, 5 *P. Wms.* 51.
(*b*) *Code*.

wards to lay hold of him, yet the master may not beat or *forcibly compel* him against his will to return or tarry with him, or do his service, but either he must complain to the justices of the departure, or he may have an action of covenant against the third person, who covenanted for his faithful services. (c) But this does not apply to menial servants, over whom magistrates have no controul.

2. The same principles extend to the Recaption of *Personal Property*, (d) and it has been observed, that there may be many cases where recaption may be *the only* or the best remedy; as if one joint-tenant or tenant in common take a chattel real or personal, and assume the exclusive possession, in which case his co-tenant cannot support an action against him, (although sometimes a Court of Equity would regulate the enjoyment,) and therefore the only remedy would be for the other co-owner to retake the possession. (e)

If a party be wrongfully dispossessed of his personal property, he may in general justify the retaking them from the house and custody of the *wrong-doer*, even without a previous request to redeliver them; for the violence which happens through the resistance of the wrongful taker being attributable to his own original tortious act, deprives him of any right to complain. (f) But in this recaption, care must be observed to avoid any personal injury, or any forcible entry or breach of the peace, and if either be anticipated, then the owner of the goods should replevy or resort to an action rather than subject himself to a proceeding for the personal injury, or an indictment for the breach of the peace. (g)

If the personal property was not originally illegally seized, but is merely wrongfully detained, then the owner must first request the re-delivery, and he cannot justify more than gently laying his hands on the wrong-doer in order to recover it; (h) nor can the owner, without leave, enter the door of the house of a *third person* not privy to the wrongful detainer, to take the goods

(c) Dalt. J., c. 121, page 281, 282; Burn's J. Apprentice, VI. (b); and see *Rex v. Reynolds*, 6 T. R. 497; *Rex v. Edwards*, 7 T. R. 745; *Ex parte Landsdown*, 5 East, 38, the reason why the Court refuse an habeas corpus in case an apprentice is willing to serve in the navy.

(d) *Ante*, 639, 634.

(e) *Per* Littledale, J. in *Cubitt v. Porter*, 8 Bar. & Cres. 269.

(f) *Anon.* 3 Salk. 169; 3 Bla. C. 404, 405, note 18; *Weaver v. Bush*, 8 T. R.

78; *Higgins v. Andrewes*, 2 Rol. R. 56; *Masters and Poolie's case*, Id. 208; Rol. Ab. 565, pl. 50; *Anon.* 2 Leo. 202; Selwyn, N. P. tit. Assault and Battery.

(g) *Rex v. Wilson and others*, 8 T. R. 364; *Weaver v. Bush*, 8 T. R. 78; *Gregory v. Hill*, Id. 299; 1 Saund. 296.

(h) *Weaver v. Bush*, 8 T. R. 78; *Higgins v. Andrewes*, 2 Rol. R. 56; *Masters and Poolie's case*, Id. 208; Rol. Ab. 565, pl. 50; *Anon.* 2 Leo. 202; Selwyn, N. P. tit. Assault and Battery.

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therefrom; (i) and the same doctrine extends to the *land* of a third person; (k) and therefore a plea to a declaration in trespass for entering a close, that certain goods of the defendant *were there*, (without showing how,) and that they entered to take them, doing no unnecessary damage, was holden ill, as it neither stated how the goods came there, as by the tortious act of the plaintiff, or by his license, or by accident, nor showed any previous request to have the goods delivered; (l) and there should have been at least a *prior request*, and even then and after it a party cannot in all cases legally enter the house or land of another to retake his property, but must frequently proceed by action of detinue, replevin, or *trover*; (m) and in no case can the owner be guilty of riot, or a forcible entry, or breach of the peace to regain his property, (n) or if he be, he may be indicted for a breach of the peace.

Another general rule is, that the natural right of recaption should never be exerted where such exertion would occasion strife and bodily contention, or endanger the peace of society. Therefore we have seen, that if an horse is taken away and the owner find him in a common, a fair, or a public inn, he may lawfully seize him for his own use; but that he could not justify breaking open a private stable, or entering on the grounds of a third person to take him, but should have recourse to an action at law. (o) So, in justifying the breaking open a lock to distrain cattle fraudulently removed, under 11 Geo. 2, c. 19, it must be averred and proved that a peace officer was present; and in a plea of recaption upon a rescue, it must be averred that the recaption was in fresh pursuit. (p)

If a party take my personal property and alter its form, or improve it without altering it into a *different species*, I may retake the whole. (q) In case of goods obtained by *false and fraudulent pretences* of a *purchase*, no property passes, and the vendor may lawfully rescue or retake them even out of the hands of the sheriff, who had taken them under an execution against the wrong-doer, and this even by stratagem. (r)

But if a tenant neglect to remove his *fixtures* or *crops* during his tenancy, he loses his property therein, unless in cases where he is entitled to emblements or a way-going crop,

(i) *Higgins v. Andrewes* 2 Rol. Rep. 55, 56; *Masters and Poolie's case*, Id. 208; 2 Rol Ab. 565, l. pl. 2; Bac. Ab. Trespass, E.

(k) *Anthony v. Haney*, 8 Bing. 186.

(l) Id. *ibid.*

(m) *Ante*, 641, n. (g); *Anthony v. Haney*, 8 Bing. 186.

(n) 3 Bla. C. 4; *Rich v. Woolley*, 7

Bing. 661, 662.

(o) *Per* Tindal, C. J. *Rich v. Woolley*, 7 Bing. 661, citing 2 Rol. Ab. 565; 3 Bla. Com. 5; *ante*, 639.

(p) *Rich v. Woolley*, 7 Bing. 651.

(q) 3 Bla. C. 404, 405, note 12.

(r) *Earl of Bristol v. Willsmore*, 1 Bar. & C. 514; 2 D. & R. 755, S.C.; *Noble v. Adams*, 7 Taunt. 59.

and he cannot afterwards enter to re-take them, or support an action of trover for withholding them; (s) and if a vendor execute a general conveyance of land, and neglect previously to remove his fixtures, they pass by the conveyance, and it is too late to enter and retake them. (t) But where an occupier has been strictly a tenant at will, or at sufferance, and another person has determined his right to continue in possession, it should seem that he would not be a trespasser if he enter afterwards to remove his goods, and continue only a reasonable time for that purpose. (u)

We have seen what degree of force may be used in *defence* of *personal* property, and the same rules will here apply. (x) If, upon an officer's showing a search warrant to the occupier of an house the latter refuse to return it, the officer will be justified in using just so much violence as may be necessary to retake it, and no more, and it will be a question for a jury whether the officer used more force than was necessary, for if he did, then such excess of force might be legally repelled. (y) The rule is, that to justify an entry into the house or land of another to retake personal property, it must be shown that it was improperly taken away, or received, or detained, and placed by the wrong-doer in his house or land, in which case an entry may be made without previous request, or an instant seizure; (z) but in other cases, in order to retake, the owner can only justify *moliter manus*, (a) nor can he, without leave, enter the house of a third person, not privy to the wrongful detainer, to take his goods therefrom, if they get there through his own default. (b) An executor or administrator may enter the house or land of the heir, to remove the personal estate of the deceased, after demand, and ought to remove the same within a reasonable time, or the same may be distrained damage feasant. (c)

If trees be blown down, it is not trespass for the owner to enter the land into which they fall to take them, (d) so if a man have to lop his tree, and he cannot do it unless it fall, without

(s) *Doe dem. Nicholl v. M'Kaeg*, 10 Bar. & Cres. 721; *Lyde v. Russell*, 1 Bar. & Ald. 394.

(t) *Colegrave v. Dias Santos*, 2 Bar. & Cres. 76.

(u) *Doe dem. Nicholl v. M'Kaeg*, 10 Bar. & Cres. 721.

(x) *Ante*, 597 to 599.

(y) *Rex v. Milton*, 1 Mood. & M. 107; 3 Car. & P. 31, S. C.

(z) *Crawford v. Hunter*, 8 T. R. 18; *Higgins v. Andrewes*, 2 Rol. R. 56; *Mas-*

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ters and Poolie's case, 2 Rol. 208; Rol. Ab. 565; *Anon.* 2 Leo. 202; Selw. N, P., Assault and Battery.

(a) *Id. ibid.*

(b) *Id. ibid.*; *Anthony v. Hancy*, 8 Bing. 186.

(c) *Ante*, 512; Went. Off. Ex. 81, 209, 14 ed.; *Stodden v. Harvey*, Cro. J. 204; *Graysbrook v. Fox*, Plowd. 280; 2 Williams, 602.

(d) Vin. Ab. Trespass, H. a., 2.

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his fault, upon the land of another, he may justify the felling of it upon such last mentioned land. (e) So if a fruit tree grow in a hedge, and the fruit fall into the land of another, the owner may go upon the land and fetch it: (f) but in these cases, the occupier should be previously requested to deliver the property to the owner, or to allow him to enter. (g) And in all these cases, the special excuse for the entry on the land of another must be shown, for if the goods happen to be on the land of another, without any default on his part, it does not follow that there is any right to enter to retake them, but the owner must make a demand, and then proceed by action, when sustainable; and therefore a plea to a declaration in trespass for entering land, merely stating that the defendant's goods *were there*, and that he therefore entered to carry them away, was holden bad, as well for not showing any previous request as also for not stating the special circumstances how the goods came there, and that the defendant had any right of entry. (h)

If goods be illegally taken or distrained under colour of a distress or seizure without warrant, then, at any time before they have been impounded, the owner may make a rescue, but if they be impounded, then it is said that the owner cannot justify the breach of the pound to take them out, because the distress is then in the custody of the law, and the proper course is to replevy or sue for the wrongful seizure: but if the pound be unlocked, it seems the owner may, in such case of illegal seizure, take them. (i) But it should seem, that if the distress were illegal the distrainer could not maintain any action for the pound-breach, and it seems not quite settled, that a pound-breach, without conspiracy, riot, or breach of the peace, is an indictable offence. (k) In case of rescue (l) or pound-breach of a distress for *rent*, the *party grieved* may, in a special action on the case, recover treble damages and treble costs against the offenders, or against the owner of the goods, if they came to his use. (m) But as only the party grieved can sue, it should

(e) *Dyke v. Dunstan*, 6 Ed. 4, 18.

(f) Vin. Ab. Trespass, L. a. post, 663.

(g) See ante, 569, and form.

(h) *Anthony v. Haney*, 8 Bing. 186.

(i) *Knowles v. Blake*, 3 Moore & P. 214; 5 Bing. 499, S. C.; Bul. N. P. 61. N.B. The facts in the case of *Knowles v. Blake* have been misrepresented. I was in the cause, and the cattle were impounded in a public pound, which the defendant Blake broke open, and took the cattle therefrom. The report of the learned judge who tried the cause completely misapprehended the

facts.

(k) As to pound-breach being indictable, see *Sanderson's case*, 4 Leon. 12; Gilb. 75; Com. Dig. Rescous, D. 3; 2 Hawk. c. 10, s. 56; 1 Russ. Crim. L. 363; Cro. Cir. Assist. 9 ed.; 2 Chit. Crim. L. 201; but see Burn's J. Distress, 1001, and form 17.

(l) What a rescue of goods, *Knowles v. Blake*, 5 Bing. 499.

(m) 2 W. & M. sess. 1, c. 5, s. 4; *Firth v. Purvis*, 5 T. R. 432; *Lemon v. Storey*, 1 Lord Raym. 20.

seem that if the distress was illegal the wrongful distrainer could not sue, and that consequently, at least, a rescue may be made when the distress was illegal; and it is usual, in a declaration upon this statute, to show the right to distrain,⁽ⁿ⁾ though it is otherwise in a declaration for a pound-breach of goods taken damage feasant.^(o)

With respect to goods wrongfully obtained under colour of a contract, if the pretended purchaser's conduct was so fraudulent as to avoid the contract, the vendor may retake or even rescue them by any stratagem, even when taken and in the hands of the sheriff under an execution at the suit of a creditor against the fraudulent purchaser.^(p)

So where goods have been purchased without such fraud, and it be discovered, before they have reached their destination or in the hands of the purchaser, that he is insolvent, they may be stopped *in transitu* by any means short of force,^(q) though a part delivery will in general defeat the right to stop the residue.^(r) When a person can legally stop goods *in transitu*, he should *himself* immediately exercise that power to avoid loss, for a Court of Equity it seems will not lend its aid for the purpose.^(s) The right to stop *in transitu* is one of the most important branches of law.

Between tenants in common and joint-tenants of personal as well as real property there are cases of injuries where the only remedy is to retake the property.^(t)

On the other hand, the purchaser of a specific chattel, who has paid for the same, or who tenders the price, may take them with force, in case the vendor or a third person should refuse to deliver them; but in general, by a contract to sell or to make and deliver an article, which the vendor might satisfy by delivering any article of the same description and value, no property passes in any specific article until actually set apart or marked, and consequently the purchaser, although he may have

(n) *Ridley v. Bell*, Lutw. 218; *Bellamy v. Burbridge*, 3 Ld. Raym. 177; Mod. Ent. 210; Bul. N.P. 61; *Bentley v. Donnelly*, 8 T. R. 130; Com. Dig. Pleader, C. 19.

(o) *Cotsworth v. Betison*, 1 Ld. Raym. 104; 1 Salk. 247, S. C.

(p) *Noble v. Adams*, 7 Taunt. 59; *Earl of Bristol v. Wilsmore*, 1 B. & Cres. 514; *Ferguson v. Carrington*, 9 B. & Cres. 59; *Stephenson v. Hart*, 4 Bing. 476, 482.

(q) *Lickbarrow v. Mason*, 2 T. R. 75; *In re the Constantia*, 6 Robinson, Rep.

324; *Hawes v. Watson*, 2 B. & C. 546.

(r) *Scott v. Goodwin*, 1 New R. 69; *Sluby v. Heyward*, 2 Hen. Bla. 504; *Harvey v. Cook*, 6 East, 227; *Crayshaw v. Eades*, 1 B. & C. 181.

(s) *Goodhurst v. Lowe*, 2 Jac. & W. 349.

(t) *Per Little Dale*, J. 8 Bar. & Cres. 268; *Heath v. Hubbard*, 4 East, 117, 121; Co. Lit. 200, a.; *Martyn v. Knowles*, 8 T. R. 145; 2 Saund. 47, h.; 1 Chit. Pl. 5th ed. 91.

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3. Recaption or
re-entry with
force on *Real
Property*.

paid the full price, cannot take the article though making for him, or any one of like value. (u)

3. It is laid down at the common law, "that if a man be disseised of any lands or tenements, he may, if he cannot prevail by fair means, legally regain the possession thereof by force, unless he were put to the necessity of bringing his action by having neglected to re-enter in due time, i. e. within 20 years, for the violence which happens through the resistance of the wrongful possession being originally owing to the wrong-doer's own fault, gives him no just cause of complaint, inasmuch as he might have prevented it by doing as he ought." (x) And although Lord Kenyon has observed upon that doctrine, and it seems clear, that if on regaining possession to which a party is entitled, he be guilty of a forcible entry or breach of the peace, he may be *indicted* for the disturbance of the peace; (y) yet it is equally clear that the original wrong-doer, or person who had no right to retain the possession, could not sustain any *action* for such forcible regaining possession, as far as regards any alleged injury to the house or land, or the expulsion, but at most only for any unnecessary personal injury in turning him out, or avoidable damage to furniture. (z) So that actions of ejectment are very frequently unnecessarily resorted to. (z) The better way however is in these cases to avoid personal violence or the breaking an outer door, and to obtain possession through the intervention of a tax gatherer (who may be authorized by a warrant to break open doors) or by stratagem. In general, when the occupier wrongfully holds over, after his tenancy has expired, the landlord may enter peaceably and turn on his cattle; and if the occupier should wrongfully distrain, then the landlord may support replevy or sustain an action of trover or trespass; (a) and in the absence of the occupier he may break open the outer door of a house and take possession, although goods of the late

(u) *Mucklow v. Mangles*, 1 Taunt. 320; *White v. Wilks*, 5 Taunt. 176; *Shepley v. Davis*, Id. 617; *Busk v. Davis*, 2 Maule & Sel. 397; *Zagury v. Furnell*, 2 Campb. 240; *Wood v. Russell*, 5 Bar. & Ald. 942.

(x) Hawk. c. 64, s. 1; 3 Salk. 169.

(y) *Rex v. Wilson and others*, 8 T. R. 364.

(z) *Taunton v. Costar*, 7 T. R. 431; *Rex v. Wilson and others*, 8 T. R. 364; *Turner v. Meymott*, 1 Bing. 158; 7 Moore, 574, S. C.; *Wildbor v. Rainsforth*, 8 B. & C. 4; *Davis v. Connop*, 1 Price, 53; *Rogers v. Pitcher*, 6 Taunt. 202; 1

Saund. 296, a. 1. If the party thus ousted should bring trespass for the eviction, and even pulling down the house, the plea of *liberum tenementum* would be an answer, and the plaintiff could not reply excessive violence as regards the land or building, for the defendant had a right even to pull down his own house, and if the plaintiff should reply his former tenancy, the defendant would rejoin showing how it was determined, which would if true be a conclusive bar to the action.

(a) *Taunton v. Costar*, 7 T. R. 431.

tenant remain there. (b) So the landlord is entitled to and may seize the growing crops as his own, unless they are strictly emblements, or were sown under a custom to have an away-going-crop. (c) And a mortgagee may thus take possession from the mortgagor, or any person who became tenant after the mortgage, and who has not been acknowledged by him. (d) And a person who has recovered in ejectment may, without any writ, thus take possession. (e)

VII. Cases of abatement or removal of injuries by the mere act of the party himself, and without the assistance of the law, generally occur in private or public *nuisances* as they are usually termed. But the same principles will, in general, apply to other cases. Thus it should seem that in the case of a clear libel upon the character of a party, published as a gross caricature, rendering him ridiculous, and subjecting the wrong-doer to an indictment, the party injured might destroy it; (f) it is true that in a late case the owner of such a picture, intrinsically worth several hundred pounds, recovered 5*l.* damages for

VII. Of the removal of injuries by abating, &c.

First, Private nuisance.

1. Nuisances or injuries to the person.

(b) *Turner v. Meymott*, 7 Moore, R. 574; 1 Bing. 158, S. C.; *Butcher v. Butcher*, 1 Man. & R. 220. Where the tenant of a house, after a regular notice to quit, abandoned the premises, locked up the door, and left only a few articles of furniture therein, and the landlord afterwards, in his absence, and when no person was in the house, broke open the door and took possession, held that he was justified in so doing, as he had a legal right of entry, and it seems that the tenant cannot maintain trespass against him, but that his remedy, if any, is by indictment for forcible entry.

Lord C. J. Dallas.—“The plaintiff as tenant held over after a regular notice to quit. His legal right of possession was then determined and vested in the landlord, and it must be admitted that the latter had a right to take possession in some way or other. In *Taunton v. Costar*, 7 T. R. 431, Lord Kenyon said that, “if indeed the landlord had entered with a strong hand to dispossess the tenant by force, he might be indicted for a forcible entry; but that there could be no doubt of his right to enter upon the land at the expiration of the term;” and in *Taylor v. Cole*, 3 T. R. 295, his lordship further observed that, “a person having a right of

entry might enter peaceably, and being in possession might retain it.” In the former case, the putting in the cattle was an act of possession to which the landlord was deemed to be entitled. I take it to be clear that on the determination of a tenancy a landlord is entitled to take possession peaceably. The only question then is, as to the distinction between a peaceable and forcible entry. The latter is an act against the public, which subjects the party to an indictment, but surely it is a different case where a tenant holds over against law and justice. Here the plaintiff had ceased to be tenant to the defendant, and it would be going a great length to say, that he could bring an action of trespass against him for entering his own house. If the plaintiff has any remedy he may try it by an indictment for a forcible entry.”

(c) *Davis v. Connop*, 1 Price, R. 55; *Doe d. Upton v. Witherwich*, 3 Bing. 11.

(d) *Doe d. Roby v. Maisy*, 8 Bar. & C. 767, and 5 Bing. 421, S. C. ante, 258.

(e) *Taylor v. Horde*, 1 Burr. 60, 88; *Badger v. Floyd*, 12 Mod. 398; *Withers v. Harris*, 2 Lord Raym. 806, 808.

(f) As to the power of seizing blasphemous or seditious libels, see 60 Geo. 3, and 1 Geo. 4, c. 8.

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destroying the same, but the defendant had unadvisedly pleaded only the general issue, and it may be collected that if he had pleaded a justification, he would have sustained a defence; (g) and the old law clearly was, that an infamous libel might be destroyed by any one, though it has been stated to be the safer course to take the libel to a magistrate, who might direct what proceedings should be pursued; (h) and who might issue a warrant for publishing the libel, at least when reflecting upon a judge. (i)

2 & 3. Abate-
ments and re-
movals of pri-
vate nuisances
and injuries to
personal or real
property.

2, 3. The reason why the law allows the *abatement of a nuisance*, private or public, by any individual annoyed by it, (a private and summary method of doing oneself justice,) is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an *immediate* remedy and cannot wait for the slow progress of the ordinary forms of justice. (k) But at least in the case of a private nuisance, the building or act, however *likely* to become a nuisance, cannot be legally abated until it has actually become so in some sen-

(g) *Ante*, 44; and see stat. 60 Geo. 3, and 1 Geo. 4, c. 8, as to the seizure of blasphemous or seditious libels; and see *Earl Lonsdale v. Nelson*, 2 Bar. & Cress. 311, *Du Bost v. Beresford*, 2 Campb. 511, was as follows: Trespass for cutting and destroying a picture which the plaintiff had publicly exhibited; per quod, loss of picture and profits from exhibiting the same. Plea, not guilty. It appeared that the plaintiff was an artist of considerable eminence, but that the picture in question, called "La Belle et la Bête," or "Beauty and the Beast," was a scandalous libel upon a gentleman of fashion and his lady, who was the sister of the defendant. It was exhibited at a house in Pall Mall for money, and great crowds went daily to see it until the defendant cut it in pieces. Some of the witnesses estimated it at several hundred guineas. The plaintiff's counsel insisted, on the one hand, that he was entitled to the full value of the picture, together with a compensation for the loss of the exhibition; while it was contended on the other, that the exhibition was a public nuisance, which every one had a right to abate by destroying the picture.

Lord Ellenborough. — The only plea upon the record being the general issue of not guilty, it is unnecessary to consider whether the destruction of this picture might or might not have been justified. The material question is, as to the value to be set upon the article destroyed. If it was a libel on the persons introduced into it, the law cannot consider it *valuable* as a picture. Upon an application to the Lord

Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damages, must not consider this as a work of art, but must award the plaintiff merely the value of the canvass and paint which formed its component parts. — Verdict for 5*l.* damages. — But the supposition of Lord Ellenborough's, that the Chancellor would have interfered, has been treated as erroneous. See *Gos v. Pritchard*, 2 Swanst. 402, *post*, next chapter.

(h) *Anon.* 5 Coke's Rep. 125, b.; *Lake v. Hutton*, Hob. 253; see *Du Bost v. Beresford*, 2 Campb. 511. The court, after commenting strongly on the provoking tendency of libels, observed —

"And it was resolved in *Hallwood's case*, M. 43 & 44 Eliz. that if one find a libel, (and would keep himself out of danger,) if it be composed against a private man, the finder either may burn it or presently deliver it to a magistrate; but if it concern a magistrate or other public person the finder ought presently to deliver it to a magistrate, to the intent that by examination and industry the author may be found out and punished."

(i) *Butt v. Conant*, 1 Brod. & B. 548; 6 Moore, 65, S. C.; 3 Brod. & B. 3; *Gow*, C. N. P. 84, S. C.

(k) 3 Bla. C. 6; *Earl Lonsdale v. Nelson*, 2 Bar. & C. 302; 3 Dowl. & B. 556, S. C. The instance of destroying a libellous caricature may be considered as of the same nature, *supra*, n. (g), (h).

sible degree, and not prospectively or *quia timet*. (l) And before an actual injury has arisen, the party apprehending prospective injury should file a bill in equity for an injunction. (m) If a wrong-doer illegally erect upon his own soil a thing which is a nuisance to another, as by stopping a *rivulet* and so diminishing the water used by him for his cattle, the party injured may enter on the soil of the other and abate the nuisance and justify the trespass, and this right of abatement is not confined merely to nuisances to a *house*, to a *mill*, or to *land*. (n) So if a person on his own land erect a building which obstructs the light or air passing through an ancient window, the occupier of the latter may legally abate or remove it, and if necessary may enter the premises of the wrong-doer for that purpose. (o) On the other hand, although a person may have a right for light and air to pass through his ancient window into his building, yet the occupier of the adjoining land might prevent such party from overlooking his premises by so placing boards or other obstructions *under the window* as to prevent such overlooking, but taking care not to commit any trespass upon or to the building in which the window is placed. (p)

When the nuisance was occasioned by the *tortious misfeasance* or *malfeasance* of another, the party thereby injured may in general abate the nuisance immediately and without any previous notice or request; but if the nuisance be merely continued by a party who did not erect it, or when it consists of *omission*, the party should be requested to remove it before the party injured can himself remove the injury; (q) for nuisances by an act of *commission* are committed in defiance of those whom such nuisances injure, and the injured party may *abate them* without *notice* to the person who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from *omission*, except that of cutting branches of trees which overhang a public road or the private

(l) *Rex v. Whurton and others*, 13 Mod. 510; but see *Greenlade v. Halliday*, 6 Bing. 381, 382, where no objection was made to a removal in anticipation of injury, and so as to prevent the other party's assertion of a larger right than he was entitled to.

(m) See *post*, ch. viii.

(n) *Raikes v. Townsend and another*, 2 Smith's R. 9; Com. Dig. tit. Plead. 3, M. 38, 41. The cases put in 2 Rol. Ab. 144, b, Nuisance, Reformation (S), are only put by way of instance.

(o) *Penwarden v. Ching*, 1 Mood. & M. 400; though we have seen that if he

should throw water over the party erecting the obstruction, he would by such excess become a trespasser, *ante*, 600, note (p).

(p) What is such a contact as to constitute a trespass to a building or fence, see *Arlett v. Ellis*, 9 Bar. & Cress. 691, *ante*, 380.

(q) *The Earl Lonsdale v. Nelson*, 3 Bar. & C. 302; 3 Dowl. & R. 556, S. C.; *post*, 650, note (r), and as to destroying a libellous picture, *Du Bos v. Beresford*, 2 Campb. 511, *ante*, 648, note (g), and as to seizing blasphemous or seditious libels, 60 Geo. 3, & 1 Geo. 4, c. 8.

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property of the person who cuts them; the permitting these branches to extend beyond the soil of the owner of the trees is a most unequivocal act of negligence which distinguishes that case from most of the others that have occurred; the security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy; in such cases an individual would be justified in abating a nuisance from omission *without previous notice*; but in all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale and appeal to a court of justice. (r)

In abating a *private* nuisance care must be observed to abate no more than is necessary to restore the party injured to the enjoyment of his right as before the nuisance; thus if a house be built too high, only so much of it as exceeds the lawful height should be pulled down; (s) and supposing that a person might legally remove stakes which had been placed in a water-course so as to occasion a permanent instead of an occasional irrigation of the party's meadow, if another party remove a board as well as the stakes, he will be liable to be sued for the excess in removal; (t) and no unnecessary cutting or injury must be committed; (u) and if it be necessary to remove materials, they must be removed only to a small distance, (x) and placed where the same will not probably be injured, as on his own premises, for otherwise the party removing will become a trespasser *ab initio* or guilty of a conversion, (y) or at least will be liable to make compensation for so much of his conduct as was illegal; (z) there-

(r) *Per Best, J. in The Earl of Lonsdale v. Nelson*, 2 Bar. & Cres. 502; 3 D. & R. 556, S. C. Even in cases of public nuisance the Highway Act requires notice to the occupier before a nuisance can be removed. Therefore when in trespass for entering the plaintiff's manor, &c. the defendant pleaded that there was a Public Port partly within the said manor, and also in a river which had been a public navigable river, and that there is in that part of the port which is within the manor an ancient work necessary for the preservation of the port and for the safety and convenience of the ships resorting to it, and that such work was in decay, and that the plaintiff would not repair it but neglected so to do, and therefore the defendants entered and repaired; and upon a replication *de injuria*, there was a verdict for

the plaintiff on the plea of general issue, and for the defendants on the second plea; it was held that plaintiff was entitled to judgment *non obstante veredicto*, as the second plea did not state that immediate repairs were necessary, or that any one bound to do so had neglected to repair after notice, or that a reasonable time for repairing had elapsed, or that defendants had occasion to use the port.

(s) *Batten's case*, 9 Coke, 53; *Traherne's case*, Godb. 221; *Rex v. Pappineau*, 2 Stra. 686.

(t) *Greenlade v. Halliday*, 6 Bing. 379.

(u) *Pickering v. Rudd*, 1 Stark. R. 56; *Houghton v. Butler*, 4 T. R. 364.

(x) *Forsdick v. Collins*, 1 Stark. R. 173.

(y) *Houghton v. Butler*, 4 Term R. 364.

(z) *Forsdick v. Collins*, 1 Stark. R. 173.

fore it was held that a person who comes into possession of land on which he finds a block of stone belonging to another, is not justified in removing it to a distance, and that such removal supersedes the necessity of proving a formal demand in an action of trover; and it having been contended by counsel that the defendant had a right to remove it from his own premises, Lord Ellenborough said, "but he is not justified in removing it to a distance, for in an action of trespass at the suit of the owner, he must, in his justification, have alleged that he removed it to some adjacent place for the use of the owner, and he could not have justified this removal." (a) In these cases it should seem at least prudent to give the owner of the materials notice of the abatement of the nuisance and of the place to which the materials have been removed, and the notice may be as subscribed. (b)

If, however, a waste or *common* be surrounded by a fence placed *upon* the same, so that a person who has right of common cannot turn on his cattle, he may justify prostrating the fence and opening a way for cattle before he actually attempts to turn on, and he may prostrate a *large* piece of the fence, when so erected *upon* the common, and even much more than was necessary for the convenient ingress and egress of men and commonable cattle, because in this case the whole fence was upon the common, and injuring the pasture there, (c) and consequently the commoner might abate the *whole*, and not merely an opening to let in his cattle; (d) and it has been observed that the exercise of a right to abate may be much more convenient than that the commoner should bring an action for

(a) *Foradick v. Collins*, 1 Stark. R. 173; *Houghton v. Butler*, 4 T. R. 364.

(b) Sir,—You having, after notice and request to you to remove the same, neglected to do so, I hereby give you notice that I have found it necessary to abate and remove so much of a certain building erected and continued by you upon the ground and premises adjoining to my messuage, situate, &c. which did unlawfully obstruct and prevent the light and air, which of right ought to have entered into and through four windows of and belonging to my said messuage, from entering the same, and thereby annoyed and incommoded myself and my family in the occupation and enjoyment of my said messuage; and inasmuch as you have refused permission to leave or deposit certain parts of the materials of your said building arising from such abatement and removal on or upon your said grounds and premises, I hereby give you notice that the said materials have been and are deposited at, &c. [*describing the place, and which should be as near as practicable,*] and that you may have and take away the same upon any reasonable application, and I request you to remove the same forthwith.

Dated, &c.

Your's, &c.

Suggested form of a notice of having removed an obstruction to an ancient window, and of the place where the materials have been deposited.

(c) *Arlett v. Ellis*, 9 Bar. & C. 671; *Sadgrove v. Kirby*, 6 T. R. 487; *Mason v. Caesar*, 2 Mood. 65; *Arlett v. Ellis*, 7 Bar. & C. 346; and Com. Dig. Com-
mon, H.; 3 Chit. Pl. 1110.
(d) *Arlett v. Ellis*, 7 B. & Cres. 346, 362; 9 B. & Cres. 684, S. C.

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Trees, property
in and cutting
the same. (g)

every obstruction, because, where the fences are thrown down, the question of right may be decided in one action. (d) But the commoner could not have justified the prostration of *trees*, (e) nor killing rabbits. (f)

With respect to the property in *trees*, and nuisances or private *injuries* arising from their boughs overhanging the land of another, much contention has arisen, and which, though provided for in the French code, is not so well defined and regulated in this country. (h) The old cases establish, that if the boughs of a tree standing in a neighbour's close grow over mine I may cut them. (i) But according to the rule just stated, requiring previous request before abating a nuisance in omission, it should seem that there ought to be a previous request. (k) With respect to the property in a tree itself, it has been considered that if a tree grow in A.'s close, and roots in B.'s, yet the *body* of the main part of the tree being in the soil of A., all the residue of the tree belongs to him also. (l) But that if it grow in a hedge which divides the land of A. and B., and the roots take nourishment from both *their* lands, then they are tenants in common thereof. (m) But in a late case at Nisi Prius, the rule was laid down to be, that if a tree grow near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was sown or planted. (n)

(d) *Per* Littledale, J. in *Arlett v. Ellis*, 7 B. & Cres. 378, ante, 395. Besides, the right of one commoner may be disputable, whereas several commoners may concur in abating, and afterwards, in defending an action against them, all may defend either upon the right of each, or of any one the most clear.

(e) *Sadgrove v. Kirby*, 6 T. R. 487; *Arlett v. Ellis*, 7 B. & Cres. 362.

(f) 1 Saund. 383, a, n. 2, ante, 396.

(g) *Ante*, 183, 184.

(h) See in general *Vin. Ab. tit. Trees*, E. and tit. Nuisance, W. 2, and tit. Fences, and ante, 183, 184.

(i) *Norris v. Baker*, per Croke, J., 2 Rol. Rep. 394; 3 Bulstr. 198, 8. C.

(k) *Ante*, 649, 650, but note *Best*, J. treated trees overgrowing a public way as an exception. See the clauses in the Highway Act, which seem to require previous notice, 13 G. 3, c. 78, s. 12, &c.

(l) *Masters v. Pollie*, 2 Roll. Rep. 141.

(m) *Anon.* 2 Roll. R. 255, S. P.; *Waterman v. Soper*, 1 Ld. Raym. 737; and per Littledale, J. "There is a case on the subject, (*Masters v. Pollie*, 2 Roll.

R. 141,) in which it was considered, that if a tree grow in A.'s close, though the roots grow in B.'s, yet the *body* of the tree being in A.'s soil, the tree belongs to him; I remember, when I read those cases, I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*, (1 Ld. Raym. 737, ante,) and I still think so. However, if the question becomes material, I will give you leave, on the authority of that case, to move to enter a nonsuit. His lordship, in summing up to the jury, said, that with respect to any question which had been raised as to the proportion of nourishment derived by the tree from the soil of the plaintiff and defendant, he did not see on what grounds the jury could find for either party; but that the safest criterion for them would be to consider whether, from the evidence given as to the situation of the trunk of the tree above the soil, and of the roots within it, they could ascertain where the tree was first sown or planted; if they thought it was first set in the land of the plaintiff, they would find a verdict for him, and for the defendant if the tree

But the right to cut the overhanging boughs of trees is restricted to so much only as actually overhangs the party's land, and as such cutting of a tree that has been suffered to grow to considerable size, is in general considered an unneighbourly act, great care must be observed that there be no excess, and that the cutting be as little injurious to the tree as possible; for if there be any excess, a jury will frequently give very considerable damages, especially if the trees were ornamental. (n)

If trees grow in a hedge, and near the land of another, and the fruit fall there, the owner of the tree may go into the adjoining land and take it, (o) but this would be only in cases of accident, and it should seem that the occupier of the land should be requested to deliver them, or permit entry, and should have refused, before the owner of the tree should enter to take the fruit. (p)

If a party have erected any building or other work on his own land, by the verbal license of the adjacent owner, although the statute against frauds enacts that no interest in land shall pass otherwise than by a memorandum in writing, duly signed, and although a parol license is in general revocable, yet in this case the party who gave the license cannot so far revoke it as to enable him to sustain an action against the other for continuing the erection; (q) and it should seem doubtful whether, after such revocation, the party could even abate the erection. (r) But in these cases, as the licenses were to erect on land, not of the party giving the license, in truth, no interest passed by the license, but it would probably be otherwise if the land were the property of the party giving the license. (r)

With respect to the abatement of *Public* nuisances, private individuals are in many cases allowed to remove them, without

Secondly, Of the
abatement of
Public Nui-
sances.

had originally been set in his. If they could form no opinion on this subject, he would afterwards give them his direction on the questions which they would then have to consider," *Holder v. Coates*, 1 Mood. & N. 112; Car. & P., S. C. and notes.

In a note to this case it is observed, that in the new Code Civil of France, the difficulty has been avoided. By a minute and careful legislation, the boundary hedges and the trees in them are declared (Art. 670, 673) to be common property, "mitoyens." Except in certain cases the planting of other trees within certain distances of the hedge, is forbidden by art. 671. And if any are planted within these

distances, the occupier of the adjoining land has the right of having them removed, and also of cutting the roots of trees growing into his land, by art. 672.

(n) In *Penoyre v. Adams*, the jury, in such a case, gave 500*l.* damages, but the verdict was set aside, and the cause was compromised; on Western Circuit; Selwyn for defendant.

(o) *Millen v. Fandrye*, Popham, 163; Vin. Ab. Trespass, L. 2. and tit. Trees, E.

(p) *Anthony v. Hancy*, 8 Bing. 192, 193, ante, 644.

(q) *Winter v. Brackwell*, 8 East, 308; *Figgins v. Juge*, 7 Bing. 682, ante, 338.

(r) *Id. ibid.*, *sed quare*, Sugden's Vend. & P. 8 ed. 75; ante, 338.

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the interposition of any legal authority, and in others, certain inferior officers or persons, authorized by custom or particular statutes, may summarily do the like, as a leet jury, in destroying defective weights and measures. (s) It is clear that any one may justify the removal of a *common nuisance* whether on land or water; (t) and if a gate or wall be erected across or upon a *public highway*, so as to constitute a *common nuisance*, any of the king's subjects passing that way may cut or pull it down and even destroy it; (u) and it should seem that at common law, if the occupier of the adjacent land suffer trees to grow and hang over a highway so as to annoy passengers, any person may justify lopping the same so far as to avoid the nuisance, (x) though perhaps the occupier should be first required to lop them himself, and a reasonable time afterwards elapse, before another person should so interfere, (y) and it seems to be settled, though the principle seems questionable, that in abating a *public nuisance*, it is not so essential to avoid unnecessary damage as in the removal of a private nuisance; and that even the cutting down a gate across a public way is allowed, although it might have been opened without cutting. (z) However, as the contrary had previously been decided, it is always advisable to avoid any unnecessary mischief. And even after indictment and conviction for a nuisance for continuing a glass-house, the judgment would not be to prostrate the build-

(s) *Wilcock v. Windsor*, 3 B. & Adolp. 43; what the plea of justification must state, see *Shephard v. Hall*, Id. 433.

(t) *Hale de Port. Mar.*, pt. 2, c. 7.

(u) *James v. Hayward*, Cro. Car. 184; Hawk. b. 2, chap. 75, s. 9.; *Lodie v. Arnold*, 2 Salk. 458; *infra*, note (s); 3 Bla. Com. 5, 6; *Rex v. Stead*, 8 T. R. 142; *Rex v. Inhabitants of Yorkshire*, 2 East, 342. But if the building, &c. complained of, be upon the whole productive of more public benefit than detriment, then the erection would be lawful or excusable, *ante*, 198, notes (m), (n); *sed quare*, Lord Tenterden diss.

(x) Hawk. b. 2, c. 76, s. 52, *ante*, 650.

(y) See *Earl Lonsdale v. Nelson*, 2 B. & Cres. 302; and such previous notice is required under the Highway act, 13 Geo. 3, c. 78. sec. 6, 7, 8; and see *Lowen v. Kaye*, 4 Bar. & Cres. 3; 6 Dowl. & R. 20, S. C.

(z) Hawk. b. 2, c. 75, s. 12; *Lodie v. Arnold*, 2 Salk. 458; trespass for breaking his close, and throwing bricks and other materials there lying, *erga consecrationem domus de novo erect* into the sea. The defendant pleaded that it was a

nuisance, being a house built across the way, and that he pulled down the walls, &c. and they rolled into the sea. The plaintiff demurred, but judgment was given for the defendant. First, The court seemed to agree that the trespass which the plea affected to justify, was not the trespass complained of, for that was throwing materials there lying, whilst that which was confessed, was pulling down a wall. Secondly, That where H. has a right to abate a *public nuisance*, he is not bound to do it orderly, and with as little hurt in abating it as can be, and therefore was not answerable in this case for the rolling into the sea. In the case of *James v. Hayward*, Cro. Car. 184, the defendant might have opened the gate without cutting it down, and yet the cutting was holden lawful, and the court denied *Hill's Case*, 3 Cro. 384, that matter of aggravation need to be answered. But 3dly, The court held that the declaration was repugnant and insensible, for there could not be materials towards the building of a house erected which is already built, M. 9 W. 3, B. R.

ing, but only to prevent its being again used as such, (a) and though any individual may abate a nuisance, yet he must not remove the materials to an improper distance, or convert them to his own use. (b)

An entry to abate a nuisance immediately dangerous to the public safety, and which requires *immediate* abatement, may be made without any previous request, for necessity will then justify such an immediate entry. But where there is no such *immediate* necessity, some application and notice must be made and given to the owner of the soil, to abate the nuisance himself, (c) and even then, the nuisance cannot be so abated as to transfer its injurious consequences to another, unless it be to restore a river to its proper and *ancient* course. (c)

It seems to have been considered by the legislature, at least in the Highway Act, as regards public nuisances of omission, and even in some of commission, that the wrong-doer should have previous notice and request to remove the nuisance, before the surveyor or other public officer himself should commence a removal. (d)

Where a stack of chimneys, belonging to a house close to a highway, by reason of a fire, were in *immediate* danger of falling in the highway, it was held that firemen were justified in throwing the same down, and that they were not answerable for damages thereby unavoidably done to an adjoining house of a third person; (e) and upon the same principle, captains of ships may legally throw overboard cargoes, or part of cargoes, to save the lives of the crew. (e)

No person, however, can justify *placarding* a supposed house of ill-fame, or placing and keeping a lighted lamp opposite to the same in the day time, for the libel on the occupier would tend to a breach of the peace, and the nuisance should have been put down by legal means. (f)

Various acts relating to the metropolis and to Brighton, and other towns, give large powers to commissioners to abate

(a) Co. Ent. 92; and see as to steam engines, 1 & 2 Geo. 4, c. 41, s. 2.

(b) Dalt. c. 50; Burn's J. Nuisance, III., *ante*, 650.

(c) *Earl Lonsdale v. Nelson*, 3 D. & R. 556; 2 B. & C. 302, S. C.; *ante*, 650, n.(r). As to the right to obstruct the encroachments of the sea, see *Rex v. Pagham*, 8 B. & C. 355; 3 Chit. Pl. 1094, 1095; *ante*, 610; and as to encroachments in rivers, see *Menzies v. Earl Breadalbane*, 3 Wilson & S. 235; *Farquharson v. Farquharson*, A. D. 1741, cited *id. ante*, 199,

n. (c), and *ante*, 610.

(d) 13 Geo. 3, c. 78, s. 12, requires notice to be given of annoyances and to remove them, before the surveyor can himself remove; sect. 12 & 13, as to cutting hedges; sect. 6 & 7, as to trees growing over; sect. 8, as to ditches; sect. 10, stones, manure, &c.

(e) *Dewey v. White*, 1 Mood. & M. 56, where see form of plea.

(f) *Jefferies v. Duncombe*, 11 East, 226; 2 Campb. 3, S. C.

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obstructions, and to widen streets, &c.; but these, when derogatory of private right, are construed strictly. When unqualified, no action lies against the commissioners for any act done within their jurisdiction. (g) But the power of commissioners under the Metropolis Paving Act to remove projections affixed to houses, without making compensation, is limited to such things as actually project over the public ways, and an action of trespass is sustainable against a party who removes railings not so projecting. (h) So under the Highway Act, it was held that the 6th and 68d sections do not authorize the surveyor to widen a road to thirty feet by removing a fence, unless the fence supposed to be an encroachment was actually upon the highway. (i)

VIII. Of dis-
tresses and
seizures.

VIII. Distresses of cattle or chattels, whether damage feasant or for rent, or for other claims, may also be properly considered in the nature of remedies by acts of the parties, without the intervention of legal authority, (k) although they frequently give rise to actions of replevin and other litigation.

First. When or
not it is advisa-
ble to distrain
damage feasant.

With respect to *Distresses Damage Feasant*, it would be beyond the scope of this work to attempt to state the whole law upon the subject, and we will therefore merely notice the general rules; and *first*, it had been considered that no person should distrain cattle damage feasant, unless it be certain that he has the legal title to the land, and not a bare possession, and that if his title should be questionable, he should be content to drive off the cattle and to bring an action of trespass to recover compensation for the damages, and which action is always sustainable against a wrong-doer; (l) and it had until lately been supposed, that if cattle should be distrained damage feasant and be replevied, the avowry in an action of replevin should state a seisin in fee, or other legal freehold estate, and not rely merely on the possession; and that if the legal title should prove insufficient, the distress would be illegal, although the cattle belonged to a mere trespasser, (m) and this although it had always been clear that in a plea to an *action of trespass* justify-

(g) *Houghton v. Butler*, 4 T. R. 364; *Boulton v. Crowthor*, 2 B. & C. 703; 4 D. & R. 195, S. C.; *Leader v. Maxton and others*, 3 Wils. 461.

(h) *Bouverie v. Miles*, 1 B. & Adolp. 38.

(i) *Lowen v. Kaye*, 4 Bar. & Cres. 3; 6 Dow. & Ry. 20, S. C.

(k) 3 Bla. C. 5, 6.

(l) *Graham v. Peat*, 1 East, 244; 1 Saund. 346, c. in note. But see *Selby v. Bardons*, 3 Bar. & Adolp. 2.

(m) *Hawkins v. Eccles*, 2 Bos. & Pul. 359; 1 Saund. 284, 346, c. in notes. But see *Selby v. Bardons*, 3 Bar. & Adolp. 2.

ing the taking as a distress, it is sufficient to show mere possession. (n) But by a recent decision that distinction in the course of pleading and defence has been rendered at least questionable, so that probably a person in possession of land *might now as safely distrain as he might proceed in an action of trespass.* (o)

Secondly, In all cases, before making a distress, the party should well consider whether the trespass was not justifiable, either in respect of the state of the fences, which he ought to have repaired, or otherwise; and even then, as the making a distress damage feasant is usually considered an unneighbourly act, it would be better, if the owner of the cattle be known and solvent, to forbear to distrain, and rather to drive off the cattle and give notice of action, in case of future trespasses, and wait till considerable or repeated damages clearly exceed 40*s.* and then to proceed by *action* of trespass for all the injuries. (p) But if the owner of the cattle be unknown, then, in order to endeavour to secure satisfaction, a distress is advisable.

Thirdly, The cattle must be taken whilst actually upon the owner's land and in the very act of doing damage, and not after it is over, or at least after they have escaped from the land even whilst the party was pursuing them, or although the owner of them drove them off on purpose to prevent the distress; (q) and it has been recently considered, that if after distraining cattle the party drive them off into adjoining land and there leave them for a time, he cannot afterwards again drive them to a pound, and if he do, the owner may legally rescue them. (r)

(n) *Anon.* 2 Salk. 643; *Bullard v. Harrison*, 4 M. & S. 392; *Stott v. Stott*, 16 East, 343. *Quere* the distinction, *Dye v. Leatherdale*, 3 Wils. 90; Com. Dig. 3 M. 26; and see *Knowles v. Blake*, 3 M. & P. 214; 5 Bing. 499, S. C.

(o) *Selby v. Bardons*, 3 Bar. & Adolp. 2, decided by Parke and Patteson, Js. but Lord Tenterden dissents. That decision was merely that the replication *de injuria* is in each case proper; but *semble*, that the reasons would equally establish that an *avowry* in *replevin*, as well as a *plea* in *trespass*, may equally rely on the mere possession of the party who distrained. *Semble sed quere.*

(p) *Vaspor v. Edwards*, 12 Mod. 660; 1 Salk. 248, S. C.

(q) Co. Lit. 161, a.; Bac. Ab. Distress; *Vaspor v. Edwards*, 12 Mod. 661; and see *Knowles v. Blake*, 3 Moore & P.

214; 5 Bing. 499, S. C. *infra*, note (r).

(r) *Knowles v. Blake and another*, 3 Moore & P. 214, 218; 5 Bing. 499, S. C. The printed report of the facts in that case is exceedingly inaccurate, and indeed the learned Baron who tried the cause appeared to have greatly misunderstood the facts, and therefore the decision cannot be relied upon further than the general rule. The plaintiff distrained the defendant's cattle *damage feasant* on his (the plaintiff's close), and he drove them into a close of the defendant's, in the way towards his the plaintiff's yard, and then went to apprise the defendant of the circumstances, leaving the cattle in such close of the defendant's, where they remained half an hour. On the plaintiff's return he drove the cattle from the defendant's close to his own yard, and from thence into the public pound, from whence

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So a horse, with its rider upon him, or goods in the actual use of the party, cannot be taken, because such a distress might lead to a breach of the peace; (s) and for the same reason, at common law, nets or ferrets could not be taken damage feasant in a warren, if they were in the hands of the person using them; (t) but by the recent acts we have seen that the tackle of fishers illegally fishing in a private fishery, (u) and the gins, snares or engines, and dogs of persons illegally in pursuit of deer in any forest, chase or purlieu, or inclosed land where deer are usually kept, (v) and game recently killed, in the possession of any person whilst he is trespassing upon any land in pursuit of game, (x) may be seized to the use of the owner. But in these cases the articles to be seized, it will be observed, are not to be taken as a distress damage feasant, but absolutely for the use of the party injured by the trespass, and they therefore become absolutely his, and consequently the destruction of the property seized would not now be illegal. (y)

Fourthly, The cattle, &c. taken, cannot be legally impounded after a tender of adequate amends and before impounding. (z)

they were liberated by the defendant's breaking open the pound; and it was held that this was not an illegal rescue or pound-breach, because the plaintiff by leaving the cattle in the defendant's close was an abandonment of the distress. And per Tindal, C. J., the distrainer is not bound to lay his hand upon the cattle; it is sufficient if he endeavour to prevent their escape from the field in which they are trespassing. But a distress for *damage feasant* is a matter of strict right, and if the party distraining permit the cattle to escape, or go out of his lands, his right is gone, and he has his remedy by action against the owner of the cattle for the injury done to his property. But a mere escape for a moment, if the distrainer immediately follows, would not be an abandonment of the distress, for Lord Coke (Co. Lit. 161, a.) says, "a rescous in law is, when a man hath taken a distress, and the cattle distrained, as he is driving of them to the pound, go into the house of the owner, if he that took the distress demand them of the owner and he deliver them not, this is a rescous in law." So here, if the plaintiff had followed the horses from his field into the defendant's "nursery," and instantly driven them back or taken them directly to his yard, we are all of opinion that this action might have been maintained, but as he allowed them to remain in the nursery for half an hour, and they were not demanded during that time, it was an abandonment of the

right of freshly following them, and consequently an end of the distress. Lord Coke says, "if the cattle of themselves after the view go out of the fee, then cannot the lord distrain them." And in *Vasper v. Eddows*, (Holt's Rep. 257; 12 Mod. 658,) Lord Holt, C. J. said, "If a distress for *damage feasant* dies in pound or escapes, the party shall not distrain *de novo*, [but he may sue for the trespass, see *Williams v. Price*, 3 Bar. & Adolp. 695,] but if it were for *rent*, in either case he may distrain *de novo*. That is a far stronger case than this, as the horses had never been in the pound, (this is a mistake, they had been impounded in the public pound, and were rescued therefrom by the defendant,) we are therefore of opinion that a verdict must be entered for the defendant Blake, and that damages must be assessed by a jury against the defendant Sayers, who has suffered judgment by default."

(s) *Storey v. Robinson*, 6 T. R. 138.

(t) *Hargrave's Co. Lit.* note 13; *Read v. Burley*, Cro. Eliz. 550.

(u) 7 & 8 Geo. 4, c. 29, s. 85, ante, 624.

(v) 7 & 8 Geo. 4, c. 29, s. 29, but this does not extend to other game, ante, 623, 624.

(x) 1 & 2 Wm. 4, c. 32, s. 36, ante, 627.

(y) *Kingsworth v. Bretton*, 5 Taunt. 416; 1 Marsh. 106, S. C.

(z) *Anson v. Shore*, 1 Taunt. 961; *Lady Branscomb v. Bridges*, 3 Stark. 171.

And where cattle distrained damage feasant were in a private pound, and the distrainer admitted they were *about* to be forwarded to a public pound, it was held that a tender of amends made while they were in such private pound was not too late. (a)

Fifthly, Cattle distrained must not be beaten or wounded, or worked or used, and the doing either would render the party distraining liable to an action of trespass. (b). So the distrainer ought not to tie up cattle impounded; and if he should do so, and they be strangled, he would be liable in damages; (c) but if they die in the pound, without fault of the distrainer, the loss will fall upon the party distrained upon, (d) and if they should die or escape from the pound, without his default, he may sue for the trespass. (e) And the property distrained cannot be sold, but can only be impounded and kept as a pledge until compensation for the damage has been made; and if they should be illegally sold, the party distraining would become a trespasser *ab initio*. (f) So that if the owner of the cattle should be obstinate and refuse to replevy or pay damages, the party distraining would derive no advantage from his distress.

Sixthly, Supposing a distress damage feasant should be made and impounded in a *common pound overt*, the owner of the cattle is, in point of law, bound to take notice of it at his peril; but if the cattle be put in any *special* pound, overt or covert, the distrainer must give notice thereof to the owner; and in both the cases of pounds *overt*, the owner of the cattle, and not the distrainer, is bound to provide the beasts with food and necessaries. But if they are put in a pound *covert*, as in a stable, the distrainer must feed and sustain them. (g) In all cases it is the proper course to give the owner notice in writing of the impounding, and which may be in the form subscribed. (h)

(a) *Brown v. Powell*, 4 Bing. 230; 12 Moore, 454, S. C.

(b) *Bro. Ab. Distress*, 71; *Dye v. Leathdale*, 3 Wils. 20; *Deane v. Clayton*, 1 J. B. Moore, 208; *Tyler v. Wall*, Cro. Car. 228; *Bagshaw v. Goward*, Cro. Jac. 147; *Oxley v. Watts*, 1 T. R. 12; *Forsdick v. Collins*, 1 Stark. R. 173; *Bradby on Distresses*, 241.

(c) *Vesper v. Eddows*, 1 Salk. 248; 12 Mod. 660, S. C.

(d) *Id. ibid.*; *Ricord v. Bettenham*, Burr. 1738; *Moore v. Pyrke*, 11 East, 54.

(e) *Williams v. Price*, 3 Bar. & Adolp. 695.

(f) *Per Lord Hardwicke*, C. J. 1 Selwyn's N. P. 6 ed. 684.

(g) *Co. Lit.* 47; 3 Bla. C. 13.

(h) Mr. A. B.—Take notice that I have this day distrained three horses, (or — cows, &c. according to the fact,) which I am informed are your property, whilst the same were trespassing and doing damage to and upon my crop of wheat, (or oats, &c. according to the fact,) and other crops and herbage growing and being in a close in my occupation, called —, in the parish of —, in the county of —, and I have impounded the said horses (or cows, &c.) for such trespass and damage in the common

Suggested form of notice of having distrained and impounded cattle damage feasant.

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2. Of distresses
for Rent, and
when or not it is
advisable to dis-
train.

2. In general if there be sufficient goods to countervail the arrears of RENT on the demised premises, a distress is preferable to an action, because the goods, unless replevied, may be sold after the expiration of five days, and thus produce speedier satisfaction than an action; and if replevied, the tenant must find responsible suréties for the return of the goods in case the action of replevin should terminate in favour of the distrainor; and if the sureties were not apparently sufficient at the time they were accepted, the sheriff would be liable to pay the value of the goods and costs in the event of their turning out insolvent; so that it is most probable that a landlord will, by distraining, ultimately obtain satisfaction; whereas if the tenant be arrested in an action for the rent and find bail, and judgment be obtained, the bail may render him to prison and no satisfaction may be obtained. But upon the other hand, the making a distress may be more annoying and injurious to the tenant and his family than an action even by arrest, and if resisted, judgment in replevin is seldom obtained so soon as in other actions. And in proceeding by distress great caution is requisite in the selection of an experienced agent or broker, for whose conduct throughout the landlord is by law responsible; and the very frequent irregularities in making or disposing of distresses lead to numerous vexatious or trifling actions, to prevent the accumulation of costs, in which, especially when for small damages, some regulation and restriction seem highly expedient. (i)

When an in-
junction in
equity restrains
from distrain-
ing.

Although a proceeding by distress seems in some respects in the nature of process, yet it is not legally considered as a proceeding *at law*, and therefore a common injunction in a court of equity restraining proceedings *at law* means in court, and does not extend to prohibit a distress for rent; and in many cases it may be advisable, notwithstanding a general injunction,

pound, situate at, &c. where you must feed and provide for the same at your peril; and I further inform you that the damage done by the said horses to and upon my said close amounts to £—, the payment of which I hereby require, but I am ready to concur with you in having the same again fairly valued if you require. I have a further claim upon you for antecedent damage, and to which I request your attention to prevent the necessity for legal proceedings.

Dated, &c.

Your's, &c.

(i) Distresses for rent are at present a most fertile source of litigation. It frequently turns out that the property distrained is very inadequate to pay the arrear of rent, and yet the insolvent tenant will cause two actions to be brought against his landlord, first, in *trespass*, for perhaps exclusion from a room or for staying a day

too long upon the premises; and, secondly, in *case*, with several special counts for small irregularities, and perhaps nominal damages are recovered; but the costs will exceed the amount of many years' rent; or if the tenant fail in the action, he will still retain possession of the premises, and be discharged under the Insolvent Act.

for a landlord to distrain in order to secure the ultimate payment of an arrear of rent, to prevent which a special injunction, expressly prohibiting that proceeding, must be obtained. (k)

With respect to such *distresses* for *Rent* we can only notice the general rules. *First*, a distress can only be made when there is a *subsisting tenancy*, or has been such a tenancy within the last six months, and whilst the party still retains possession, and the title of the lessee continues. (l)

Secondly, There must be a *tenancy* under a *demise*; and the party distraining must have the immediate reversion, or an express power of distress reserved against a person subject to such a power; for if there be no tenancy but an adverse holding, or if the party be in possession under a mere prospective tenancy, as under an agreement for a lease without words of immediate demise, and there be no circumstances from which, in the mean time, a tenancy from year to year can be inferred, (m) or if there be no reversion, (n) then no distress can be made. But an admission of a tenancy suffices against the party making it. (o) Thus it has been held that if a person be let into possession under an agreement for a lease, which does not contain words of immediate demise, no distress can be made, unless from a previous payment of rent or other circumstance a tenancy from year to year can be inferred, and the only remedy is by action for use and occupation. (p)

Thirdly, The tenancy must also be at a *certain fixed rent*, or a rent readily ascertainable by calculation, for, as Lord Coke quaintly said, it is a maxim in law that no distress can be taken for any services that are not put into certainty, nor can be reduced to any certainty; (q) and, consequently, where an estate has been let without in any way fixing the amount of the rent, the only remedy is by action; (r) but as *id certum est quod certum reddi potest*, if a man hold land paying so much per acre, although by the term of the demise the number of acres be not fixed, yet the lord may distrain. (s)

(k) *Hughes v. Ring*, 1 Jac. & W. 392.

(l) 8 Anne, c. 14, s. 7; Chit. Col. Stat. 665. The holding over must be substantial, and the merely leaving articles of furniture upon the premises, but not sleeping there nor retaining the keys, will not authorize a distress.

(m) What is a *demise* or not, *Stainforth v. Fox*, 7 Bing. 590, and cases there cited; and ante, 254 and 474.

(n) *Pluck v. Digges*, 2 Dow. & Clark Rep. 180; *Proece v. Corrie*, 2 Moore & P. 57; 5 Bing. 24, S. C.; *Regnart v. Porter*,

7 Bing. 451; and see *Prescott v. Boucher*, 3 Bar. & Adol. 849.

(o) *Cox v. Bent and others*, 5 Bing. 185; 2 Moore & P. 281, S. C.

(p) Ante, 254, 474; *Hegan v. Johnson*, Taunt. 148; *Dunk v. Hunter*, 5 Bar. & Ald. 322; *Tempest v. Rawling*, 13 East, 19; *Regnart v. Porter*, 7 Bing. 451.

(q) Co. Lit. 96, a.; Vin. Ab. Distress, E.; *Bussard v. Capel*, 8 Bar. & Cres. 141.

(r) *Regnart v. Porter*, 7 Bing. 451.

(s) Co. Lit. 96, a.; Vin. Ab. Distress, E.; *Bussard v. Capel*, 8 Bar. & Cres. 141.

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Fourthly, Another rule is, that a distress for rent can only be made *upon the demised premises*, (t) unless under the statute, of *live* stock upon a common appurtenant, or in case of a fraudulent removal. (u) It was therefore held that where a wharf was demised, with the *use* of the water of an adjacent navigable river, but without any demise of the soil of such river, a barge upon the water, close to the wharf and attached thereto by ropes, could not legally be distrained for the rent thereof, because the place where it lay was not part of the thing demised. (x)

Fifthly, With respect to *the things* that may be taken under a distress for rent, wearing apparel when not in actual use, that is, upon the person of the occupier, may be taken; and that doctrine has been carried so far, that if the owner be in bed and the clothes near, they may in point of law be taken. (y) So implements of trade, when not in actual use, may be taken, although there be other sufficient property; (z) but it would be otherwise whilst they were in actual use. (a) Goods of third persons on the premises may also be taken, unless they were there in the way of trade, in which case they are privileged. (b) But a carriage standing at livery stables is not exempt. (c) However, whatever is fixed to the freehold, and not at the time separated therefrom, is not distrainable, although the owner might have a right to remove the same; (d) unless in the case of certain growing crops; (e) and growing trees in a nurseryman's ground, though removable by him, are not distrainable under that statute. (f)

Sixthly, In making a distress for rent, the goods taken may, under 11 Geo. 2, c. 19, s. 10, be impounded or secured "*in such place*, or in such part of the premises chargeable with the rent, as shall be most fit and convenient for the im-

(t) *Ante*, 661, n. (s); *Furneaux v. Fotherby*, 4 Campb. 136.

(u) 11 Geo. 2, c. 19; *Furneaux v. Fotherby*, 4 Campb. 136.

(x) *Buzzard v. Capel*, 8 Bar. & Cres. 141; *ante*, 154.

(y) *Baynes v. Smith*, 1 Esp. R. 206; *Bissett v. Caldwell*, Penke's R. 36.

(z) *Fenton v. Logan*, C. P. 18 Apr. 1833, on motion for new trial by Storks, Serj.; *Gorton v. Falkner*, 4 T. R. 565.

(a) *Id. ibid.*; *Watts v. Davis*, 1 Selw. N. P. 676.

(b) *Thompson v. Mashiter*, 8 Moore, 243; *Matthias v. Nesbitt*, 1 M. & W. 100; *Ellon*, 1 M. & W. 100.

6 Moore, 243; 3 Bro. & B. 75, S. C.

(c) *Francis v. Wyatt*, 3 Burr. 1498; 1 Bla. R. 483, S. C.; *Crosier v. Tomkinson*, 2 Keny. 439.

(d) *Niblett v. Smith*, 4 Term R. 504; and see as to fixed machinery, *Duck v. Brad-dyl*, M'Clel. 217; 13 Price, 459, S. C. But for a wrongful distress the remedy should be trespass not replevin, *id. ante*, 94, note (x), 95.

(e) 11 Geo. 2, c. 19, s. 8, nor then if previously sold under a *fi. fa.*; *Pearcock v. Parris*, 2 Brod. & B. 262; 5 Moore, 79, S. C.

(f) *Clark v. Calvert*, 3 Moore, 96; *Clark v. Gaskarthy*, 2 Moore, 496.

pounding or securing the distress," and this should be effected without unnecessary disturbance or annoyance of the occupier, and the goods may with his consent be left in his use in the different parts of the premises; but if he object, then such goods as may be necessary to cover the rent in arrear and taxes and expenses should be placed and secured *in one room*, and possession kept of that only, leaving the rest of the house for the uninterrupted use of the occupier; but very slight evidence of the occupier's consent to the goods remaining dispersed as usual in different parts of a house and of a man remaining in possession would suffice; (g) and if not given, the party distraining might legally insist upon removing the goods. If the occupier, or his family, should be excluded from more than one room when large enough to contain all the property distrained, or if possession under the distress should be retained, without consent, for an *unreasonable* time after the *seventh* day, including that of taking possession, (h) then the party distraining, and all persons acting under him, will be subject to an action of trespass; (i) and the occupier's consenting to an extension of time is no waiver of any other irregularity or illegal step. (k) And if, after a distress for rent and before the actual impounding, the rent be tendered and refused, and the goods should be afterwards impounded, then, under 11 Geo. 2, c. 19, s. 19, the tenant may support trespass for the taking. (l)

Seventhly, The 2 W. & M. c. 5, (which first introduced the power of *sale* of a distress for *rent*,) enacts that a *notice* of the distress shall be given; and though a verbal notice would suffice, (m) it is usual and better to give it in writing and in the subscribed forms. (n)

(g) 11 Geo. 2, c. 19, s. 10; *Washborn v. Black*, 11 East, 403, n. (a). It should seem questionable whether without consent the party distraining has any right to leave a man in possession; at all events he would be justified in keeping possession of the goods only in one particular secure room, and not as usual of entering into every room he might please.

(h) *Pitt v. Shew and others*, 4 B. & Ald. 258, qualifying *Wallace v. King*, 1 Hen. Bla. 15; in *Pitt v. Shew and others*, 4 B. & Ald. 208, the jury held that retaining possession whilst selling even for *fourteen* days after the original seizure was not too long.

(i) *Etherton v. Popplewell*, 1 East, 139;

Winterbourne v. Morgan, 11 East, 395; *Griffin v. Scott*, 2 Ld. Raym. 1424; 1 Stra. 717, S. C.

(k) *Sells v. Hoare*, 1 Bing. 401; *Willoughby v. Backhouse*, 2 B. & Cress. 821; 4 D. & R. 539, S. C.; *Harris v. Barry*, 7 Price, 690. The consent of the tenant will not justify the *longer* detention of a lodger's goods. *Fisher v. Algar*, 2 Car. & P. 374; 2 Moore & P. 374, S. P.

(l) *Virtue v. Beasley*, 2 Mood. & M. 21; *Etherton v. Popplewell*, 1 East, 139; *Winterbourne v. Morgan*, 11 East, 395.

(m) *Walker v. Rumbold*, 12 Mod. 76; 1 Ld. Raym. 53, S. C.; *Moss v. Gallimore*, 1 Dougl. 279; *Crowther v. Ramsbottom*, 7 Term R. 654.

(n) Mr. A. B.—Take notice, that I have this day distrained (or "that as bailiff to C. D., your landlord, I have this day distrained,") and impounded on the premises Form of notice of distress unde

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3. Distresses
and seizures for
other claims.

3. To the proceeding by distress for rent may be added distresses specially authorized, as *rent charges*, (o) or for *sewers' rate*, (p) *poor rate*, (q) or *highway rate*, (r) or under various particular acts of parliament, authorizing the levying *finer* or *penalties* by distress and sale. When, as in the case of a highway rate, or poor rate, a statute gives a *distress* for an arrear, that remedy only must be pursued, and no *action* can be main-

2 W. & M. sess.
1, c. 5, s. 2, and
of having im-
pounded upon
the premises
under 11 Geo. 2,
c. 19, s. 10.

hereunder stated,* the several cattle, goods and chattels specified in the subscribed inventory, for the sum of £100, being one year's rent due to me (or "to the said C. D.") at Midsummer last,† for the said premises; and that unless you pay the said arrear of rent, with the charges of distraining for the same, within five days from the date hereof, the said goods and chattels will be appraised and sold according to law. Given under my hand this — day of —, in the year of our Lord, 1853.

Witness, R. S.

C. D.

Inventory above referred to.

In the stable in your occupation, situate at —, three horses; in the cow-house adjoining, four cows and three calves, &c. &c. (enumerating every chattel distrained and in what place taken).

Notice of having
distrained grow-
ing crops on
11 Geo. 2, c. 19,
s. 8.

Mr. A. B.—Take notice that I have this day taken and distrained (or "that as bailiff to C. D., your landlord, I have taken and distrained,") on the lands and premises hereunder mentioned, and there impounded the several growing crops specified in the subscribed inventory, for the sum of £—, &c. (as in last) for the said lands and premises, and that unless you previously pay the said rent, with the charges of distraining for the same, I shall proceed to cut, gather, make, cure, carry and lay up the said crops, when ripe, in the barns or other proper place, on the said premises, and in convenient time to appraise, sell and dispose of the same, towards satisfaction of the said rent and of the charges of such distress, appraisement and sale, according to the form of the statute in such case made and provided. Given under my hand, &c. (as in last).

Notice of a dis-
tress for the
arrears of a
rent charge or
annuity charged
on land, with
express power
of distress.

Take notice, that by order and on behalf of C. D. I have this day taken and distrained in and upon the farm and lands called —, in your occupation, in the parish of —, in the county of —, all the severed‡ corn, grain and effects in the inventory hereunder written mentioned, for the sum of £—, being — years' annuity or rent charge of £— per annum, due to the said C. D. at — last, and charged on, and issuing and payable out of certain manors, farms, lands and premises called —, in the said parish of —, in the county of — aforesaid, of which the farm and lands first above-mentioned are part and parcel, and that unless the said arrears of the said annuity or rent-charge, together with the expenses of this distress, are paid and satisfied, the said corn, grain and effects will be disposed of according to law. Dated, &c.

To Mr. A. B. and all others whom it shall concern.

E. F.

(o) 4 Geo. 2, c. 28, s. 6; *Bradbury v. Wright*, Doug. 627; but it cannot be made upon a person who became tenant before the grant, 1 Rol. Ab. 669, pl. 45; see form of notice of distress for rent charge, *supra*.

(p) 7 Ann. c. 10.

(q) 43 Eliz. c. 2, s. 4; 17 Geo. 2, c. 38, s. 7; 34 Geo. 3, c. 170, s. 12; *Hutchins v. Chambers*, 1 Burr. 589; under these acts the distress for poor rates may be made in any place.

(r) 13 Geo. 3, c. 78, s. 67; *Hendebourck v. Langton*, 10 Bar. & Cres. 546.

* The 11 Geo. 2, c. 19, s. 10, authorizes impounding on the premises, *Griffin v. Scott*, 3 Ld. Raym. 1424; 1 Stra. 717, S. C.; *Swann v. Earl Falmouth*, 8 B. & C. 456. If elsewhere, say, "and impounded in a certain yard and premises situate, &c."

† It is not necessary to mention when the rent became due. *Moss v. Gallimore*, Doug. 279; but if mistated the mistake would not be material, *Crowther v. Ramsbottom*, 7 T. R. 654.

‡ A distress for a rent-charge cannot be made upon growing crops, or upon a common appurtenant, under 11 Geo. 2, c. 19, s. 8, unless under express power, *Mitter v. Grass*, 8 Bing. 92, ante, 227, note (e).

tained. (s) But as the power to distrain on standing crops, or of cattle upon a common, is only given in case of *rent service*, such crops or cattle cannot be taken under a distress for arrears of an annuity or rent charge. (t)

Seizures and distresses for *heriots* are also remedies by the act of the party entitled to them, which may be properly classed under this head. (u) For heriot service, which is a species of rent, the lord may distrain or seize; but for heriot custom he can only *seize* the identical heriot, and cannot distrain any other chattel. (x) The like speedy and effectual remedy of *seizure* is also given by law with regard to many things that are said to lie in franchise, as waifs, wrecks, estrays, and deodands, which may be taken without the formal process of a suit or action. (y)

IX. The *setting off* one debt against another may also be treated as a mode of preventing a loss by the act of a party himself. At common law, when there were *cross* demands not arising out of the same transaction, nor agreed by the parties to be applied in payment of each other, each party must have paid his debt, and brought an action against the other, at the risk of his ability at the end of the suit to obtain actual satisfaction. The statutes 2 Geo. 2, c. 22, s. 13, and the 8 Geo. 2, c. 24, and the 6 Geo. 4, c. 16, s. 50, as to bankrupts, rectify this evil, and enable debts and mutual credits to be set off against each other, and the balance only is recoverable by either party. (a) These acts extend to inferior courts and courts not of record, as the County Court, (b) but not to Courts of Request. (c) A party may waive his right of set-off; (d) but on the other hand a creditor may, by refusing to receive payment of more than the balance, insist upon and compel the other party to avail himself of the set-off, at least so as to preclude him from suing on his side of the account. (e)

IX. Of obtaining satisfaction by a set-off.

(s) *Stevens v. Evans*, 2 Barr. 1157; *Underhill v. Ellicombe*, 1 M'Clel. & Young, 450; *Heudebourck v. Langton*, 10 Bar. & C. 546.

(t) *Miller v. Green*, 8 Bing. 92.

(u) As to these in general, see 2 Saund. 168, note 1; 3 Bla. C. 15.

(x) *Id.* *ibid.*; *Odham v. Smith*, Cro. Eliz. 590; *Major v. Brandwood*, Cro. Car. 260.

(y) 3 Bla. C. 15.

(a) See the acts and decisions, Chitty's Cal. Stat. 874 to 879.

(b) In the County Court a set-off may

be pleaded, but as the defendant can only plead *several* pleas to the same matter in Courts of Record, the defendant should plead *non assumpsit*, except as to the part which he knows he cannot dispute, or that his set-off will fully cover, and then plead the set-off as to that part.

(c) Tidd, 9 ed. 1191, note (a), *sed quare*.

(d) *Brown v. Pigeon*, 2 Campb. 595; *Hennell v. Fairlamb*, 3 Esp. R. 104.

(e) *Laing v. Chatham*, 1 Campb. 252; *Hennell v. Fairlamb*, 3 Esp. R. 104.

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Under the above acts there is a mode, in case of contracts, by which a creditor may, by his own act, sometimes obtain satisfaction of a debt from his insolvent debtor, even by surprise or *stratagem*, i. e. by a *concerted set-off*. Thus it has been held, that if the purchaser of goods offer to the vendor, as payment of the price, an overdue bill, which the vendor continues liable to pay, this is a good payment; and where the defendant, who had ordered goods, and even expressly engaged to pay *ready money*, and then, in lieu of cash, sent to the vendor's agent a bill accepted by such vendor, which had been due and dishonoured before the goods were ordered, and the agent at first refused to take the bill, but ultimately carried it to the vendor, who kept it, and the vendor afterwards became bankrupt; it was held, in an action brought by his assignees, to recover the value of the goods, that this transaction was equivalent to payment; (f) but if the bill had not been due, it would have been otherwise. (g) So where the plaintiff declared *in indebitatus assumpsit* for goods sold, it was decided that the defendant might set off money due upon a bill accepted by the plaintiff, although the defendant agreed to pay *ready money* for the goods. (h) And a plaintiff cannot, when the real transaction is strictly that of a contract or debt, by declaring specially for not accounting, deprive the defendant of a set-off, of which he might have availed himself in case the declaration had been generally for money received. (i) However, in a special *assumpsit* for not paying over money pursuant to agreement, (k) or for breach of duty in not handing over the proceeds of a bill delivered to the defendant to get discounted, (l) it has been held a defendant cannot avail himself of a set-off. In some of these cases it will be seen that a person who *holds* the bill or note of a party in doubtful circumstances, may by manœuvre often obtain satisfaction of the debt by purchasing goods as for ready money, and then instead of actually paying in money, tendering the overdue bill in satisfaction. So if it be suspected that a party to a bill is about to become insolvent or bankrupt, the holder may, before notice of an act of bankruptcy, at any time before the date of the commission, indorse it to a party who is

(f) *Mayer v. Nias*, 1 Bing. 311; 8 Moore, 275, S.C.; *Eland v. Karr & others*, 1 East, 375; *Fair v. M'Iver*, 16 East, 130.
(g) *In re Goodchild*, 2 Law J. 187.
(h) *Cornforth v. Rivett*, 2 Maule & S. 510; *Eland v. Karr*, 1 East, 375; 13 Ves. J. 180; *Mayer v. Nias*, 8 Moore, 275; 1

Bing. 311, S. C.; *M'Gillivray v. Simson*, 9 Dowl. & R. 35, 2 C. & P. 820, S. C.
(i) *Birch v. Depeyster*, 4 Campb. 385.
(k) *Colson v. Welsh*, 1 Esp. R. 378; *Lechmere v. Hawkins*, 2 Id. 626.
(l) *Thorpe v. Thorpe*, 3 Bar. & Adelp. 580, 584, 585.

debtor to the bankrupt, and who may discharge his debt by setting off the bill in his hands, provided he also, at the time he received the bill, was ignorant of any act of bankruptcy. (m)

Supposing the debtor should also be a creditor, but upon a negotiable bill or note, then, to prevent the holder from transferring it to a third person, and thereby avoiding the set-off, it will be necessary for the debtor to file a bill in equity, to restrain him from so transferring the bill, (n) and it should seem that this even would be requisite, although the bill is already over due. (o)

X. In cases of torts, or of debts that cannot be set off under the above statutes, and indeed, independently of such statutes, if there be cross actions or suits, the superior courts, in favour of this equitable mode of adjusting accounts between the same parties, or where the parties are the same substantially, at common law, allow one judgment to be set off against the other, (p) and also costs in equity to be set off against costs at law, (q) and this extends even to interlocutory costs; (r) and the court will sometimes even stay execution in one action till judgment has been obtained by the defendant therein, viz. a cross action, so as to enable the latter afterwards to obtain such set off. (s)

X. Of setting off judgment and costs against each other.

XI. Another recognized mode of remedy, without legal process, may be arranged under this head, though strictly it is considered as redress by *mere operation of law*, viz. *Retainers*, which is, where a creditor is by his debtor made his executor, (t) or one of his executors, (u) or where the creditor obtains letters of administration to his intestate debtor, (x) or where a creditor becomes heir to his debtor, (y) in all which cases the executor or administrator, as he could not sue himself, has a right, if he think fit, to pay himself, or retain assets that come to his hands, before and as against any other creditors in equal degree. (z) So if a debtor be made executor of his creditor, this at *law* operates as a release of the debt, it being

XI. Of remedies by Retainers, Lien, &c.

(m) *Hawkins v. Whitten*, 10 B. & C. 217; *Dickson v. Cass*, 1 Bar. & Adol. 343.

(n) *Ex parte Harding*, 1 Buck, 24.

(o) *Burrough v. Moss*, 10 Bar. & Crea. 558; 8 Law J. 287, K. B., 8. C.

(p) *Tidd*, 9 ed. 991, 992; *Simpson v. Hanley*, 1 Maule & Sel. 696; *Sherlock v. Burned*, 6 Bing. 21; *Hemel v. Lord Egmont*, Id. 61; and see the cases in equity, *Chitty's Eq. Dig.* 1202, and post.

(q) *Webber v. Nicholis*, 4 Bing. 16.

(r) *Doe v. Carter*, 8 Bing. 330.

(s) *Masterman v. Malin*, 7 Bing. 435.

(t) 1 Rol. Ab. 922; *Paramour v. Yardley*, Plowd. 543, ante, 534, 535.

(u) *Chatham v. Ward*, 1 Bos. & Pul. 630.

(x) *Pynes v. Erle*, 8 T. R. 407.

(y) *Sawley v. Gower*, 2 Vern. 62.

(z) Id. *ibid.*; 3 Bla. C. 18; 2 Bla. C. 512.

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presumed that the testator intended to forgive the debt; besides, the executor could not sue himself. (a) But if a debtor be appointed *administrator*, no presumption of an intended release arises, and therefore, although the legal remedy is suspended during his life, yet after his death his legal representative may be sued for the recovery of the debt by a succeeding *administrator de bonis non*. (b) In equity, however, the debt of an executor shall not be released, even as against legatees, if the presumption arising from his appointment be contradicted by the express terms or a strong inference from the will; as where the testator directed a specific legacy to be paid out of such debt. (c) So if he leave the executor a legacy, that indicates that he did not mean to release the debt, and in such case the executor is trustee to the amount of the debt for the residuary legatee or next of kin. (d) So an executor without a legacy, where it appeared that the testator considered him a mere trustee of his whole property, was held not to be discharged from his debt. (e)

Of the right of
Lien, or Re-
tainer in gene-
ral.

But with the exception of the powers of distress and seizure, and of these rights of set-off and retainer, and the right of retaining possession of certain tangible personal property, on the ground of *Lien*, (which rights, we have seen, are very limited,) no person has a right, either at law or in equity, to detain or withhold the property of another, either in compensation or security for any debt or damage he may claim from the owner; and therefore, as a measure of precaution, the right of lien, and also the sale thereof, should always be *expressly* stipulated for. (f) We have seen that a solicitor has no lien on a will, (g) nor has he in any case where the retention of a lien would affect a trust. (h)

(a) 2 Bla. C. 512; *Woodward v. Lord Darby*, Plowd. 184; *Waukford v. Waukford*, 1 Salk. 299, 303; 1 Rol. Ab. 921.

(b) *Lockier v. Smith*, 1 Sld. 79; *Waukford v. Waukford*, 1 Salk. 303; *Freakley v. Fox*, 9 B. & C. 130, and 1 M. & Ry. 18, S. C.

(c) *Flud v. Rumsey*, Yelv. 160.

(d) *Caring v. Goodings*, 3 Bro. Ch. R.

110; C. T. Talbot, 240; Bro. P. C. 180; 2 Foul. Eq. 325.

(e) *Berry v. Usher*, 11 Ves. 87; *Simmons v. Gutheridge*, 13 Ves. 262.

(f) *Ante*, 122, and 492.

(g) *Ante* 513, note (o).

(h) *Baker v. Henderson*, 1 Clark & Fin. 27.

CHAPTER VIII.

OF THE PREVENTION OF INJURIES BY LEGAL AUTHORITY.

- I. Of those means of Prevention in general.
- II. Prevention by imprisoning a Lunatic.
- III. ——— presence of a Justice of the Peace or Peace Officer.
- IV. ——— by a Justice's Warrant.
- V. ——— by Chief Justice's Warrant to prevent a Duel, &c.
- VI. ——— by Security to keep the Peace or be of good Behaviour.
 - First. By Justices of Peace.
 - Secondly. By Court of K. B.
 - Thirdly. By Court of Chancery.
- VII. Prevention of Imprisonment, and obtaining Release.
 - First. By Habeas Corpus.
 - Secondly. By Summary Application.
- VIII. Preventions by Proceedings in Superior Courts.
 - First, In Courts of Law.
 - Secondly, In Courts of Equity.

Injunction Bills in general to prevent irreparable injury.
But not Crime or Libel.
Nor breach of mere Personal Contract or Small Injury.

 1. Relating to the PERSON.
 1. Absolute Rights.
 2. Relative Rights.
 - Between Parent and Child, and Guardian and Ward, &c.
 2. Relating to PERSONAL Property,
 1. As Injunctions against partners.
 2. ——— against Agents.
 3. Injunctions to restrain Negotiation of Bills.
 4. ——— to have Deeds delivered up.
 3. Relating to REAL PROPERTY.
 1. Injunctions to prevent Loss—Boundary Bills.
 2. ——— to prevent Wasteful Trespasses.
 3. ——— to quiet Possession.
 4. ——— to prevent Waste.
 5. ——— to prevent Nuisances.
 1. Private.
 2. Public.
 4. To Prevent Injuries from Litigation in nature of Injunctions.
 1. By Writ of *ne exeat regno*.
 2. Bill to perpetuate Testimony.
 3. Bill to restrain actions, &c.
 4. Bills of Interpleader.
 5. Motions in Courts of Law.
- IX. To prevent Loss in other Particular Cases.
 1. Protests for better Security.
 2. Proceedings in London against a Fugitive Debtor.

WE have now to consider the *preventive remedies by the intervention of some competent legal authority* or proceeding, whether *summary* or *formal*, as distinguished from preventions by the mere act of parties, considered in the last chapter. (a) We have adverted to the legal maxim as declared by North and Tenterden, C. Js. that, "*laws for prevention are even prefer-*

1. Of Preventive Measures by intervention of Legal Authority in general.

(a) See division of the subject, *ante*, 586, 587.

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LEGALLY.

able to laws for punishment," and upon that principle it was decided that a custom for the homage to choose every year two surveyors, to take care that no unwholesome victuals should be sold within the manor, and with power to destroy whatever corrupt victuals they found exposed to sale, was valid ; (b) and that a custom in a manor for the leet jury to break and destroy measures found by them to be false is also lawful ; (c) and on the same principle, the acts were passed relating to weights and measures, giving justices of the peace power to order the destruction of such fraudulent weights and measures, and at the same time preserving and continuing every local custom or usage to the same effect. (d) The same principle induced the passing of the *vagrant* act, and all the summary powers enabling justices and others to apprehend certain suspicious individuals, to prevent them from committing a crime. (e)

II. Imprison-
ment of a luna-
tic to prevent
mischief.

II. The first proceeding of this nature, besides those referred to, is to *prevent* mischief from a *Lunatic*. At common law any person might justify confining, and as it has been said *beating*, (that is *restraining*,) his friend in such a manner as may be essential under such circumstances ; (f) and a private individual may arrest a lunatic who seems disposed to do mischief. (g) But a medical man is not warranted, merely on statements made by the relation of a person supposed to be insane, in sending men to take him into custody and confining him, unless he be satisfied that those statements are true, and that such a step is necessary to prevent some immediate serious injury from the individual either to himself or to other persons ; and if access cannot be had for the purpose of proper examination, application should be made to the Lord Chancellor that the party may be taken up under his authority. (h) When there is danger of a lunatic committing any crime or offence or serious mischief, for which if sane he would be *criminally* punishable, the proper course is to proceed under the 39 & 40 Geo. 3, c. 94, s. 3, which enacts, "that for the better prevention of crimes being committed by persons insane, if any person shall be discovered and apprehended

(b) *Vaughan v. Attwood and others*, 1 Mod. 202.

(c) *Willcock v. Windsor*, 3 Bar. & Adolp. 43 ; *Sheppard v. Hall and others*, Id. 433.

(d) Id. *ibid.* ; 55 Geo. 3, c. 43, s. 112.

(e) See them enumerated, and the powers of the several acts considered, as

far as they authorize private individuals to apprehend, &c. *ante*, 619 to 631.

(f) Hawk. P. C. c. 60, s. 23 ; Barn's J. Arrest.

(g) *Brookshaw v. Hopkins*, Loft, 243 ; Bac. Ab. Trespass, D. 3.

(h) *Anderdon v. Burrows and others*, 4 Car. & P. 210.

under circumstances that denote a *derangement of mind*, and a purpose of committing some crime, for which, if committed, he would be liable to be indicted, and any justice before whom such person may be brought shall think fit to issue a warrant for committing such person as a dangerous person suspected to be insane, such cause of commitment *being plainly expressed in the warrant*, the person so committed shall not be bailed except by two justices, one whereof shall be the justice who issued such warrant, or by the quarter sessions, or by one of the Judges or Lord Chancellor, Lord Keeper or Commissioners of the Great Seal." (i)

Independently of this power, and of the other enactments relating to lunatics, neither a court of common law, nor the judges, have any power to interfere with the person of a lunatic when he has been *arrested*, so as to take him out of the custody of the sheriff or his officer, (k) either before or after a commission of lunacy has been found. (l) But it should seem that the Lord Chancellor has jurisdiction in any case, even before a commission, upon proper application, to order in whose custody a dangerous lunatic shall be placed; (m) and after a commission has been established by the verdict of a jury, it is clear that the Chancellor may order that the lunatic shall be delivered to the committee, and that an *habeas corpus* is unnecessary. (n)

If a lunatic be likely to commit any injury, for which he might if sane be indicted, and the immediate interposition of the Lord Chancellor cannot be obtained, then it would be prudent to apply to a justice of the peace under the before mentioned 39 & 40 Geo. 3, c. 94, s. 3, (o) and to make oath of the derangement of mind, and of the apprehended purpose of committing some crime, and thereupon the justice should by warrant commit the party as a *dangerous person*, suspected to be insane; and as the act enacts, that the person so committed shall not be bailed except by two justices, or by one of the judges, or the Lord Chancellor, it should seem that the party so committed could not be legally removed by the sheriff underailable process, or even in execution. (p) There is a prescribed form of such a warrant of commitment, and it should seem that it need not

(i) This act, it will be observed, extends to every description of deranged persons; whereas the 17 Geo. 2, c. 5, s. 20, only extended to vagrant lunatics, 2 Atk. 52.

(k) *Nutt v. Verney*, 4 Term R. 121; *Kernot v. Norman*, 2 Term R. 390; *Ibbison v. Galway*, 6 T. R. 133; Tidd, 9th ed. 216.

(l) *Steel v. Alan*, 2 Bos. & Pul. 362; *Anderson's Bail*, 2 Chit. R. 104.

(m) See cases in notes (k) and (l); and see *Anderdon v. Burrows*, 4 Car. & P. 210.

(n) *Ex parte Cranmer*, 12 Ves. 445; *Lord Ely's case*, 1 Rid. P. C. App. 518.

(o) *Ante*, 670.

(p) *Seemle, sed quere*,

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state the name of the person towards or upon whom the assault or crime was expected to be committed, nor need it appear on the warrant that the evidence given before the justice was upon oath. (q)

III. Preven-
tions by appli-
cation to a
Magistrate or
Peace officer.

III. In case a felony or a serious breach of the peace, or disturbance, or other illegal act constituting a misdemeanor, be expected, then it is advisable, either by application to a magistrate or to a constable, or other peace officer, to cause him to attend, so that if he have information of any felony, or view of any actual breach of the peace, he may immediately interfere and apprehend the wrong-doer; and on any information that a breach of the peace is about or likely to ensue, it is the duty of every justice of the peace and constable within his district to attend and prevent it. (r) The very appearance of a known officer will frequently prevent or at least interrupt the apprehended illegal act. This is also advisable in anticipation of all large and open assemblies of persons of all classes, especially when for convivial sports or amusements, which so frequently lead to extra excitements, quarrels, and breaches of the peace, unless immediately restrained by some legal authority. We have seen some of the cases in which a peace officer may and ought to interfere without warrant, and others will be found in the books referred to in the notes. (s) Such officers are generally better informed of the powers of interference and arrest and the modes in which it may be made, than any private individual who may call for their assistance, and who may afterwards act with more security and indemnity in the assistance of the constable, for then he has the protection of the statutory provisions, generally extending to all persons *bond fide acting in aid of a peace officer.* (t)

Appointment
of special con-
stables.

On the reasonable expectation of any *actual tumult, riot, or felony*, (but of which it is necessary that some person should make oath before a magistrate,) and for prevention thereof, and before the same has actually occurred, or whilst it is in progress, or likely to be repeated, any *two justices* may appoint *special constables* for the preservation of the public peace, and

(q) *Rex v. Gourlay*, 7 Bar. & Cres. 669; 1 Man. & Ry. 619, S. C., see form of warrant *id. ibid.* and 3 Burn's J. 26th ed. 699.

(r) *Per Bayley, J.*, in *Rex v. Bellingham*, 1 M. & R. M. C. 127; 2 Car. & P. 234, S. C. and *Rex v. Perkins*, 4 Car. &

P. 537, ante, 36, note (g).

(s) Burn's J. Arrest, Constable, Police, Vagrant; and see *Rex v. Perkins*, 4 C. & P. 537, ante, 36, note (g).

(t) 21 Jac. 1, c. 12, sect. 5; 1 Burn's J. 26 ed. 802 to 806.

the protection of the inhabitants, and the security of property, and who are to perform the same duties as common law constables, and in case of neglect each forfeits £5, and is subject to other liabilities. (u) And it would be an *indictable misdemeanor* if magistrates should *perversely*, and after tender of such oath, neglect to appoint them when requisite; (x) but by the above statute, as well as the prior act 1 Geo. 4, c. 87, it is necessary for some person to make oath that a riot is expected before a magistrate can legally appoint or call out special constables. (y)

It is the duty of justices of the peace, when they are informed that a breach of the peace is likely to take place, *in person* to attend, or at least to send peace officers to prevent it; (z) and as all persons present countenancing a prize fight are guilty of an offence, whenever a prize fight is expected, the magistrates ought to cause the intended combatants to be brought before them, and compel them to enter into securities to keep the peace till the assizes or sessions, and if they should refuse to enter into securities, then to commit them. (a)

IV. If a magistrate have jurisdiction, his error in issuing a warrant to apprehend, or in committing a person to take his trial for a supposed offence, will not subject *him* to an action of trespass; (b) and this, although the depositions were improperly taken in the words of the act, and not in those of the witness. (c) But if he had no jurisdiction at all, or if it had ceased, it would be otherwise. (c) And sometimes the proceeding *irregularly* will in effect be equivalent to the want of jurisdiction; as if a magistrate maliciously issue a warrant, without any information upon oath, when that preliminary is required by law, in that case he might be a trespasser. (d) In general, whether for the purpose of searching for goods supposed to have been stolen, or for apprehending a supposed offender, the safest course is for an injured individual to go before a justice and *dispassionately* to state the facts of the

IV. Of apprehending supposed offenders under a Warrant of a justice.

(u) 1 & 2 Wm. 4, c. 41.

(x) *The King v. Pinney, Mayor of Bristol*, trial at Westminster, K.B., 1 Nov. A. D. 1832.

(y) *Per* Littledale, J. and the whole court, in *The King v. Pinney, Esq.* *Id.* *ibid.*

(z) Dalt. J., c. 1; Burn's J. Justice, 26 ed. 448.

(a) *Per* Bayley, J., *Rex v. Bellingham*,

2 Car. & P. 234; and 1 M. & R. M.C. 127, S. C.; and *Rex v. Perkins*, 4 Car. & P. 537; ante, 36, note (g).

(b) *Crepps v. Darden*, Cowp. 640.

(c) *Mills v. Collett*, 6 Bing. 85.

(d) *Morgan v. Hughes*, 2 T. R. 225; but see *Lowther v. Earl of Radnor*, 8 East, 113.

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supposed felony, and as he is assured he will thereafter be able to prove them by some *third person*, and not *to press* the magistrate to issue his warrant, but to leave him to interfere or not of his own accord; and then in general the informer will not be responsible for the consequences, in case the magistrate should erroneously issue his warrant, (e) when if a party should *maliciously urge* a magistrate erroneously to grant his warrant, then such party might be liable to an action, though the magistrate would not. (f) But the proceedings by warrant in general suppose an offence to have been *completed*, and therefore will be more properly considered on a future occasion.

V. Application
to the Chancellor
or Chief
Justice, or other
Judge of K. B.
to prevent a
Duel.

V. Although in ordinary cases, on the apprehension of a duel or breach of the peace, application to prevent it should be immediately made to justices of the peace, as presently directed, yet, when a *Duel* is expected between persons of rank and consideration, it may be expedient to apply to the Chancellor, or Chief Justice, or other Judge of the Court of King's Bench, (g) who will sometimes send for the parties, and require their pledge of honor not to proceed to any violent measures, or will, as the most certain course, issue his warrant in the first instance, and require them with sureties to enter into a formal recognizance to keep the peace towards each other, and which will preclude them, not only in honour, but legally, from even leaving the country to fight on the continent, as a duel out of the kingdom, between parties, one of whom is a British subject, would be as penal and punishable as a duel within the king's dominions, and equally constitute a breach of the recognizance. (h)

VI. Prevention
by requiring
Sureties to keep
the Peace or be
of good beha-
viour.

VI. Whenever an injury to the person has been threatened, or the burning of a house, one of the most effectual modes of preventing injury is to obtain *sureties to keep the peace or be of good behaviour*, the latter of which includes the same thing; since if the threatener should find sufficient sureties, he would probably be deterred from committing the injury by the apprehension of subjecting his sureties to the payment of the stipu-

(e) *Ante*, 630.

(f) *Smith v. Elsee*, 1 Dowl. & Ry. 97; 2 Chit. R. 305; *ante*, 630, n. (g).

(g) Each of these has, as incident to his office, general authority to keep the peace throughout the realm, and to award process for the surety of the peace, and to take recognizance for it, Hawk. b. 2, c.

8, s. 2; and Burn's J., Justices of Peace, I. It is most usual to apply to the Chief Justice to prevent a *Duel*.

(h) *Rex v. Roche*, 1 Leach, 160; *Rex v. Sawyer*, R. & R. C. C. 294; Car. C. L. 103, 104; 9 Geo. 4, c. 31, s. 7; *Rex v. Helsham*, 1 Burn's J., Duelling, 1026.

lated forfeiture, and if no sureties be found, then he must remain in prison. (i)

By the very terms of their commission, and at common law, and under the 34 Edw. 3, c. 1, and the constructions thereon, *justices of the peace*, and each of them, are appointed to *keep the king's peace*, "and to cause to come before them, or any of them, all those who to any one or more of our people concerning their *bodies* or the firing of their *houses* have used *threats*, to find sufficient *security for the peace* or their *good behaviour* towards us and our people; and if they shall refuse to find such security, then keep them in our prisons until they shall find such security to cause to be safely kept." (k) The authority to take sureties to keep the peace was at common law; that to require sureties for good behaviour is founded upon the 34 Edw. 3, c. 1, which, although limited in its words, "and to take of all them that be *not of good fame* sufficient surety and mainprize for their *good behaviour* towards the king and his people, to the intent that the people be not by the rioters and rebels therein mentioned troubled nor endangered, nor the *peace* blemished," has by the construction of the statute been extended to other injuries than might affect the bodies or dwellings of persons, or amount to a breach of the peace; as to divers misbehaviours *not directly* tending to a breach of the peace, many instances of which are stated by Dalton, and are enumerated by Dr. Burn, (l) as to a person who bought ratsbane and mingled it with corn, and then cast it among his neighbour's fowls, whereby most of them died, and to night walkers, and eves droppers and suspected persons, common gamesters, *libellers*, (m) abusers of justices whilst in execution of their office, and persons guilty of forcible entry, or threatening a person attending a court of justice, &c. (n). But Dr. Burn observes, that whatever power in these cases the Court of K. B. may have, yet at least one justice should in prudence only require sureties for the peace or good behaviour in those cases which constitute a *breach of the peace* or tend to it, or to offences which clearly establish that an offender is not of good fame, or those which have been repeatedly decided and

(i) See in general 4 Bla. Com. 252, 253; Burn's J. Surety, Peace.

(k) See form of commission of peace, 4 Chitty's Crim. L.; and 3 Burn's J. 449, settled by Sir C. Wrey in 30 Eliz. Mic. T. 1590, and accepted and ordered to be used by the then chancellor.

(l) Dalt. J.; 5 Burn's J. Surety for good behaviour, 685.

(m) And see Butt v. Conant, 1 Brod. & B. 548, a case of a justice's warrant for a libel on Lord Ellenborough.

(n) Id. Ibid.; Dalt. c. 124; Hawk. b. 1, c. 73, s. 9; Crompt. 124, 125.

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acted upon as within the meaning of the acts and the authority of the commission. (o) It should seem, however, that when a person is bound by recognizance for *good behaviour*, he is not only to avoid actual breaches of the peace, but must well demean himself in his carriage and company, not doing any thing which might be a cause of a breach of the peace, or put the people in fear or dread, but this does not extend to misdoings of other things which touch not the *peace*. (p) A recognizance to keep the peace is only forfeited by an actual attack or threat of bodily harm, or burning a house; therefore it is not forfeited by bare words of heat and choler, as calling a man a knave, liar, rascal, or drunkard; for though such words might provoke a choleric man to break the peace, yet they do not directly challenge him to do it, nor does it appear that the speaker designed to carry his resentment further; and it has been said that even a recognizance for good behaviour shall not be forfeited by such words; (q) but a challenge to fight would undoubtedly constitute a breach of such recognizance. (r) However, a mere entry with force on lands, without offer of violence to any man's *person*, and without *public* terror, or a trespass to corn, or grass, or goods, or horse, so that it be not a taking from the person, though nominally breaches of the peace, are not sufficient to forfeit a recognizance to keep the peace, for the act to constitute a breach of such recognizance must be done or intended to the *person*, or in terror of the people. (s) But a recognizance to be of *good behaviour* shall not only be forfeited by *actual* breaches of the peace, but also for some others for which a recognizance to keep the peace would not be forfeited, as for going armed with great numbers to the terror of the people, as speaking words tending to sedition, and also as said in Hawkins, for such actual misbehaviour which are *intended* to be prevented by such a recognizance, but not for barely giving cause of suspicion for what

(o) 5 Burn's J. tit. Surety, &c. 686, 687. There seems no occasion to strain or extend the terms "*be not of good fame*," in the statute 34 Ed. 3, c. 1, to fresh cases, since by the modern act against vagrants, 5 Geo. 4, c. 83, ante, 601, 622, almost every possible description of person likely to commit offences is included, and they are made punishable, though perhaps in many of these cases it might suffice to require from such suspicious persons sureties for their good behaviour instead of the punishment at present prescribed, or at least so as to mitigate the punishment, now imprison-

ment for three or six calendar months, or a year. It seems very questionable whether a justice, in case of poisoning a neighbour's fowls, had any jurisdiction to require sureties for good behaviour under the 34 Ed. 3, c. 1, which seems only to extend to offenders therein mentioned, 5 Burn's J. Sureties, Good Behaviour, 683.

(p) Dalt. c. 122; Hawk. b. 1, c. 61, s. 5, 6.

(q) Hawk. b. 1, c. 60, s. 22.

(r) Id. sect. 21.

(s) Dalt. c. 121; 5 Burn's J. Surety, Peace, 678.

perhaps may never actually happen. (t) The term "intended," however, seems too undefined, for as the terms of the recognizance are in general to be of *good behaviour*, what those words mean must be considered to be confined to what the law considers good behaviour and its breaches, and not what the magistrate or others also required the recognizance intended to prevent.

It appears, however, to be agreed, that no legal assault or other act will constitute a breach of either recognizance if it were justifiable as a battery in self defence, or of a wife, child, apprentice, or servant. (u)

To obtain sureties to keep the peace, the party requiring it must swear to fear of present or future danger, and not merely to a battery or trespass, or any breach of the peace that is *past*, excepting indeed that it is always advisable to state any such injury and a threat of repetition, as a legitimate ground for fearing *future* injury, which fear must always be stated. (x) Whenever a person can swear to just cause of fear that another *will* burn his house, or do him corporeal hurt, as by killing or beating him, or causing others to do him such mischief, or illegally to imprison him; he may require sureties of the peace, and the justice is bound to cause proceedings accordingly, (y) or would be liable to an action and punishment for the consequences of his neglect; and a husband or parent may require such sureties against threatened injury to his wife or child. (z) But not a master in respect of threats to his servant, (a) nor any one by virtue of the general act for threats of injury to cattle, goods, or land. (b) Threats by letter or writing to burn or destroy houses, outhouses, barns, stacks of corn, or grain, hay, or straw, and other threats, are provided for by particular statutes. (c)

When and how
to proceed be-
fore a justice,
&c.

The oath and articles should state the connection, if any, between the parties, and the circumstance relating to any prior cruelty and injury to the *person*, and the threat, if any, of repetition, and then particularly state the existing fear of future *bodily* harm, or of his house being fired, and then conclude by swearing that the application is really and truly made from fear of bodily harm, and for protection against it, and not

(t) Hawk. b. 1, c. 61, s. 6.

(u) Hawk. b. 1, c. 60, s. 23, 24;
Burn's J. Surety, Peace, IX.

(x) Dalt. c. 11, s. 116; Burn's J.
Surety, Peace, I.

(y) Hawk. b. 1, c. 60, s. 6, 7.

(z) Dalt. c. 116.

(a) Id. *ibid*.

(b) Lamb. 83; Dalt. c. 116.

(c) 4 Geo. 4, c. 54, s. 3; 7 & 8 Geo.
4, c. 29, *ante*, 136; and see Burn's J.
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through hatred, malice, or ill will towards the other party. (d) But it should seem that if the facts of beating or ill usage and threat of repetition be true, and the apprehension of bodily harm be well founded, even ill will or express malice towards the party applied against will not constitute any ground for refusing sureties of the peace to prevent the commission of the expected injury. (d) Some of the forms of oath state in the *alternative*, that the party has beaten, or threatened to beat, the complainant, (e) but this is incorrect, and if actual injury and threat of further injury have taken place, both should be stated distinctly, and not in the alternative.

In general the application should be made to a neighbouring magistrate, or in case the sessions of peace are then holden, then directly to the court of sessions, unless in cases of Peers. (f)

The *Articles* before magistrates at sessions should be upon *oath*, or the affirmation of a quaker, (g) stating fully all the facts, and it is said that they should be exhibited on *parchment*; (h) but this, though usual, does not appear to be enjoined by any act of parliament, nor absolutely requisite, for immediate security may be requisite, and no parchment at hand. (i) The justices or Court of Sessions are then to issue a *Warrant* to bring the party charged before them. The *Recognizance* to be taken by a justice may be to keep the peace for a certain time, as for two years, or generally for any indefinite time, (k) though it is usually until the next sessions of the peace, and in the meantime to keep the peace to the king and all his liege people, especially to the party claiming the security, (l) and in the latter case the applicant should appear at the sessions and exhibit articles. (m) The former recognizance, however, seems preferable in common cases, because it avoids the necessity for the trouble and expense of the appearance of the parties at the next sessions. If the party refuse to find the sureties, he is, by the terms of the justice's commission and the statute, to be committed. (n) But if so committed, then the warrant must express the cause thereof, and show on the face of it that it

(d) Hawk. b. 1, c. 60, s. 6; Dalt. c. 116; see forms, 5 Burn's J. 688 to 693.

(e) *Quære*, see Burn's J. tit. Surety, Peace, Articles, K. B.

(f) Hawk. b. 1, c. 60, s. 3; 4 Bla. Com. 255; *Rex v. Bowes*, 1 T. R. 700.

(g) 9 Geo. 4, c. 32.

(h) Burn's J. Surety, Peace, IV.

(i) A plea *puis darrein continuance* at

Nisi Prius may be on paper, *Myers v. Taylor*, Ryan & M. C. N. P. 404.

(k) *Willes v. Bridger*, 2 B. & Ald. 278.

(l) Talfourd's Dick. Sess. 404.

(m) *Id. ibid.*; *Rex v. Bowes*, 1 T. R. 696.

(n) 2 Hale, 112; Dalt. c. 118; Burn's J. Surety, Peace.

was a good one. (o) The forms of the proceedings may resemble those in the notes. (p)

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(o) 4 Bla. C. 256; Hawk. b. 1, c. 60.

(p) Be it remembered, that on, &c., A. B. of —, in the said county of —, [gentleman], came personally before me, J. K., one of his majesty's justices of the peace in and for the said county at —, and on his oath informeth me that C. D., of &c. [labourer], did, on &c., at &c., most violently and maliciously declare and threaten, &c., and did also on, &c. [here state the defendant's threats and acts; see a form post], and that from the above premises he this complainant is afraid that the said C. D. will do him some grievous bodily injury; and therefore prays that the said C. D. may be required to find sufficient sureties to keep the peace [or, to be of good behaviour, as may be required; see form, Burn's J. 26 ed. No. 6, page 690,] towards him this complainant; and this complainant also says, that he doth not make this complaint against nor require such sureties from the said C. D. from any hatred, malice, or ill will, but merely for the preservation of his life and person from injury.

Form of information before justice out of sessions to require surety of the peace or good behaviour.

Sworn before me,

J. K.

A. B.

To the constable of —, in the county of —, and also to the keeper of his majesty's gaol for the said county.

Form of commitment there-upon for refusing sureties to keep the peace.

County of —, to wit.

Whereas A. B. of —, in the said county, hath this day made oath before me, one of his majesty's justices of the peace in and for the said county, that C. D. of —, in the said county, did, on the 10th day of May last, at the parish of —, in the said county, threaten to kill him the said A. B. by his the said C. D. running a pitch-fork through him the first opportunity when he caught him alone, and that from the above and other threats used by the said C. D. towards the said A. B. he the said A. B. is afraid that the said C. D. will do him some bodily injury, and therefore the said A. B. hath prayed that the said C. D. may be required to find sufficient sureties to keep the peace, and be of good behaviour towards him the said A. B. And whereas the said C. D. was this day brought before me to answer the said complaint, and I, the said justice, have ordered and adjudged, and do hereby order and adjudge, that the said C. D. shall enter into his own recognizance in the sum of 100*l.* with two sufficient sureties in the sum of 50*l.* each, to keep the peace and be of good behaviour towards his majesty and all his liege people, and particularly towards the said A. B. And inasmuch as the said C. D. hath refused to enter into such recognizance, and to find sureties as aforesaid, I do hereby require and command you the said constable forthwith to convey the said C. D. to the common gaol of the said county, and to deliver him to the said keeper thereof, together with this warrant. And I do also require and command you the said keeper to receive the said C. D. into your custody in the said gaol, and him there safely to keep, unless he in the mean time enter into such recognizance with such sureties as aforesaid, to keep the peace in the manner and for the term above-mentioned. Herein fail not. Given under my hand and seal, the — day of —, one thousand eight hundred and thirty-three.

J. K., (L. S.)

At the quarter [or general quarter] sessions of the peace of our lord the king, holden at the New Sessions-house on Clerkenwell Green, in and for the county of Middlesex, by adjournment, on Monday the first day of May, in the third year of the reign of our sovereign lord William the Fourth, king of the united kingdom of Great Britain and Ireland, before W. M., J. P., W. D., E. F., esqrs., and others their fellows, justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the said county of Middlesex, and also to hear and determine divers felonies, trespasses, and other misdeeds, committed in the same county.

Articles of peace exhibited at sessions Clerkenwell, Middlesex.*

Style of the sessions.

Middlesex: Articles of the peace exhibited by W. P., of Guildford-street, in the parish of St. Pancras, in the said county of Middlesex, gentleman, on behalf of himself and Hannah his wife, she the said Hannah being now confined through sickness in this exhibitant's dwelling-house, situate as aforesaid, against J. M., late of —, in the said county, shoemaker, in order to preserve the lives and persons of himself, this exhibitant, and the said Hannah his wife from bodily harm.

First, this exhibitant upon his oath saith, &c. [Here state the subject matter of the complaint and causes of fear, which may be as in the form post, 680.]

This exhibitant on his oath saith, that the said H. P., this exhibitant's said wife, is now so ill and weak that she cannot be removed from her home to attend this

* See a form 5 Burn's J. 26 ed. 691.

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If the party required to find sureties be a Peer (q) or if it be sworn that the local magistrates have improperly refused to

honourable court, to join in exhibiting this complaint, and that he this exhibitant, by means of the premises aforesaid, conceives and verily believes himself and his said wife to be in great bodily danger: and he further saith, that he doth not make this complaint against the said J. M. through any hatred, malice, or ill will, which he hath or beareth towards the said J. M., but merely for the preservation as well of the life of his said wife as of his own, and also of their persons from bodily harm. Sworn at the New Sessions-house on Clerkenwell Green, this 1st day of May, 1833.

By the Court.

W. P.

Form of stating
the threats, &c.

First, This exhibitant upon his oath saith, that the above-named C. D. hath at several times abused him in a very gross and scandalous manner, by threatening to destroy him if he did not give him money.

Secondly, This exhibitant further saith, on — last, the said C. D. abused him in a violent manner in his own house, and shook at this exhibitant a large stick in a threatening manner, and as if he was about to beat this exhibitant, and uttered violent oaths and imprecations, and said that he would not quit him until he had got five guineas from him, and likewise threatened to him, this exhibitant, mischief, if he did not by some means or other get it for him: that this exhibitant being apprehensive of his family being hurt from his threats, went out with him to his sister's, and in the way there he cursed him this exhibitant, and with great violence struck his stick against the ground and broke it into pieces, to the great terror of him this exhibitant; and this exhibitant saith, that from the violent oaths and threats of the said C. D. to him, he was induced and obliged to sign a note for 5l. payable to Mrs. A. D., his sister, to get released from him, and he was apprehensive that the said C. D., from his great passion, would destroy him, if he did not sign that note.

Thirdly, This exhibitant further saith, that on, &c. the said C. D. came again to this exhibitant's house, and, in a most violent and terrible manner, and with very many horrid oaths and imprecations, threatened this exhibitant's life, by saying he would be revenged of him, and would pull down and fire the whole house if he did not give him more money, and bid him this exhibitant fail at his peril.

Fourthly, This exhibitant further saith, that from the very many violent declarations made by the said C. D., he this exhibitant is under great fear, dread, and apprehension of some violent mischief being done unto him by the said C. D., and that by reason thereof he this exhibitant is obliged to keep within doors in order to prevent his putting his said threats into execution, and this exhibitant is in great danger of having his house set on fire and burnt by him the said C. D., as he this exhibitant apprehends and verily believes.

Fifthly, This exhibitant further saith, that from the very many threats and declarations made by the said C. D., and from the advanced age and weak state of health of this exhibitant, in consequence of his great fear, dread, and apprehension for his safety, he was at the time last aforesaid taken extremely ill, and hath continued so ever since, and been attended by a physician.

Lastly, This exhibitant saith, that he goeth in danger of his life, and of having his house set on fire from the said C. D.'s threats, and therefore he requireth sureties of the peace of the said C. D., not through any malice, hatred, or ill will towards the said C. D. but merely for the preservation of his life, family, and property from danger.

Sworn, &c.

A. B.

Articles of the
peace exhibited
at the quarter
sessions by a
wife against her
husband.

Middlesex, to wit: Articles of the peace exhibited by E. the wife of C. D., of the parish of —, in the county of Middlesex, carver and gilder, against her husband the said C. D. at the general quarter sessions of the peace, held at the session's house on Clerkenwell-green, in and for the said county, on, &c.

First, This exhibitant upon her oath saith, that she was married to the said C. D. in the month of —, A. D. —, and that since her marriage the said C. D. has repeatedly abused and ill-treated her, without any provocation, and threatened her life, and that once in particular, not long before this exhibitant was brought to bed, the said C. D. said that, &c. [stating the threat.]

Secondly, This exhibitant further saith, that the said C. D. hath frequently kicked her this exhibitant, and otherwise ill-treated her, insomuch that she has been several times obliged to seek shelter with her child in her father's house, and had it not been for her parents she should have wanted for victuals and drink and the common necessities of life.

interfere, (r) or if the case be of sufficient importance as to be fit for the immediate interference of the Court of King's Bench, then the statute 21 Jac. 1, c. 8, regulates the proceeding, and enacts, that process of the peace or good behaviour shall not be granted either of the Court of Chancery or the King's Bench, but upon motion in open court, and declaration in writing and upon oath, to be exhibited by the party desiring such process, of the causes for which such process shall be granted; the motion and declaration to be indorsed on the back of the writ; and if it shall afterwards appear that the causes are untrue, the Court may order costs to the party grieved, and commit the applicant till paid.

The Articles in the King's Bench are to be framed substantially in the same terms as those at sessions, and must particularly state the past as well as future personal danger, and other circumstances. (s) The form is usually as in the note. (s) The articles

Thirdly, This exhibitant further saith, that on the 25th day of October last, as she the exhibitant and the said C. D. were coming home in a coach, the said C. D. grossly abused this exhibitant, and scratched her arms in a cruel manner, and that he struck her a violent blow on her face, which caused her nose to bleed and her eye to become blood-shotten, and that she suffered great pain therefrom for several days afterwards.

Fourthly, This exhibitant further saith, that on or about the — day of — last, the said C. D. threatened the life of this exhibitant and her child, and spat in the said exhibitant's face 30 or 40 times, saying that if she offered to cry out or make any the least alarm, he would run the carving tools in her body.

Lastly, This exhibitant saith, that she goeth in great danger of her life from the threats and ill treatment of the said C. D., and therefore she requireth sureties of the peace of the said C. D., not through any hatred or malice or ill-will towards the said C. D., but merely for the preservation of her life from danger. C. D.

Surrey: At the general quarter sessions of the peace of our sovereign lord the king, holden at Guildford, in and for the county of Surrey, on —, the — day of —, in the third year of the reign of king William the Fourth, A. B. of the parish of —, in the county of —, carpenter, prays security of the peace against C. D. of, &c. peelmaker, for fear of losing his life or receiving some bodily harm from the said C. D.

Form of articles of the peace used at the Surrey sessions, to be exhibited on parchment.

First, This exhibitant saith, that, &c. &c. [same in other respects as in the preceding forms.]

(r) *Rex v. Waite*, 2 Burr. 780.

(s) See requisites, 21 Jac. 1, c. 8, ut *supra*. Of Easter Term, in the third year of the reign of King William the Fourth, England.

Articles of the peace exhibited by a wife against her husband in the King's Bench.*

Articles of the peace exhibited by E. B. wife of A. B. of, &c. gentleman, against the said A. B. her husband, through fear of death or of receiving some great bodily harm.

First, This exhibitant on her oath saith, that she hath been married to the said A. B. for the space of six years and upwards, and that for the space of one year and ten months before the 1st day of November last past, the said A. B. hath treated this exhibitant with great cruelty and barbarity, and without any provocation whatever from this exhibitant, and in particular hath frequently during the time last aforesaid, struck and threatened to strike this exhibitant, and dragged her about his dwelling-house.

Secondly, This exhibitant on her oath saith, that the said A. B. having made a voyage to the East Indies, returned on or about the, &c. and soon after his return commenced or renewed an acquaintance with a woman who was known by the name of E., with whom, as well as with other women, the said A. B. frequently cohabited, as this exhibitant hath great reason to believe, this exhibitant having known the said woman

* See proceedings before the Chancellor, *Tunnecliffe's case*, 1 Jac. & W. 348, post, 683.

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must, by the terms of the above act, be verified by the oath of the exhibitant, (t) or by affirmation of a quaker. (u) This oath or affirmation should not be entitled with any names, though affidavits in answer must be so entitled. (x) In general it is advisable to have corroborative affidavits, but no affidavit in contradiction of the facts respecting the battery or injury, and threat of repetition, are to be received, as they are to be taken to be true until negatived through the medium of an appropriate prosecution; (y) but an explanation of ambiguous parts of the exhibitant's affidavits may be received; (z) and it should seem that affidavits showing direct evidence of express malice on the part of the applicant, such as a declaration to that effect, though not of inferred malice collected from general reasoning or collateral circumstances, may be received. (a)

The Court of King's Bench may require a *Recognizance* with sureties to keep the peace for any term of years (and which they may afterwards reduce (b)) or generally, in which case it

called by the name of E. shut into the said A. B.'s bed-room, where she hath remained with him several hours. And this exhibitant saith, that the said A. B. compelled this exhibitant to reside in mean lodgings, different from his place of residence, and that whenever this exhibitant ventured to go to the said A. B.'s chambers to expostulate with him on his ill treatment, he hath beaten or threatened to beat this exhibitant; and this exhibitant saith, that at one time in particular, during the time last aforesaid, the said A. B. did with a violent blow knock this exhibitant down in the said chambers, and that this exhibitant, in consequence of the said blow, lay senseless for a considerable time.

Thirdly, This exhibitant on her oath saith, that by means of the cruel treatment of the said A. B. before set forth, and particularly of his having at divers times within the space of three months last past, as this exhibitant hath been informed and believes, threatened to seize, confine, beat, maim or ill treat this exhibitant; she, this exhibitant, is put into the utmost fear and danger, and verily believes that the said A. B. will put his said threats into execution, and will do this exhibitant some bodily hurt, and therefore this exhibitant is prevented from going out upon her lawful occasions until she can obtain that protection from the laws of this country which this honourable court has authority to grant. And this exhibitant further saith, that she is now under great fear and apprehension that the said A. B. will take the first opportunity of doing this exhibitant some bodily hurt, unless he is restrained therefrom by this honourable court, and therefore this exhibitant most humbly craves that the said A. B. may be ordered by this honourable court to find sufficient sureties for keeping the king's peace towards this exhibitant.

Lastly, This exhibitant saith, that she doth not make this complaint against the said A. B. through any hatred, malice or ill will which she hath or beareth towards him, but merely for the preservation of her life, and also of her person from bodily harm.

E. B.

The above-named E. B. was sworn to the truth of the above premises, on Saturday next after —, in the third year of the reign of King William the Fourth.

By the Court.

(t) *Rex v. Green*, 1 Stra. 527; 2 Mod. 243.

(u) 9 Geo. 4, c. 32.

(x) *Rex v. Lewis*, 1 Stra. 704; *Bevan v. Bevan*, 3 T. R. 601; *King v. Cole*, 6 T. R. 642.

(y) *Dick. Seas.* 504; see *Lord Vane's*

case, 13 East, 171; *Sutton v. Johnston*, 1 T. R. 504; *Rex v. Parnell*, 2 Burr. 806; 3 Burr. 1932.

(z) *Rex v. Doherty*, 13 East, 174, note.

(a) *Dick. Seas.* 504; *Lord Vane's case*, 13 East, 171.

(b) *Rex v. Bowes*, 1 Term R. 700.

continues during life; (c) and where the party required to give the security is aged or ill, or at a distance, the court will authorize, and by mandamus command, local justices to take the recognizance specifying the form. (d)

By the Chancellor.

The *Chancellor* is by the common law a conservator of the peace, and may award precepts and take recognizance of the peace, (e) and upon *oath*, and proceedings regulated by the before-mentioned statute and *Supplicavit*, he is expressly authorized to require sureties of the peace. (f) But sureties in that court are not so frequent, unless when connected with some other pending proceeding; many instances of that proceeding are however to be found. (g) It is said that a *supplicavit* has often been granted by the court upon articles filed on oath by a wife of assault and battery, and that the party goes in fear of her life, (h) and a case of that nature has recently occurred. (i) But in some cases the writ has been refused, and the party directed to apply to justices of the peace. (k) To grant the writ the articles should not be in the general form as fearing, "being threatened," &c. but some fact must be shown on which the fear is grounded. (l) This court will only bind a husband for his good behaviour, and will not remove his wife from him; (m) and in this court, as at sessions and in the Court of King's Bench, the defendant will not be discharged on an affidavit contradicting the facts, without showing combination and contrivance; (n) but it is usual to discharge the defendant at the end of a year, unless repetition of personal injury appear. (o) With respect to the required sureties they have been some time reduced, (p) and the master has been directed not to be strict as to the abilities of the sureties. (q)

It is principally on the part of a *wife* against cruelty and personal injury from a husband that articles of the peace are exhibited. (r) Where such an application is founded on good ground, it is considered so *necessary*, that an attorney employed

Articles on behalf of a wife.

(c) Hawk. b. 1, c. 60, s. 15; *Willes v. Bridges*, 2 Bar. & Ald. 278.

(d) *Rex v. Rowmaster*, 1 Bla. R. 233; 2 Burr. 1039, S. C.; and *Rex v. Lewis*, 2 Stra. 835.

(e) 1 Mad. Ch. Prac. 2.

(f) Burn's J. Sureties, Peace, III. & VII.

(g) See 1 Mad. Ch. Pr. 11, and the cases there collected; 2 Chit. Eq. Dig. tit. Practice, xciii. 5, Writ of *Supplicavit*, 1160; Beame's Orders, 39, when and how to be granted.

(h) *Dobbin's case*, 3 Vesey & Bea. 182; *Tunnecliffe's case*, 1 Jac. & W. 348.

(i) *Tunnecliffe's case*, 1 Jac. & W. 348.

(k) *Clavering's case*, 2 P. W. 202; 1

Mad. Ch. Pr. 11; see forms, *Tunnecliffe's case*, 1 Jac. & W. 348.

(l) *Rex v. Brinlow*, 1 Mad. Ch. P. 11.

(m) *Ex parte King*, Amb. 333; 2 Ves. 378.

(n) Id. *ibid*.

(o) *Baynum v. Baynum*, Amb. 63; *Ex parte Sir Richard Grosvenor*, 3 P. Wms. 103; Fitzg. 268.

(p) *Ex parte Sir R. Grosvenor*, 3 P. Wms. 113. As to the amount of the sureties in general, see *Tunnecliffe's case*, 1 Jac. & W. 348.

(q) *Ex parte King*, Amb. 240; 1 Mad. Ch. Pr. 12.

(r) See instances, Burn's J. Surety, Peace, II.

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by the wife to institute such a proceeding against her husband, may even sue him for his fees and professional attendance as upon his retainer, and so strongly does the law imply his contract to pay, that it will not allow evidence to rebut the implication. (s) Generally speaking, when by a long course of cruelty on the part of the husband the possibility of the wife residing with him has become hopeless, a suit in the spiritual courts for a divorce and alimony seems the more permanent and preferable remedy. (t)

If the marriage be disputed, the court will order the recognizance to be worded so as not to admit the fact, and it was directed to be as follows:—To keep the peace towards our sovereign lord the king and all his liege people, and particularly towards *H. P.*, who hath exhibited articles of the peace against him the said *J. B.*, by the name of *H. B.*, wife of him the said *J.*, and that he shall not depart the court without leave, &c. (u)

Another mode by which a wife may obtain protection and indeed a divorce on account of the cruelty of her husband, is by proceeding in an ecclesiastical court, and which we will consider in the next volume. (v)

Summary relief
from imprison-
ment by *Habeas*
Corpus. (x)

When a party continues imprisoned, whether legally or illegally, he may (except in certain cases of the highest crimes,

(s) *Ante*, 60; *Shepherd v. Mackoul*, 3 Campb. 326; see a case in equity upon the same principle, where proceedings were sustained against the husband, *Harris v. Lee*, 1 P. Wms. 482; and *Williams v. Fowler*, 1 M'Clel. & Young, 269.

If a husband turn his wife out of doors, and it is necessary for her safety to exhibit articles of the peace against him, he is liable to an attorney employed by her for that purpose. Where a wife was indicted for keeping a disorderly house, which she had done with her husband's concurrence:—Held, that he was liable to an attorney, whom she employed to defend her, and by whom he knew that she was defended.

Lord Ellenborough.—The defendant's liability for the first part of the charge will depend upon the necessity for exhibiting articles of the peace against him. If that proceeding was uncalled for, his wife certainly could not make him liable for the expense thereby incurred. But if she was turned out of doors in the manner stated, she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might, therefore, charge her husband for the necessary expense of this proceeding

as much as for necessary food. With respect to the defence upon the indictment, as the defendant knew and approved of the business his wife carried on, and was aware of the prosecution, without expressing any dissent to the plaintiff's defending her, I think a promise may be fairly inferred on the part of the defendant to pay the plaintiff for his labour in conducting the defence.

The plaintiff had a verdict for his whole demand.

Garrow, S. G. and Reader for plaintiff; Topping for defendant. *Shepherd v. Mackoul*, *supra*.

Whenever the husband causelessly turns away his wife, he is liable for necessities supplied to her; *Thompson v. Harvey*, 4 Burz. 2177. *Aliter*, if he do so for just cause; *Ham v. Toney*, Selwyn, N. P. 2d. edit. 290.

(t) *Legardo v. Johnson*, 3 Ven. jun. 362.

(u) *Rex v. Bonbridge*, 9 Str. 1231.

(v) See also *ante*, 59.

(x) See in general Com. Dig. Hen. Ab.; Burn, J. title *Habeas Corpus*; 1 Chit. Ca. L. 118 to 132; Id. 2d edit. 122; 3 Bla. C. 129 to 139, and notes; *Crowley's case*, 2 Swanst. 56, &c.; Tidd, 9th edit. 287—347; *The King v. —*, 2 Chit. R. 120; *Rex v. Shaw*, 6 Darr. & R. 164; *Retard* part. iii. ch. iii.

as *treason* or *capital felony*, which are not bailable,) obtain an investigation of the cause of imprisonment by issuing a writ of habeas corpus, returnable immediately before the Chancellor or one of the superior courts, usually in criminal cases the Court of King's Bench in *term time*, or now before one of the judges or barons in *vacation*, and who will thereupon, if the imprisonment were wholly illegal, immediately discharge him, or when legal, unless in the excepted cases, bail him on his finding adequate sureties to be forthcoming at a future time to receive his trial for the supposed offence. (y) Lord Coke and Lord Hale say, "By virtue of the statute of Magna Charta, and indeed by the *common law*, an habeas corpus in criminal cases may issue out of the *Chancery* at all times of the year, even in the *vacation*; but that at common law neither the King's Bench nor Common Pleas could grant that writ but in *term time*." (z) The Habeas Corpus Act, 31 Car. 2, c. 2, was therefore passed to enable and require any judge or baron in *vacation*, in case of imprisonment for any *criminal* or supposed criminal matter, excepting cases of treason or felony *plainly* and specially expressed in the warrant of commitment, to issue the writ as therein mentioned. (a) It has been observed that that statute was designed not so much to confer *new rights* on the subject as to provide *new remedies* for ancient rights and to extend the previously existing common law power of the *Chancellor* to issue an habeas in *criminal* cases in the *vacation*, to the *judges* and *barons*. (b) But as that statute only applied to imprisonments for supposed *crime*, it was found necessary, by 56 Geo. 3, c. 100, (c) to extend the power of issuing an habeas corpus in *vacation* to other cases of imprisonment and to all imprisonments, excepting for supposed crime and imprisonments for debt or by process, *i. e.* *lawful* process in any *civil suit*, and which any judge (d) or baron of the superior courts is required by that act to issue in *vacation*, "upon complaint made by or on the behalf of the party confined or restrained, if it shall appear by *affidavit* or *affirmation* that there is a *probable and reasonable ground* for such complaint." These statutes only extend the *common law*.

(y) See ante, 684, note (z).

(z) Co. Lit. 81, 182; 2 Hale, P. C. 147; Crowley's case, 2 Swanst. 1, 48; Buck, 264, S. C.; where see a clear exposition of the Habeas Corpus Act, 31 Car. 2, c. 2. The Chancellor now seldom exercises his jurisdiction under the 31 Car. 2, c. 2; 2 Mad. Ch. Pr. 711. See observation as to whether the Chancellor has jurisdiction by habeas out of term, Lyons

v. Blenkin, 1 Jacob's R. 254.

(a) See the Habeas Corpus Act, Chit. Col. Stat. tit. False Imprisonment, 340 to 349.

(b) Crowley's case, 2 Swanst. 8.

(c) See that act, Chit. Col. Stat. 347, 348.

(d) It will be observed, that this act does not name the Chancellor.

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power of the court in term time to each judge in vacation, and it is still necessary to refer to the common law jurisdiction, which, in all cases not expressly provided for by the acts, is impliedly extended to and regulates the proceeding; and, therefore, though the statute, 31 Car. 2, c. 2, is silent as to any affidavit, it seems *that the party applying for the writ must, in all cases, show to the judge by affidavit a probable and reasonable ground for issuing the writ.* (e) The statutes, however, add important regulations and impose heavy penalties for disobedience of those regulations, and if a judge wrongfully refuse the writ when he ought to grant it, he incurs the penalty of 500*l.* and costs, even if his denial proceeded on the most honest doubt. (f)

The 31 Car. 2, c. 2, requires that the writ shall be *obeyed* immediately. It enacts, that any person committed or detained for any *crime*, unless for felony or treason *plainly* expressed in the warrant of commitment, or any one on his behalf, may in vacation time complain to the Chancellor or lord keeper, or any one of his majesty's justices of King's Bench or Common Pleas, or barons of Exchequer, and who, upon view of the copy of the warrant of commitment, or upon oath that it has been denied, is authorized *and required*, upon request *made in writing* by such person or any on his behalf, attested and subscribed by two witnesses who were present at the delivery of the same, (g) to award and grant an habeas corpus to the delivering officer returnable immediately, and who is to return the same within the time prescribed, and the judge within two days after the party has been brought before him, is to discharge the prisoner, taking his recognizance with sureties for his appearance in the proper court, unless it shall appear that the prisoner has been imprisoned on legal process, order or warrant for a matter or offence not bailable.

The 56 Geo. 3, c. 100, reciting that the above-mentioned act is confined to imprisonments for supposed *crime*, extends the power of issuing a writ of habeas corpus in vacation, and enacts, that where any person shall be confined or restrained of his liberty, otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process, (*i. e.* legal process,) in any civil suit, any judge or

(e) See *post*, 691; and see *Hobhouse's case*, 2 Chit. R. 207; Tidd, 9th edit. 347.

(f) *Crowley's case*, 2 Swanst. 11, 12; *Ward v. Snell*, 1 Hen. Bla. 10. The 500*l.* penalty only applies to the refusal of a

writ of habeas corpus in the *vacation*, and not to a refusal in term time, Hawk. b. 2, c. 15, s. 24.

(g) The form of *Request* as required by 31 Car. 2, c. 2, s. 3, may be as *post*, 691.

baron is *thereby required*, "upon complaint made to him by the party so confined or restrained on his behalf, if it shall appear by affidavit or affirmation that there is probable and reasonable ground for such complaint, to award in *vacation time* a writ of *habeas corpus ad subjiciendum*, returnable immediately;" and that although the return to the writ should be sufficient, it shall be lawful for the judge or baron to examine into the truth of the facts set forth in such return by affidavit or affirmation, *and to do therein as to justice shall appertain*; (h) and if the propriety of the imprisonment shall appear doubtful, he may in vacation refer the matter to the court in the next term, and take bail in the mean time; but the court in term time, or a judge in vacation, should, in case the imprisonment were *manifestly illegal*, discharge the party or bail him. (i) If the party have omitted to apply for two whole terms, then he is not entitled to an habeas corpus returnable in vacation; (j) then the acts contain regulations compelling expeditious proceeding to trial in cases where the party is legally imprisoned.

But the writ of habeas corpus does not issue as a matter of course upon application in the first instance, whether the application be at common law or on the statute 31 Car. 2, c. 2, but must be grounded *on affidavit of a probable reasonable ground for the complaint*, and that it is made *by or on the behalf of the person imprisoned*; (k) and upon such affidavit the court are to exercise their discretion whether the writ shall or shall not issue. (l) A commitment of a lunatic or by the house of commons for a contempt, is not for a *crime* within the 31 Car. 2, c. 2; (l) and it has been doubted whether a commitment by a justice of the peace on *conviction* in a penalty under the excise laws, is for a crime within the meaning of that act. (m) By the 7 Geo. 4, c. 48, s. 17, no writ of habeas corpus is to be granted for prisoners for offences against smuggling and the customs, unless the *objection* to the proceedings be stated in the affi-

(h) 56 Geo. 3, c. 100, s. 3; *Es parte Beeching*, 6 Dowl. & R. 200; 4 Bar. & Cres. 136, S. C. *Aliter*, in cases strictly criminal, when it is said the truth of the return cannot be controverted, Hawk. P. C. 113; 2 Burn's J. 26th edit. 1085.

(i) 31 Car. 2, c. 2, s. 3; 56 Geo. 3, c. 100, s. 3.

(j) *Id.* *ibid.* sect. 4.

(k) *Hobhouse's case*, 3 Bar. & Ald. 420; 2 Chit. R. 207, S. C.; 1 Chit. Crim. L. 124; see form of affidavit, Hand's Prac. 519; 4 Chit. Crim. L. 121.

(l) *Rex v. Hobhouse*, 3 Bar. & Ald. 420;

2 Chit. R. 207, S. C.; *Bushel's case*, 2 Jones, 13; 3 Bla. C. 132; Fortes. 140; Hand's Prac. 73; Tidd, Prac. 9th edit. 547; 1 Chit. Crim. L. 124. The 31 Car. 2, c. 2, s. 3 & 10, do not require any such oath or any proof, and therefore the necessity for it is *implied* by the previous *common law practice*, and for the reason stated in 3 Bla. Com. 132. The 56 Geo. 3, c. 100, s. 1, expressly requires such an affidavit where the confinement is *not* for a supposed crime.

(m) *Huntly v. Lascombe*, 2 B. & P. 530.

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davit. (n) When the application is to induce the court to bail the party, on the ground that the supposed murder or felony was merely manslaughter or no crime whatever, the application should be supported by other affidavits than the prisoner's; (o) so if committed under a rule of the court of King's Bench. (p)

If it appear as well from the return as from the accompanying depositions and proceedings, that *no offence whatever* has been committed and that there is no ground for the imprisonment, it should seem that the court would at once discharge the party without requiring *any* bail. (q) So if there has been delay of prosecution of a criminal case beyond the time mentioned in the act, the court will, in general, immediately after discharge the prisoner on bail; (r) but not if the trial was delayed on account of the absence of the prisoner's witnesses. (s) If a *corpus delicti* appear in the depositions, the court will remand the prisoner upon a special rule or bail him, although the warrant of commitment be informal. (t) If an offence be clearly charged, either by the warrant or the deposition, then the party will be bailed if the offence be bailable; (u) and it is said, that if there be *no warrant* of commitment whatever showing the crime, bail will be invariably accepted however great the crime may, from the depositions, appear to have been, because an offender should always be carried before a justice of the peace before he be committed. (x) But, in general, when a party is liable to be detained on a criminal charge, the court will not inquire into the manner in which the caption was effected; (y) and in a recent case, where a party, against whom a true bill for perjury had been found, and the chief justice's warrant for her apprehension had been granted, and she was illegally apprehended on the continent and illegally brought into England in custody, and then carried under the warrant before the chief justice, and committed by him to

(n) 2 Burn's J., Excise, 205, 222 and 1083.

(o) *Rex v. Franklin*, Cald. 246; 1 Leach, 255, S. C.

(p) *Burdett v. Abbott*, 5 Dow's Rep. 199.

(q) *Burdett v. Abbott*, 14 East, 82; Id. 94, 95; *Rex v. Dugger*, 5 B. & Ald. 791; *Ex parte Hill*, 3 Car. & P. 225. The 31 Car. 2, c. 2, s. 3, seems to suppose that bail are always to be required on discharging the party out of custody; but the 56 Geo. 3, c. 100, s. 3, relating to imprisonments *not for crime*, supposes that the court may discharge the party without bail.

(r) *Rex v. Wyndham*, 1 Stra. 4; see

31 Car. 2, c. 2, s. 7; *Anon.* 1 Ventr. 346.

(s) *Blake's case*, 2 M. & S. 428.

(t) *Rex v. Marks*, 3 East, 162; *Ex parte Kraus*, 1 B. & Cres. 262; Com. Dig. Bail, F. 1 to 10.

(u) *Baynum v. Baynum*, Amb. 64; *Rex v. Lord Delamere*, Comb. 6.

(x) *Rex v. Wilkes*, 2 Wils. 158; *Bethell's case*, 1 Salk. 347; *sed quare*, and see next note (y), and cases, and as the judges of King's Bench are *virtuti officii* also justices of the peace, why should not they commit for the crime clearly before them?

(y) *Rex v. Marks*, 3 East, 157; *Ex parte Kraus*, 1 Bar. & Cres. 258.

prison for want of bail, the court refused to discharge her on habeas corpus, on the ground that she had been improperly apprehended in a foreign country, for which she might recover compensation by action. (z) When, however, a person is entitled to the writ on the ground that he has been illegally committed by a magistrate, the judge will not impose the terms that the party shall not bring an action against such magistrate. (a)

It will be observed, that both the acts 31 Car. 2, c. 2, s. 3, and 56 Geo. 3, c. 100, s. 1, require that the application for an habeas corpus under either of those acts be made by or on the behalf of the person committed or detained, confined or restrained, and upon his written request attested by two witnesses; and therefore, in general, a stranger cannot apply, and it must appear that the party imprisoned himself requires the writ. (b)

By whom, or on whose behalf an habeas corpus may be obtained.

An alien enemy cannot have this writ, the relief being in that case by application to the secretary at war; (c) but, in general, any other alien may have this writ, if restrained of his liberty. (d) We have seen that a person committed for a contempt by the House of Lords or Commons is not within that act; (e) nor, as has been said, a person committed by rule of court. (f) But in general, any person illegally imprisoned, even in a mad-house, may by this writ obtain his release. (g) If it be doubtful whether a person is confined against her inclination, the court will order a proper private examination, (h) and where a seaman improperly impressed, before the two years of his imprisonment had expired, applied for his discharge within the time, but on insufficient affidavits, the court, although after the expiration of the time, upon proper affidavits, discharged him. (i)

A married woman may, when there are articles of separation between her and her husband, and she be afterwards confined by him, recover her liberty by this writ, made upon her own application; but the affidavit must show that the application is at her instance, (k) and unless that expressly appear the courts

(z) *Ex parte Scott*, 9 Bar. & Cres. 446.

(a) *Ex parte Hill*, 3 Car. & P. 225.

(b) *Rex v. Wiseman*, 3 Smith's R. 617; *Ex parte Lonsdown*, 8 East, 38. See form of request, post, 691.

(c) *Anon.* 3 Bla. R. 1324; *Rex v. Schiever*, 2 Burr, 765.

(d) *Hottentot Venus's case*, 3 East, 195.

(e) *Burdett v. Abbott*, 14 East, 1.

(f) *Rex v. Flower*, 8 T. R. 324; Bac. Ab. Hab. Corp. B. 4; Com. Dig. Hab.

Corp.C.; *Burdett v. Abbott*, 5 Dow's R. 199.

(g) *Rex v. Tarlington*, 3 Burr. 1115.

We have seen that if committed by a justice under the 39 & 40 Geo. 3, he might be bailed by a judge, ante, 670, 671.

(h) *Hottentot Venus's case*, 3 East, 195.

(i) *Ex parte Bruce*, 8 East, 27.

(k) *Lady Vane's case*, 13 East, 173, and *semble*, now articles of separation are void, ante, 58; but see qualification, *Wilson v. Mussett*, 3 Bar. and Adolp. 743.

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will not interfere. (l) And it has even been held, that if a husband apply for an habeas corpus to bring up his wife, his affidavit must state, that she is detained against her will; (m) and the wife could not, when the ancient writ *de homine replegiando* was in use, have it against her husband. (n)

But if it should be sworn by a third person that a married woman is so closely confined and ill-treated by her husband as to preclude all access to her, or that she is too weak in body and mind to obtain an affidavit from her, and that she is suffering in health, and in danger of her life, it is probable the court would order that a physician, apothecary, and other proper persons should have access to her. (o)

In the case of an *Infant Child*, the father may have this writ in the first instance, upon his own affidavit that his child has absconded without his consent, and that ineffectual attempts to retake him from the custody of a third person, who wrongfully harboured him, had been made, and without any affidavit on the part of the child that he was detained against his will. (p) A child, however, who wishes to return to her parents, may, on her own application, have this writ, as every individual might. (q) And he may have this writ in case of cruel or personal ill usage from his parent, though in general, if he have property, then it is better to make him a ward in Chancery, where his interests can be better protected than at law. (r)

But in the case of *Infant Apprentices*, there must be an affidavit that he is detained against *his* will, and the court will not issue the writ on the mere application of the master; (s)

(l) *Rex v. Middleton*, 1 Chit. R. 654; *Middleton v. Middleton*, 1 Jac. & W. 94.

(m) *Rex v. Wiseman*, 2 Smith's R. 617.

(n) *Attwood v. Attwood*, Pre. Ch. 492; 1 Mad. Ch. P. 21.

(o) *Rex v. Wright*, 2 Burr. 1099; but see *Rex v. Middleton*, 1 Chit. R. 654, and *Middleton v. Middleton*, 1 Jac. & Walk. 94, ante, 60.

(p) *In re Pearson*, 4 Moore, 366; *Rex v. Hopkins*, 7 East, 579.

(q) *Rex v. Clerk*, 1 Burr. 606.

(r) *Lyons v. Blenkin*, 1 Jacob's R. 254, ante, 64, 65, 69.

(s) *Rex v. Reynolds*, 6 Term Rep. 497. If an apprentice, aged 18, voluntarily enter into the sea service, his master is not entitled to a habeas corpus to bring him up.

Lord Kenyon C. J.—“The writ ought not to be issued at the instance of the master, but the apprentice, who is of sufficient age to judge for himself, should have applied for it, if he had wished it.

By comparing the different clauses of the act of Anne together, it appears that the apprentice, if under 18 years of age, ought not to be impressed into the king's service; but, according to the 17th section, the master is entitled to the wages earned by his apprentice after the age of 18. Suppose this apprentice had been taken into the service of any other master, we should not have granted an habeas corpus at the instance of his first master, but should have left him to his action for seducing his apprentice: then, as far as respects the question before the court, it is immaterial whether the apprentice be now in the king's service, or in that of any other master.”

Rex v. Edwards, 7 T. R. 745. One Gabriel, an apprentice, having entered into the sea service and received the bounty money, the master moved for an habeas to bring him up in order that he might be restored to him; then

Percival obtained a rule to show cause

though it should seem that the chief justice may, at the instance of the master, issue his warrant to bring up his impressed apprentice, without any assent on the part of the latter. (t) If it should appear by the return that the apprentice was legally committed for running away, he will be remanded. (u)

When a party considers himself to be illegally imprisoned, or that he is entitled to be released out of custody on finding bail, if he be imprisoned on a charge of *crime*, or even *supposed* crime, the statute 31 Car. 2, c. 2, s. 3, expressly requires that when the application is made in the vacation, the judge applied to shall have view of the *copy of the warrant of commitment* and detainer, or an oath that such copy was denied to be given to the party imprisoned, and there must be a *Request in writing* by the party imprisoned, or some one on his behalf, attested and subscribed by two witnesses, who were present at the delivery of the same, (x) and thereupon the judge is to issue the

Practical proceeding in obtaining a writ of habeas corpus.

why the writ should not be quashed *quia improvidè emanavit*, on the ground that this application was made by the master, and not by the apprentice, and he relied on the case of *Rex v. Reynolds*, 6 Term Rep. 497.

Erskine, *contra*, contended that no apprentice could be impressed either in the army or navy; that it was even part of the oath taken by a soldier on enlisting, that he was not an apprentice; and that if the apprentice were improperly detained, the court ought to grant a habeas, either at the instance of the master or the apprentice.

But the court said, that the distinction was properly taken in the case cited, that though the apprentice might obtain the writ the master could not, for that *its object was the protection of the liberty of the party*. That the master was not without a remedy, for that he might have his action against those who detained the apprentice, after knowing him to be an apprentice. But they added, that the Lord Chief Justice had the power, under an old statute passed in the reign of Henry 8, of granting warrants for the bringing up apprentices in this situation, and that Lord Mansfield had frequently exercised that power. And Lord Kenyon added, that though the Court would make this rule absolute, to quash the writ of habeas corpus, he should

issue his warrant to bring Gabriel before him to be discharged, unless the Admiralty agreed to release him. Rule absolute.

Ex parte Lansdown, 5 East, 58. Maryat moved for a writ of *habeas corpus* to bring up the body of J. Lansdown, an apprentice, (one who was protected from being impressed by the statute 13 Geo. 2, c. 17,) who had been impressed and taken on board one of the king's ships. But he stated that this application was made on behalf of the master, the apprentice himself being willing to enter into the king's service.

Lord Ellenborough, C. J.—“The writ of *habeas corpus* is for the protection of the personal liberty of the subject. If the party himself, being of competent years of discretion, do not complain, we cannot issue the writ on the prayer of the master, who has his remedy by action, if his apprentice have been improperly taken from him.”

The other judges concurred, and observed that of late years similar applications had been repeatedly refused to be granted.

Rex v. Middleton, 1 Chit. R. 654, in 1 Burn's J. 176.

(t) *Rex v. Edwards*, 7 T. R. 745.

(u) *Ex parte Gill*, 7 East, 376.

(x) *Huntley v. Luscombe*, 2 Bos. & P. 530; *ante*, 686.

My Lord, (or Sir,)

I do hereby respectfully request you immediately to peruse the copy of the warrant of commitment and detainer hereunto annexed, and under colour or pretence whereof I am now imprisoned in the gaol of —, in the county of —, and inasmuch as such imprisonment is unlawful, and I am entitled to be released or bailed from such imprisonment, I do hereby respectfully, in pursuance of the statutes in that case

Form of written request to a judge to issue an *habeas corpus*.

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writ of habeas corpus returnable immediately, And we have seen that although the statute 31 Car. 2, c. 2, s. 3 & 10, does not in terms require any affidavit, yet in practice it is usual to produce *an affidavit or affidavits of the prisoner and third persons*, showing that there is reasonable cause for issuing the writ. (y)

Whenever the application is for a writ to relieve a party from imprisonment for an offence against smuggling and the customs, the affidavit must state the objections to the proceedings. (z)

When the imprisonment is *not* for an alleged crime, but on some other pretence, and the application is in the *vacation*, the 56 Geo. 3, c. 100, s. 3, expressly requires that the complaint shall be by or on the behalf of the person confined or restrained, and upon an affidavit or affirmation that there is a probable and reasonable ground for the complaint, and thereupon the writ is to be issued in vacation, and the court may afterwards in term discharge or bail or remand the party, and the truth of the return may be controverted by affidavit. (a)

In *term* time the *application* is made by the prisoner's counsel, founded upon the proper *affidavits*; in *vacation* by his attorney; and when the application is made to a judge at chambers, he grants his fiat, upon which the clerk in court makes out the habeas corpus and delivers it to the prisoner's attorney. (b) At the time of moving or applying for an habeas corpus, it is usual and proper also to apply for a *writ of certiorari* from the crown office to the committing magistrate, and requiring him to return the depositions taken before him, so that besides reading the commitment the court may be able to form an opinion upon the nature of the supposed offence and the probable guilt of the prisoner, and then discharge or bail him. (c)

made and provided, request you immediately, and in proper form, to award and grant an habeas corpus, returnable immediately, so that I may be removed and released from such imprisonment. Dated this — day of —, A. D. —.

Signed and delivered by the said A. B.
on this — day of —, A. D. —, in our
presence, and which we now attest.

Signature, A. B.

E. F.
G. H.

(y) *Ante*, 687; *Rex v. Franklin*, Cald. 246; 1 Leach, 255; *Hobhouse's case*, 2 Chit. R. 207; 3 B. & Ald. 420, S. C.; Burn's J. Habeas Corpus, II. 1083. But see Hand's Prac. Forms; and 4 Chit. Cr. L. 519.

(z) 7 Geo. 4, c. 48, s. 17. See *Kite and Lane's case*, 1 Bar. & Cres. 101; *In re Nunn*, 8 Bar. & C. 644; *Deybel's case*, 4 B. & Ald. 243; *Nash's case*, 4 B. &

Ald. 295; *Sanden's case*, 4 B. & Ald. 294; *Rex v. Rogers*, 3 D. & R. 607.

(a) *Ex parte Beeching*, 4 Bar. & Cres. 136; 6 Dowl. & Ry. 209, S. C.; Tidd, 9 ed. 347.

(b) Burn's J. Habeas Corpus, II. 1085.

(c) *Rex v. Marks*, 3 East, 157; 2 Burn's J. 26 ed. 1085.

The writ of habeas corpus is general, without stating the grounds or reason for issuing the same. (d) It must not be in the disjunctive, as thus, "to the sheriff or gaoler," (e) and should be directed to the officer in whose custody the prisoner is; (f) and it must be subscribed by the judge awarding it, or it need not, it is said, be obeyed. (g) With respect to the service, if the gaoler be accessible, the writ should be served upon him, otherwise on the deputy, but endeavours should be made to serve the writ on the principal. (h) The return may be enforced by attachment, even against a peer, or redress by action or indictment. (i) Such return will necessarily vary according to circumstances. (k)

In criminal cases it has been said that the return cannot be controverted, (l) but in offences which rather partake of a civil nature, as in case of imprisonment upon an information in the Exchequer for penalties for smuggling, &c. the truth may be denied; (m) and it seems that where a prisoner is brought up under an habeas corpus, issued at common law, he may controvert the truth of the return by virtue of the express enactment in 56 Geo. 3, c. 100, s. 4. (n)

Upon the return, the prisoner's counsel may move to file it, and to have the prisoner called into court, and the return, with the depositions, usually returned with the certiorari, read, and after which his counsel may argue for the prisoner's discharge. The judge before whom the prisoner is brought, is within two days to discharge him from imprisonment on proper sureties for his appearance, if the cause or charge be bailable, and if it be not, then he is to remand him. But the Court of King's Bench may remand him, and require him to be brought up from time to time, during a reasonable time, until they have come to a decision. (n)

The course formerly was to bring up the party into court in all cases, however great the distance, but of late, where the court thinks fit, upon hearing affidavits of poverty or inability to travel, they will grant a rule to show cause, and decide upon

(d) 1 Chit. Crim. L. 125, 126; see form, 4 Chit. Crim. L. 121.

(e) *Rex v. Fowler*, 1 Salk. 350.

(f) Godb. 44; Bac. Ab. Hab. Corp.

(g) *Rex v. Roddam*, Cowp. 672.

(h) *Huntley v. Lumcombe*, 2 Bos. & P. 530.

(i) *Rex v. Winton*, 5 T. R. 89; *Anon.* Salk. 349; *Ex parte Bosen*, 2 Kenyon's R. 289; *Crowley's case*, 2 Swanst. 73; *Ex parte Harrison*, 2 Smith, 488; *Rex v. Fer-*

rets, 1 Burr. 631.

(k) See a form of return to an habeas on the application of a father, *Lyons v. Blenkin*, 1 Jacob's Rep. 247, 248.

(l) Hawk. b. 2.

(m) *Ex parte Beeching*, 4 Bar. & C. 136; 6 Dowl. & Ryl. 209, S. C.; Tidd, 9 ed. 347; 2 Burn's J. 26 ed. 1085.

(n) *Rex v. Bethel*, 5 Mod. 19; Bac. Ab. Hab. Corp.

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motion whether the party shall be discharged or bailed, and if the latter, will direct the bail to be taken before a magistrate in the neighbourhood. (o)

With respect to the number and amount of the *bail*, the Court of King's Bench invariably require four sureties on charges of felonies. (p) The rule is, where the offence is *prima facie* great to require good bail, moderation nevertheless is to be observed, and such bail only is to be required as the party is able to procure, for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge. (q) Nor will the court, at the instance of the prosecutor, increase the amount of the bail after they have once been taken. (r) The bail do not, as in civil cases, formally depose to their sufficiency, but after reasonable time for inquiry, are taken absolutely. (s)

Present practice
as to application
to the Lord
Chancellor.

It will be observed that the principal habeas corpus act, 31 Car. 2, c. 2, only relates to *criminal charges*, and only authorizes the Chancellor to issue an habeas corpus in *vacation*, whilst the 56 Geo. 3, c. 100, only applies to imprisonments, not for crimes, and gives the Chancellor no jurisdiction whatever. But the Lord Chancellor has at *common law* jurisdiction to grant an habeas corpus as well in vacation as in term, and Jenkin's case, in which Lord Nottingham was of a contrary opinion, has been overruled. (t) But in modern practice, an application to the Chancellor is seldom made under the statute of Car. 2, or at common law, except in cases depending in his own court, for the ordinary purpose of commitment, or of changing the custody. (u)

Practice of dis-
charging a
party on Sum-
mary applica-
tion.

But besides the mode of being relieved from illegal imprisonment by writ of *habeas corpus*, there are numerous cases where by particular acts of parliament, or by the practice of each court, a party is to be discharged on motion, and sometimes by mere application to the judge. As where an ambassador or his servant, (x) or a certificated bankrupt, (y) or a discharged in-

(o) *Rex v. Jones*, 1 Bar. & Ald. 209; *Rex v. Massey*, 6 M. & S. 108. Mr. Evans, in his collection of statutes, observes, that the liberty of the subject would be materially promoted by giving the judges a discretionary power to discharge from illegal commitments by rule of court or order, without the necessity of the actual appearance of the party, which in most cases has no other effect than a great accumulation of expense, and the necessity of which often occasions a material failure of justice, as any person who has been in the habit of perusing the calendar of courts of quarter sessions will

be easily convinced of.

(p) *Rex v. Shaw*, 6 D. & R. 154.

(q) *Rex v. Wilkes*, 2 Wils. 159.

(r) *Rex v. Salter*, 2 Chit. R. 109.

(s) *Rex v. Hall*, 2 Bla. R. 1110; Tidd, 9 ed. 253, note (d).

(t) See the judgment of Lord Eldon in *Ex parte Crowley*, 1 Swanst. 1; Buck, 264, S. C.; 1 Mad. Ch. Pr. 21.

(u) *Ex parte Oliver*, 2 Ves. & Bea. 248; 2 Mad. Ch. Pr. 711; Chit. Eq. Dig. tit. Practice, xlv. 1031.

(x) Tidd, 9th ed. 199, 201, 212, 214, 216.

(y) 6 Geo. 4, c. 16, s. 126.

solvent, (z) or where a party has been arrested whilst attending the court as a party or witness. In these cases, although a *habeas corpus* may be requisite if the officer wrongfully refuse to bring the party into court, (a) yet in general that writ is not necessary, and the party may be discharged on affidavit and motion, or sometimes by summary application even without affidavit, and upon mere undisputed statement to the court or the judge sitting at nisi prius at the time the illegal arrest has been made. (b) A summary mode of interfering, which, when the facts are not disputed, is exceedingly salutary, and advisable to be extended. (c)



The *preventive* remedies by application to the *Superior Courts* are, *first*, those to Courts of *Law*, and *secondly*, those to Courts of *Equity*. The former are few compared with the latter, which are of great variety. In Courts of *Law* sometimes *preventive proceedings* may be adopted, as summary applications and motions to set aside a warrant of attorney and judgment thereon, which it is feared may be attempted to be enforced; (d) or to set aside an annuity under the 53 Geo. 3, c. 141; (e) or where a similar summary proceeding has been given by particular statutes, or may be founded upon the general practice of each court in respect of some irregularity in the proceedings. The ancient writ of *Estrepement of Waste* was also an advantageous proceeding at common law to *prevent waste*, and might now with utility be revived in practice; (f) and at common law the writ *Quod permittat prosternere a nuisance*, was and still might be a very effective proceeding to *prevent the continuance* of a private nuisance. (g) But in modern times the *preventive* proceedings in equity by bill and injunction have been found so summary and salutary, that at present recourse is scarcely ever had to any of the ancient specific common law remedies.

Preventive remedies in the Superior Courts.

First, In courts of Common law.

Courts of Equity have a very *extensive, expeditious*, and *summary jurisdiction* by writ of *Injunction*, and founded on a bill filed to *prevent*, and sometimes *virtually to remove*, most

Secondly, Preventive remedies in Courts of Equity in general.

(z) 7 Geo. 4, c. 57, s. 60; 1 Geo. 4, c. 119, s. 26; Tidd, 214, 215.

(a) *Solomon v. Underhill*, 1 Campb. 229; *Ex parte Tillotson*, 1 Stark. R. 470;

(b) Tidd, 9th ed. 216, 197, 198; *In the matter of —*, 1 Rose, 230.

(c) *Ante*, 694, note (o), and Mr. Evans's

note.

(d) Tidd, 9th ed. 545 to 556.

(e) Tidd's Pr. 9th ed. 521; and see Chit. Col. Stat. tit. Annuities, 23.

(f) See 3 Thomas, Co. Lit. 242, in notes; 3 Bla. Com. 226, 227.

(g) 3 Bla. Com. 221, 222.

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private injuries and *public nuisances*. It has been observed in a valuable work, (*h*) that an injunction is a writ issuing by the order and under the seal of a Court of Equity, of *two* kinds, the one *remedial*, the other *judicial*; the former to *prevent* injuries, the latter to *enforce* a *decree* for specific performance and in the nature of an execution, containing a direction to yield up, to quit, or to continue the possession of houses or land, followed by a writ to the sheriff commanding him to deliver the possession. The former may relate to proceedings in Courts of Law, as to stay proceedings in Courts of Law, or in the Spiritual Courts, or in Courts of Admiralty, or in some other Court of Equity, or, as unconnected with legal proceedings, may be to restrain the indorsement or negotiation of bills of exchange and promissory notes, or the sale of land, or the sailing of a ship, the transfer of stock, or the alienation of a specific chattel, to prevent the wasting of assets or other property pending a litigation, to restrain a trustee from assigning the legal estate, or any party from setting up a term of years and thereby precluding the trial of the real right, or to restrain assignees from making a dividend, to prevent a party from removing out of the jurisdiction, or marrying, or having any intercourse with a ward or even parent, which the court disapproves of; to restrain the commission of every species of waste to houses, mines, or timber, or any other part of the inheritance; (*i*) to prevent the infringements of patents and the violation of copyrights, either by publication or theatrical representation; to suppress the continuance of public or private nuisances; and by the various modes of interpleader to restrain vexatious or multifarious suits, or to quiet possession before pending suit or after decree, or to stop the progress of other vexatious litigation. These are the principal instances of the interference of courts of equity to prevent injustice. (*k*) But we will presently examine injunctions fully, and under the following arrangement, viz. first, as relates to the Person; secondly, Personal Property; and thirdly, as to Real Property.

It will be found that the interference of Courts of Equity is a jurisdiction assumed at common law, and is rarely exercised by authority of any legislative enactment. (*l*) The *principle* upon which the courts interfere is, that if the party were allowed to proceed in his wrongful act, an action might afford

(*h*) Eden on Injunctions.

(*i*) So to prevent waste by a tenant in common on account of his poverty, though the court would not otherwise have inter-

ferred, 3 Thomas, Co. Lit. 244, note 26; *Smallman v. Onions*, 3 Bro. C. C. 621.

(*k*) Eden on Injunctions, 2.

(*l*) Id. Ibid. 264.

but an imperfect remedy for the injury, and damages might be incapable of complete proof, the injury might be to an incalculable extent, and the wrong-doer insolvent, and unable to make compensation; (m) and the proceedings in many of these cases, as in those of waste and piracy of copyrights, besides preventing the wrong-doer from future waste or injury, compels him to keep and render an account, and make compensation for the past. (n) And although the court will sometimes refuse to grant an injunction in the first instance, on the ground that the right is doubtful, yet they will frequently compel the defendant in the mean time to keep an account of his sale and profits, and in case the decision should be finally against him, to render the same and pay what is just. (o) Consequently it is better to suspend the completion of the expected injury until at least the right to commit it has been tried. It will be observed that as there is no compensation at law in damages for the consequences of maliciously or without adequate cause granting an injunction, and thereby preventing another person from exercising his trade, or pursuing any other profitable undertaking, great caution should be observed before granting an injunction.

It should seem that the principles upon which injunctions are in general granted would apply even more strongly to prevent the commission of *crimes*, the law for *preventions of crimes* being even preferable to those of *punishment*. (p) But nevertheless the general rule is, that Courts of Equity will not interfere to prevent the commission of *any crime*, (q) excepting to restrain a libel upon an infant (who is under the peculiar protection of a Court of Equity), (r) and excepting such cases of *public nuisances* as are more particularly injurious to particular individuals in the neighbourhood, and also constitute *private injuries*. (s) In the case of *Gee v. Pritchard*, (r) the counsel, in support of a motion to dissolve an injunction against publishing letters, having cited Hudson's *Treatise on the Court of Star Chamber*, (t) and urged that there was no trace of any inter-

Courts of equity will not interfere to prevent a *Crime* nor a *Libel*.

(m) See observations as to injunctions against piracies in *Hogg v. Kirby*, 8 Ves. 225; and in *Wilkins v. Aiken*, 17 Ves. 424; Eden, 264; 1 Mad. Ch. Pr. 126, 127, 150, and *post*.

(n) Eden on Injunctions, 160.

(o) *Wilkins v. Aiken*, 17 Ves. 422; 1 Mad. Ch. Pr. 150.

(p) *Ante*, 19.

(q) *Holderstaffe v. Saunders*, 6 Mod. 12; *Lord Montague v. Dudman*, 2 Ves. S. 396; 1 Mad. Ch. Pr. 126, n. (l), 159,

255, 256; Eden's Inj. 42, 315 to 318; *Southey v. Sherwood*, 2 Meriv. 440, 441; and see *Webster v. Webster*, 3 Swanst. 490, where the chancellor said the circumstance of a name being improperly used on a bill in fraud of the public, is no ground for applying for an injunction.

(r) *Gee v. Pritchard*, 2 Swanst. 413.

(s) *Mayor of London v. Bolt*, 2 Ves. J. 129; *Attorney General v. Cleaver*, 18 Ves. 211; Eden, 224 to 226.

(t) 2 Collect. Jurid. 1, 239.

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ference of that tribunal by injunction or otherwise on the subject of letters unless the *publication was libellous*, the chancellor said, "It will not be necessary to trouble you with that view of the case. The publication of a libel is a crime, and *I have no jurisdiction to prevent the commission of crimes*, excepting of course such cases as belong to the protection of *infants*, when a dealing with an infant may amount to a crime, an exception arising from that peculiar jurisdiction of this court." And he further observed, that an injunction cannot be sustained on the ground that the publication of the letters will be painful to the feelings of the plaintiff; and he said neither can this injunction be maintained on any principle of this sort, that if a letter had been written in the way of friendship, either the continuance or discontinuance of that friendship affords a reason for the interference of the court. (u) In short, courts of equity will not interfere to *prevent* the commission of any crime whatever, as to prevent the publication of a libel, (x) and therefore when the publication of letters has been prevented, it has been on the ground of *copyright* in the writer, and not with any view to prevent the libel. And it has been said that a Court of Equity has no cognizance of a libel unless it is a contempt by being *an abuse of their proceedings*, as scandalizing the court or the parties, or prejudicing mankind before the cause has been heard. (y) And in the work before referred to, speaking of the observations of Lord Ellenborough in the case of *Du Bost v. Beresford*, that "upon an application to the lord chancellor he would have granted an injunction against the exhibition of a libellous picture," it is stated that that proposition was a hasty dictum, and obviously erroneous, and excited the astonishment of all the practitioners of the Courts of Equity. (z) So speaking of *frauds*, it has been laid down that some are of such turpitude that only the criminal courts have jurisdiction over them, because Courts of Equity do not affect to consider fraud in the light of a crime; it is not their province to punish, nor have they a censorial authority; they interfere in cases of fraud in a civil, and not in a criminal point of

(u) *Gee v. Pritchard*, 2 Swanst. 413; *Lawrence v. Smith*, 1 Jacob's Rep. 473.

(x) *Gee v. Pritchard*, 2 Swanst. 402 to 422; and see observations of Lord Eldon in *Southey v. Sherwood*, 2 Meriv. 440, 441; and see *In re Champion*, 2 Atk. 469; Eden on Injunctions, 315 to 318.

(y) *In re Champion*, 2 Atk. 469.

(z) Eden, 315, 316; *Du Bost v. Beresford*, 2 Campb. 511; ante, 20, 648 (g); Howell's St. Tr. 799, note. As the chancellor is a justice of the peace, and may require surety of the peace, *semble*, he might clearly in that character have prevented the publication of the picture.

view. (a) Nor in the case of *bills* will a Court of Equity entertain an injunction to prevent a fraud upon the public. (b)

It should seem on principle, that as the chancellor is *virtute officii*, the principal justice of peace in the kingdom, and may issue a writ of *supplicavit*, and require sureties to keep the peace, (c) he at least *has power to prevent* all breaches of the peace and offences having that tendency, and consequently might, if so disposed, prevent the publication of a libel. (d) And in one case Lord Macclesfield considered that the court had a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained injurious reflections on religion or morality. (e) So Lord Hardwicke appears to have considered that an injunction lies in the case of private persons entering *by force* into ground of which another has had possession for twenty-one years, though in such case there is a remedy at law, and though the offence is indictable. (f) So in case of public nuisances they may be restrained. (g) And it seems to be admitted, that when criminal matters are mixed up with civil, a Court of Equity may interfere; (h) and whenever the Chancellor or a Court of Equity has jurisdiction to prevent *crime*, it will be admitted to be most salutary that it should be exercised.

At all events a Court of Equity so far examines into criminal matters, that, as observed by Lord Eldon, it will not decree an account of the unhallowed *profits of libellous publications* in favour of a supposed author or proprietor of the copyright; (i) and the court always exercises a jurisdiction over *proceedings* in a suit there depending to prevent permanent and unnecessary libel therein, as upon reference to the master to expunge impertinent scandalous statements, whether in an affidavit in lunacy or bankruptcy, or other proceeding; (k) or they will refuse to hear scandalizing depositions containing general

(a) 1 Madd. Ch. Pr. 255, 256; *Waltham v. Broughton*, 2 Atk. 43; and *Ball v. Coutts*, 1 Ves. & B. 298.

(b) *Webster v. Webster*, 3 Swanst. 490, ante, 697, note (q); and post.

(c) Ante, 683; Burn's J. Justice of Peace; 1 Hawk. P. C. c. 8, s. 2.

(d) An ordinary justice of the peace may issue his warrant to apprehend a person for publishing a libel, *Butt v. Conant*, ante, 648, note (i); and see 5 Coke's R. 125, as to taking a libel to a magistrate, ante, 648 (g); and 3 Burn's J. 448; Dalt. J. c. 1; Burn's J. Surety, Peace.

(e) *Barnett v. Chelwood*, 2 Meriv. 441, note; but see Eden, 316, 317.

(f) *Hughes v. Trustees of Morden College*, 1 Ves. 189.

(g) *Mayor of London v. Bolt*, 5 Ves. J. 129; and post.

(h) Eden on Injunctions, 42, n. (c).

(i) *Wolcott v. Walker*, 7 Ves. 1; and *Southey v. Sherwood*, 2 Meriv. 437; *Lawrence v. Smith*, 1 Jacob's Rep. 473, 474, and notes.

(k) See in general 2 Mad. Ch. P. 167, 215, 276, 352; *Ex parte Le Heup*, 18 Ves. 221; *Earl of Portsmouth v. Fellows*, 5 Mad. 450; *Davenport v. Davenport and Gel*, Mad. 251; Chit. Eq. Dig. Practice, Reference, as to scandal; 3 Bla. Com. 427, in notes.

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abuse, (l) a jurisdiction which indeed all courts of law exercise over their own proceedings. (m) So a plaintiff in equity has a right upon application to have an answer taken off the file in order to prosecute the defendant for perjury, being in furtherance of public justice. (n) So that at least a Court of Equity will not *impeach* criminal proceedings, (o) unless in cases where a prosecutor is also proceeding in chancery, when he may be *restrained* from proceeding upon an indictment; (p) and there are many instances in which a Court of Equity will collaterally assist or restrain criminal proceedings; (q) and we have seen that the Chancellor may compel parties to give security to keep the peace or be of good behaviour. (r) This court also so far regards crimes, that it will not enforce a specific performance of an agreement to grant a lease to a person who it appears has, after the agreement, committed a felony rendering him an unfit lessee; (s) but a Court of Equity will not compel a discovery in aid of criminal proceedings. (t)

The practice in obtaining an injunction. (x)

In some urgent cases an injunction will be granted upon *petition and affidavit*. (u) But in general the proceeding to obtain an injunction must be by first filing a *Bill*, (x) (except to stay waste or proceedings at law,) (x) stating the cause of complaint and praying the interposition of the court, and an injunction should be specially prayed. (y) But immediately after the bill has been filed, and upon *proper affidavits*, and a *motion ex parte*, even before the defendant has been served with process on the bill or knows of any proceeding, an injunction may in cases requiring immediate interposition be obtained, even within a very few hours after the cause of proceeding has arisen. (z) The cases in which the court usually interferes thus summarily are those of irreparable waste, plain nuisance, infringement of a clear copyright, forcible entry, wasteful trespass, executors wasting assets, and danger of a bill being unjustly negotiated. (a) But excepting in the case of waste, or great injury to an estate, an injunction out of term can only be

(l) *Watkins v. Watkins*, 2 Atk. 96.

(m) *Sanderson's Bail*, 1 Chit. Rep. 676; Tidd, 9th ed. 274.

(n) *Stratford v. Green*, 1 Ball & B. 294.

(o) *Ex parte Wood*, 1 Atk. 221.

(p) *Mayor of York v. Pilkington and others*, 9 Mod. 273; 1 Atk. 282, S. C.; *Attorney General v. Cleaver*, 18 Ves. J. 250; 1 Chit. Crim. L. 304; and see Eden on Injunctions, 42, 43.

(q) See instances collected, Chit. Eq. Dig. Jurisdiction, viii.; *Mayor of York v. Pilkington*, 2 Atk. 302.

(r) *Ante*, 688.

(s) See dictum in *Willingham v. Joyce*, 3 Ves. 168; 1 Mad. Ch. Pr. 421.

(t) 2 Ves. 398; Mitford, Pl. 150.

(u) 2 Mad. Ch. Pr. 216; 2 Newl. 335.

(x) 4 Ann. c. 16, s. 22; Eden, 49. See the full practice, post, second volume.

(y) 2 Mad. Ch. Pr. 171, 216; 2 Newl. 339.

(z) See the instance in *Trespass*, post, and 1 Mad. Ch. Pr. 126, 127; 2 Id. 217.

(a) 2 Mad. Ch. Pr. 217.

moved for on a seal day, though sometimes it may be heard on other days. (b)

It seems to be a general rule that it is no objection to the granting an injunction that the plaintiff has commenced an action at law; and in one instance where this was the case and it was offered to discontinue the action, if necessary to entitle the parties to the injunction, Lord Eldon held it immaterial. (c)

The effect of an injunction *in general* is only *in personam*, i. e. to attach and punish the party if disobedient in violating the injunction; (d) and in case of nonobservance, the modern practice is, where the party is in contempt for breach of the injunction, to give notice of a motion that the defendant may stand committed for breach of the injunction, and which is moved upon affidavit of the service of the injunction and of the contempt. (e) If the other side be not immediately prepared to resist the motion, the court usually gives a day to show cause against it, and then upon hearing the affidavits on both sides decides whether the party has been guilty of the breach and contempt, and if guilty the court makes an order for his commitment, and he will not be discharged unless he pays the adverse party his costs. (f)

In case of a writ of injunction in the affirmative, as to yield up, quiet, or continue possession of houses or land, though the strict primary decree of a Court of Equity, as observed by Lord Hardwicke, is *in personam*, yet it has been long established that that court will not only commit the party for his contempt, but will issue a writ of assistance to the sheriff to put the complainant into possession, in a suit of lands; (g) and after recovering at law upon a writ of dower, or in ejectment, if the possession be withheld or disturbed after it has been delivered, proceedings may in some cases be advantageously had in this court. (h)

We will now proceed to consider the principal injuries which may be prevented by injunction as they relate to the person or to personal or real property.

I. With respect to the *Person*, we have seen that the Chancellor may prevent a breach of the peace by requiring

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The effect of an injunction and proceeding for a contempt.

Particular cases in which Courts of Equity will grant or refuse an injunction.

I. As respects the person.

(b) *Rowe v. Jarrold*, 5 Mad. R. 45; *Fielding v. Capes*, 4 Mad. R. 393.

(c) *Attorney General v. Nichol*, 3 Meriv. 687.

(d) *Eden*, 363.

(e) *Eden*, Inj. 76; *Angerstein v. Hunt*,

6 Ves. 488.

(f) *Harr. Ch. Pr.* 552; *Bullen v. Ovey*, 16 Ves. 141; *Leonard v. Attwell*, 17 Ves. 385.

(g) *Eden on Injunction*, 363, 364.

(h) *Id.* 364, 365.

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sureties of the peace, (i) or may prevent a continued illegal imprisonment by habeas, but that a Court of Equity will not interfere to prevent a libel unless on the ground of copyright or to protect an infant. (k)

The Court of Chancery has a very summary and extensive *preventive* jurisdiction in protection of the *Relative Rights of persons*, as between husband and wife, parent and child, and guardian and ward; and it is frequently particularly desirable in those cases to apply to that court for an immediate injunction.

We have seen that a Court of Equity will bind the *Husband* to keep the peace towards his wife but will not remove her from him. (l) And in an injunction to restrain the husband from preventing his wife's solicitor and friends from having access to her, she being confined by dangerous illness in his house, to enable her to execute a deed of appointment under a power in her marriage settlement, was refused, it not being proved that she had given instructions for such a deed, and it was doubted whether under any circumstances such an injunction could be granted. (m) Generally speaking, as respects cruelty to the wife and alimony, her more *permanent* remedies are in the Spiritual Court. (n)

An injunction may be obtained *by a Parent* to prevent the marriage of his son, aged eighteen, and restraining communication with him until further orders, and that service of the order at the house, which appeared to be the last place of abode, though apparently shut up, should be good service; (o) and a Court of Chancery will assist a parent or guardian in compelling the son or ward to obey their legal desires; and where an infant went to Oxford contrary to the orders of his guardian, who wished him to go to Cambridge, the court sent a messenger to carry him from Oxford to Cambridge, and on his removing back to Oxford another messenger was sent to carry him to Cambridge and keep him there. (p) And where a presbyterian, having three daughters bred up in that persua-

(i) *Ante*, 683.

(k) *Ante*, 697; *Ge v. Pritchard*, 2 Swanst. R. 402; *In re Champion Newspaper*, 2 Atk. 469; Eden on Injunction, 41.

(l) *Ex parte King*, Amb. 334; 2 Ves. 578, S. C.

(m) *Middleton v. Middleton*, 1 Jac. & W. 94; and see *Rex v. Middleton*, 1 Chit. Rep. 654, where an application to a court of law for a *habeas corpus* was refused; and see Chit. Eq. Dig. 500.

(n) *Legard v. Johnson*, 3 Ves. J. 352.

(o) 1 Mad. Ch. Pr. 348; *Pearce v. Crutchfield*, 14 Ves. 206; *Sherwood v. Sanderson*, 19 Ves. 282; Chit. Eq. Dig. 1039, tit. Infant, 528, 529; Eden, Inj. 297. But the infant must be a ward in chancery, 2 Atk. 535, 539; Chit. Eq. Dig. 736; but which is constituted by filing a bill as on his behalf, and which of itself makes him a ward, 1 Mad. Ch. Pr. 332.

(p) *Tremaine's case*, 1 Strange, 167; *Hall v. Hall*, 3 Atk. 721.

sion, and three brothers who were presbyterians, made his will, appointing his brothers and also a clergyman of the Church of England guardians to his three infant daughters, and died, having sent his eldest daughter to his next brother, and the clergyman got possession of his two daughters and placed them at a boarding-school where they were educated according to the Church of England, and then filed a bill to have the eldest daughter placed out with the other daughters, and the three Presbyterian brothers brought their bill to have the two daughters delivered to them, offering parol evidence that the testator directed that he would have his children bred up Presbyterians; but the court declared that no proof out of the will ought to be admitted in the case of a devise of a testamentary guardianship any more than in a case of a devise of land, and that the decision of the majority of the guardians ought to govern; and directed that the master should inquire whether the school at which the two youngest daughters were placed was proper, and as to the eldest, who was of the age of sixteen, she was brought into court and asked where she desired to be; and on her declaring her wish to be with one of her uncles, it was ordered accordingly. (q)

If a child be grown up, but not of age, and be about to quit the kingdom, even to go into Scotland, a writ of *ne exeat* may be obtained to prevent him, and if gone he might by the great or privy seal be required to return, and if he should not obey, his property would be taken. (r)

On the other hand the Court of Chancery will in many cases of immorality or ill treatment, or even insolvency, deprive a father of his natural and legal right to the custody of his child, and will restrain him from taking such child abroad. (s)

The jurisdiction of the Lord Chancellor in the Court of Chancery to controul the authority of the parent over his children, or to deprive him of their care and custody for proper cause, had been long acknowledged and acted upon, but was not established by the House of Lords until the case of *Wellesley v. Wellesley*, in which the jurisdiction and its application were fully considered. (t)

(q) *Storke v. Storke*, 3 P. Wms. 51; *Anon.* 2 Ves. 56; *Duke of Beaufort v. Berty*, 1 P. Wms. 703. As to the cases where the Court of Chancery will or not controul a parent in the possession or conduct towards a child, see 1 Bla. Com. 17 notes, and Chitty's Eq. Dig. tit. Parent and Child; and tit. Jurisdiction; and *ante*, 64.

(r) *De Manneville v. De Manneville*, 10 Ves. 63; 1 Mad. Ch. Pr. 333.

(s) *Whitfield v. Hales*, 12 Ves. 492; *De Manneville v. De Manneville* 10 Ves. 52; *Eden, Inj.* 297; 1 Mad. Ch. Pr. 332.

(t) *Wellesley v. Wellesley*, 1 Dow's R. New S. 153, July 4, 1828; *ante*, 64, 65.

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II. Injunctions
relating to *Per-
sonal Property*.
(u)

II. With respect to *Personal Property*, injunctions are usually to restrain a partner or agent from making or negotiating bills, notes, or contracts, or doing other acts injurious to the partner or principal; to restrain the negotiation of bills or notes obtained by fraud, or without consideration; to deliver up void or satisfied deeds; to enter into and deliver a proper security; to prevent breaches of some contracts, and enjoin the performance of others; to prevent breaches of confidence or of good faith; to prevent improper payments, sales, or conveyances; also bills *quia timet*, to prevent loss to a remainderman, or waste by an executor or administrator; to prevent the sailing of ships; or more frequently the infringement of copyrights or patents.

1. Injunctions
against *Part-
ners*.

1. If it be apprehended that a *Partner*, (x) whether so in writing or by parol, (y) is about unjustly or fraudulently to make, issue, or circulate bills or notes or contracts in the name of the firm, or that he will receive and misapply the assets, then upon a bill filed and proper affidavit an *Injunction* to prevent the same may immediately be obtained; (z) and this is essential when the before suggested precautionary measure of giving notice may be inadequate to prevent the completion of the fraud. (a) This also is the proper proceeding when one of several partners refuses to concur in signing notice of dissolution to be inserted in the Gazette, and it is expected that he will improperly issue bills in the name of the firm. (a) The court will not, when a bill against a partner prays an account, lend itself to the purpose of carrying on the partnership, and therefore it seems essential that the bill filed should in that case pray a dissolution as well as a final account. (b) The affidavit to obtain an injunction in a case of this nature must show actual misconduct, and not a mere apprehension or an existing strong temptation to act fraudulently, for fraud or misconduct is not to be presumed. (c) A Court of Equity has refused to decree

(u) The principles upon which Courts of Equity decree or refuse a specific performance of contracts, and which will be considered in a following chapter, will be found in many respects to apply to injunction bills.

(x) *Master v. Kirton*, 3 Ves. J. 74; *Ryan v. M'Math*, 3 Bro. C. C. 15; *Newsome v. Coles*, 2 Campb. 619; *Lawson v. Morgan*, 1 Price, R. 503; *Ex parte Noakes*, 1 Mont. on P. 93; *Solly v. Moore*, 8 Price, 631; *Houlditch v. Nias*, Id. 689; *Harts v. Schrader*, 8 Ves. 317; *Chitty on Bills*, 8 ed. 58, 61; 1 Mad. Ch. Pr. 159, 160.

(y) *Master v. Kirton*, 3 Ves. J. 74.

(z) *Ante*, 442 to 447.

(a) *Master v. Kirton*, 3 Ves. J. 74; *Ryan v. M'Math*, 3 Bro. C. C. 15; *Newsome v. Coles*, 2 Campb. 619; *Lawson v. Morgan*, 1 Price, R. 503; *Ex parte Noakes*, 1 Mont. on P. 93; *Solly v. Moore*, 8 Price, 631; *Houlditch v. Nias*, Id. 689; *Harts v. Schrader*, 8 Ves. 317; *Chitty on Bills*, 8 ed. 58, 61; 1 Mad. Ch. Pr. 159, 160.

(b) *Loscombe v. Russell*, 1 Clark & Fin. 8; *Eden's Inj.* 307.

(c) *Glassington v. Thwaites*, 1 Sim. & S. 124; *Lawson v. Morgan*, 1 Price, R. 503.

that the name of a partner shall be erased; (d) and an injunction will not be granted to restrain surviving partners from using the name of a deceased partner in the firm of a trade, (e) because it was impossible, under the circumstances, that using the testator's name in the trade could subject his estate to the trade debts; and supposing the so using his name might be a fraud upon the public, that was no ground for applying to a Court of Equity for an injunction; (f) the bill could only bind the survivors, and not affect the estate of the deceased partner, (g) and consequently no injunction was requisite.

If the partner against whom the application is made positively deny the imputed misconduct, then an injunction in the first instance will either not be granted, or will be dissolved, and the suit will proceed to hearing. (h)

2. The principle of these cases also extends to *Attornies or Agents* who may by bill and *injunction* be prevented from issuing or circulating or misapplying bills or notes to the injury of their principals, or from otherwise acting contrary to their duty, (i) and who, if they should improperly sue even a third person in prejudice of their principal, may be restrained in equity; and, on the other hand, if the principal improperly attempt to subject him to liability, he may equally obtain relief. (k)

3. Injunction against an Agent or Attorney disclosing secrets, &c.

If the retainer or employment of an attorney or solicitor has been determined on account of misconduct, or he has, after his employment has ceased, acted tortiously towards his former employer, he may by injunction be restrained from communicating information that came to him confidentially from his client. (l) So an agent or other person may be restrained by injunction from the disclosure of secrets communicated to him in the course of any confidential employment (m) or treaty; (n) but the Court of Equity will not, on motion, restrain a solicitor from giving evidence of confidential matters, the propriety of his being examined in breach of professional confidence being left to the consideration of the court before which he might appear as a witness; (o) but this does not extend to the disclo-

(d) *Ryan v. M'Math*, 3 Bro. C. C. 15.

(e) *Webster v. Webster*, 3 Swanst. 490.

(f) *Id. ibid.*

(g) *Usher v. Dauncey*, 4 Campb. 97.

(h) *Littlewood v. Caldwell*, 11 Price, 97.

(i) *Solley v. Moore*, 8 Price, 631; and see Chitty on Bills, 31 to 41.

(k) *Kidson v. Dilworth*, 5 Price, 564; 1 Buck, 113; Chitty on Bills, 8 ed. 39.

(l) *Beer v. Ward*, 1 Jac. 77; 1 Mad. Ch. Pr. 160; ante, 436.

(m) *Evitt v. Price*, 1 Sim. 488; *Yorut v. Winyard*, 1 Jac. & W. 394.

(n) *Williams v. Williams*, 8 Meriv. 157.

(o) *Beer v. Ward*, 1 Jac. 77. In *Moore v. Terrell*, K. B. Easter T. 1833, the whole court said, that after consulting with the Lord Chancellor and some of the other

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sure of a secret respecting an expired patent; (*p*) nor will a clerk of a solicitor commencing practice for himself be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having in his former service acquired information likely to be prejudicial to the clients of his master. (*q*)

3. Injunction to
prevent the Ne-
gociation of
Bills, Notes,
&c. (*r*)

3. So a Court of Equity will, upon a bill filed, grant an injunction to *prevent the negotiating* or parting with a *Bill or Note* obtained upon an illegal transaction, as at play, upon affidavit of the facts, and this immediately after filing the bill, and even before service of the subpoena to appear; (*s*) and the circumstance of there being an available defence at law on the ground that the bill was absolutely void even in the hands of a *bonâ fide* holder, constitutes no answer to an application for an injunction to prevent the negotiation of the instrument, because by a change of holder the situation of the applicant might be unjustly prejudiced in the means of defence. (*t*) It is established generally that a Court of Equity, when a bill has been obtained or is about to be negotiated fraudulently or without consideration, will in general, by injunction, restrain the circulation, and either detain or sometimes compel the owner to deliver it up to be cancelled; (*u*) and they will stay all proceedings in an action on a bill accepted by a defendant for the accommodation of one of the plaintiffs, (*x*) or accepted by one partner in fraud of the others; (*y*) and relief was granted against a bill stated to have been given for value received, but in fact obtained by fraud and for a fictitious consideration. (*z*) So where a bill or note has been given for money lost by gaming or other illegality, a Court of Equity will grant an injunction to prevent the winner from parting with it, and this even before service of subpoena, (*a*) and will decree that it shall be delivered up. (*b*)

judges, the unanimous opinion was, that the rule that an attorney was not bound to disclose the secrets of his client, is general, and not confined to matters relating to a suit: so that the same rule before prevailing in C. P. (*Cromack v. Heathcote*, 2 Brod. & Bing. 4; *Gainsford v. Grammar*, 2 Campb. R. 9; *Walker v. Wildman*, 6 Mad. R. 47,) is now universal.

(*p*) *Newberry v. James*, 2 Meriv. 446.

(*q*) *Bricheno v. Thorp*, 1 Jac. 300. See the consequent danger of a defect in title being communicated, *ante*, 436.

(*r*) See in general, 1 Mad. Ch. Pr. 154; *Eden on Injunctions*; and *Chit. Eq. Dig. Practice*, 18; 1056, and xxxv. 962.

(*s*) *Newman v. Franco*, 2 Anst. 519;

— *v. Blackwood*, 3 Anst. 851; 2 Ves. jun. 493; 1 Fonbl. Eq. 43; 1 Mad. Ch. Pr. 154.

(*t*) *Lloyd v. Gurdon*, 2 Swanst. 180; *Hood v. Aston*, 1 Russ. Rep. 412.

(*u*) *The Bishop of Winchester v. Fournier*, 2 Ves. jun. 445.

(*x*) — *v. Adams and others*, Young's Exch. Rep. 147; *Chit. on Bills*, 8th edit. 82, note (*a*).

(*y*) *Hood v. Ashton*, 1 Russ. R. 412.

(*z*) *Dyer v. Tymewell*, 2 Vern. 122; 2 Freem. 112, S. C.

(*a*) *Lloyd v. Gurdon*, 2 Swanst. 180.

(*b*) *Wynne v. Callander*, 1 Russ. 295; — *v. Blackwood*, 3 Anstr. 851.

So if given for procuring a commission in the army; (c) or for procuring a marriage. (d) So although the bill or note was valid in its origin, yet if the consideration have failed, equity will interfere; as where an acceptance has been given for goods to be delivered and the vendor afterwards refused to deliver them. (e) So the negociation of a bill has, under particular circumstances, been restrained in order to prevent the holder from depriving the defendant of the advantage of a set-off; as where a person who had been a bankrupt, gave a note to his solicitor in payment of his bill of costs for obtaining his certificate, and the solicitor was indebted to the estate, and the bankrupt had purchased so many debts due from his estate, that the share thereof coming to the bankrupt on account of such purchased debts exceeded the amount of what the solicitor owed and also the amount of the note, a Court of Equity restrained the negociation of such note, which would have defeated the set-off. (f) So where an agent has indorsed his own name on a bill, which by accident had been drawn payable to him, but for his principal's use, and the latter, or his trustee, sue such agent as indorser, a Court of Equity will restrain such proceeding. (g) And relief has even been afforded after execution levied on a judgment founded on a warrant of attorney given for an illegal consideration. (h) Though where a defendant has had an opportunity of defending and trying at law, a Court of Equity will not always relieve if he omit to do so. (i) If the defendant, in his answer, admit himself to be holder of the instrument, and the facts as charged, the court will decree the instrument to be delivered up; but in other cases he will only be restrained from negotiating it, and left at liberty to try at law. (j) Where the bill has been already negotiated, the holder, as well as the original party, should be made parties to the suit. (k) Where a promissory note had been given under suspicious circumstances, it was decreed that it should be deposited with the Registrar of the court, leaving the holder to proceed at law, and if he did not within a reasonable time, then that the note should be delivered up. (l) If after a bill filed for delivering up bills, the plaintiff should fail at law in an

(c) *Whittingham v. Bouroyne*, 3 Anstr. 900.

(d) *Smith v. Aykewell*, 2 Atk. 566; *Cotton v. Catlyn*, 2 Eq. Abr. 525.

(e) *Patrick v. Harrison*, 2 Bro. C. C. 476.

(f) *Ex parte Harding*, 1 Buck, 24.

(g) *Kidson v. Dilworth*, 5 Price, 564;

Chitty on Bills, 8th edit. 39.

(h) *Whittingham v. Bouroyne*, 3 Anstr. 900.

(i) *Dunbar v. Wilson*, 6 Bro. P. C. 231; *Naylor v. Christie*, 8 Price, 534.

(k) *Lloyd v. Gurden*, 2 Swanst. 180.

(l) *Bishop of Winchester v. Fournier*, 2 Ves. jun. 445.

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action of trover for them, yet he is still entitled to proceed in equity to have them delivered up. (m) It is said that affidavits cannot be read in support of an injunction to restrain the negotiation of bills. (n)

In general a Court of Equity will not compel a party by his answer to criminate himself; but some acts contain a particular provision compelling a party to admit the particulars of an illegal transaction. Thus the statute against *Gaming*, 9 Anne, c. 14, s. 3, enacts, "that for the better discovery of the monies or other things so won and to be sued for and recovered back as therein provided, (o) every person liable to be sued shall be obliged and compellable to answer upon oath such bill as shall be preferred against him for discovering the sum or thing won at play." So the act against *Stock Jobbing*, 7 Geo. 2, c. 8, s. 2, contains a similar provision, enacting, "that for the better discovery of the monies or premiums which shall be given, paid or delivered, and to be sued for and recovered as therein mentioned, (p) every person liable to be sued shall be obliged and compellable to answer upon oath such bill as shall be preferred against him in any Court of Equity for discovering any such contract or wager, and the sum of money or premium so given, paid or delivered."

In case of a note obtained from an *Infant* just after he came of age, for extravagant supplies previously made, the negotiation may be restrained by injunction and relief afforded. (q) And where a bill or note has already been declared void by foreign competent jurisdiction, a perpetual injunction against its circulation and against proceedings thereon may be obtained. (r) But the practice appears to be, that if upon a bill for discovery and injunction to stay proceedings at law on a bill of exchange, and for delivering it up to be cancelled, and charging fraud, not answered by the defendant, then if the discovery obtained would be a defence at law, an immediate injunction to stay proceedings will be refused, and will only be granted to stay execution. (s)

Upon the other hand, if the answer to an injunction, charging

(m) *Lisle v. Liddle*, 3 Anstr. 649.

(n) *Berkeley v. Brymer*, 9 Ves. 335; Chitty on Bills, 8th edit. 120; 2 Mad. Ch. P. 366.

(o) A bill can only be filed by the loser and not by an informer, *Orme v. Crookford*, M'Clel. 185. But an answer to a bill filed by the loser may be given in evidence in actions for penalties. *Thistlewood v. Cracroft*, 1 Marsh. 497; 6 Taunt. 141, S. C.; *Billing v. Pulley*, 2 Marsh. R.

125; and see next note.

(p) This only applies to discoveries as to monies recoverable back, and not to the recovery of penalties under the 5th and 8th sections, *Bullock v. Richardson*, 11 Ves. 373; and see last note.

(q) *Brook v. Galby*, 2 Atk. 34; Barn. 1, S. C.

(r) 2 Eq. Ab. 525.

(s) *Houlditch v. Nias*, 8 Price R. 689.

that a party obtained a bill of exchange without consideration, swear that the defendant gave adequate consideration without fraud, it suffices in such answer to state the consideration generally, without showing all the particulars. (t)

There are inconveniences and consequences which a party should anticipate and well consider before he files a bill, or at least before he moves for an injunction to restrain proceedings at law; for the Court of Equity will sometimes not grant an injunction but upon the terms of *bringing the money into court*, and which money will afterwards be at the disposal of that court, in case upon the hearing it should be considered that the defendant at law is not entitled to equitable relief; and this although perhaps a defence at law might have been sustained without the defendant's thus parting with his money. (u) Thus it has been held that if a defendant at law, in an action on a bill, file a bill in equity to restrain the proceedings at law and obtain an injunction upon the terms of bringing the money into the Court of Equity, he impliedly submits to the equitable jurisdiction of that court; and if, upon the subsequent hearing in equity, that court should decree that he is not entitled to equitable relief, the same court may order that the money be paid out of the court to the plaintiff at law, and the defendant cannot move with effect to restrain such payment even until the action at law has been determined. (u)

Considerations to be attended to before filing a bill to prevent payment of an alleged debt.

4. Whenever a deed or instrument is void at common law or by statute or has been satisfied, a Court of Equity has jurisdiction to order it to *be delivered up*; (x) as where it might, if outstanding, be again set up at a distance of time when evidence of its invalidity may have been lost, or when it might constitute A CLOUD upon a title. (y) But the court will not order the delivering up of voluntary instruments or powers of attorney which are revocable, and might by another deed be at any time revoked. (z) Where an annuity has been insufficiently memorialized, the Court of Chancery will order the *deeds* to be

4. Injunction to deliver up deeds. (x)

(t) *Webster v. Threfall*, 2 Sim. & Sta. 190.

(u) *Wynne v. Jackson*, 2 Russ. 351. This was so in — *v. Adams*, Young's Rep. 147; *ante*, 706, note (s); though the party filing the bill in that case ultimately obtained a perpetual injunction, and received back the money with intermediate dividends thereon.

(x) See in general Lord Eldon's observations in *Mayor of Colchester v. Lowton*,

1 Ves. & B. 244; *St. John v. St. John*, 11 Ves. 535; *Newland on Contr.*; *Chit. Eq. Dig.* tit. Deeds, 309, and tit. Practice, xxxv. 962; and tit. Jurisdiction, i. 586, 587.

(y) *St. John v. St. John*, 11 Ves. 535; *Mayor of Colchester v. Lowton*, 1 Ves. & B. 244; *Hayward v. Dimdale*, 17 Ves. 111.

(z) *Colman v. Sarrel*, 1 Ves. sen. 50; *Bromley v. Bromley*, 7 Ves. 28; 1 Mad. Ch. Pr. 226, 228.

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delivered up (a) upon the terms of an account being taken of the consideration of the annuity, with interest and costs, and of all the annual payments, the balance on either side to be paid and the securities delivered up and a re-conveyance, (b) which seems to be a more extensive power than that given to the courts of law by the Annuity Act. (c) But forged deeds or writings will not be ordered by the court to be torn or defaced, but to be kept, so that a prosecution may be instituted thereon against the criminal. (d) If a party have a just lien on the deeds in respect of a prior legal transaction, although they remained in his possession as a security for a subsequent illegal contract, which has been set aside, his original lien will continue. (e) So in case of a valid deed, if a party thereby bound, improperly get possession of it, he will be compelled to restore it to the right owner; (f) but not so if the deed were a fraud in law, as to pretend to create a qualification to kill game without intent to convey any beneficial interest, in which cases the court will not assist either party. (g) Where a bill *quia timet* was filed to deliver up an apprentice's bond and indenture, he being out of his time, it was ordered that the defendant should either bring his action within a year or deliver up the bond and indenture, for if it were at the master's choice to stay as long as he pleased, he might perhaps stay till the apprentice's witnesses are dead; (h) and the same reason applies to the delivering up of bonds and other instruments after they have been satisfied, and which now appears to be an established rule. (i)

5. To compel the delivery of a Proper Security. (j)

5. On the other hand, in general, if a security has by mistake been given upon an improper stamp, a Court of Equity cannot relieve or *prevent* the party from taking the objection. (k) But where a party had entered into an express agreement to give a valid note, and had given one on an improper stamp, a Court of Equity, to prevent loss, will enforce the delivery of a valid note; (l) and a Court of Equity will relieve even against a surety as well

(a) *Underhill v. Hornwood*, 10 Ves. jun. 218; *Sinclair v. Hone*, 6 Ves. 610; 1 Mad. Ch. Pr. 227; *Bromley v. Holland*, 7 Ves. 3.

(b) *Holbrook v. Sharpe*, 19 Ves. 131; 1 Mad. Ch. Pr. 227, 228.

(c) 53 Geo. 3, c. 141, s. 6; *Girdlestone v. Allan*, 1 B. & C. 61; *Barber v. Gamson*, 4 B. & Ald. 281; except in the cases in that section, courts of law can only set aside the *warrant of attorney and judgment*; and see Tidd, 9th edit. 522, note (f), 526, note 4.

(d) *Frankland v. Hampden*, 1 Vern. 66.

(e) *Wood v. Grimwood*, 10 Bar. & C. 679.

(f) *Kurger v. Moore*, 1 Sim. & S. 61.

(g) *Brackenburgh v. Brackenburgh*, 2 Jac. & W. 391; Chit. Eq. Dig. tit. Deeds.

(h) 1 Ch. Ca. 70; 1 Eq. Ab. pl. 2; 1 Mad. C. Pr. 223.

(i) *Bromley v. Holland*, Coop. 29; 1 Mad. Ch. Pr. 226, 227.

(j) The rules stated under this head perhaps more properly belong to the subsequent chapter regarding the enforcement of *Specific Performance*.

(k) *Toulmin v. Price*, 5 Ves. 240; *Ex parte Manner*, 1 Rose, 68.

(l) *Aylett v. Bennett*, 1 Anstr. 45.

as a principal, and compel all parties to give a proper bill or note according to their original intention; as where the maker of a note intended that it should be several as well as joint, but it was drawn only as a joint note, in which case, if the surety had died first, there would have been no remedy either at law or in equity against his estate, the court compelled the surety and principal to sign a joint and several note. (*m*) And where, in case of a lost deed or bill or note, there may be no remedy, or not so clear a remedy at law, a Court of Equity will, after indemnity tendered, compel payment in equity; (*n*) and where deeds constituting the evidence of the title to a rent charge have been lost, a Court of Equity has decreed the execution of fresh deeds. (*o*) So, where a woman, at the time of her marriage, was indebted in two promissory notes, and after her marriage the husband gave his bond for the amount to the creditor, who thereupon delivered up the notes, and afterwards, in an action on the bond against the husband, pleaded infancy, the Court ordered the notes to be returned, with directions that the defendant should not plead the statute of limitations to any action on the notes, or any other plea which could not have been pleaded at the time the bond was given. (*p*) So, if a vendor of part of his estate retain the title deeds, a Court of Equity will compel him to execute a covenant to produce them for the purchaser. (*q*)

6. Breaches of *Contract* are either by *commission* or *omission*, and sometimes a Court of Equity will *prevent* the completion of the former by *injunction*, or the latter by decreeing *specific performance*. In general, if the contract merely relate to *personal property*, and be limited to a *single* transaction, and not of a *continuing* nature, Courts of Equity will refuse to interfere, either by injunction or by decree of specific performance, because it is considered that adequate compensation may be recovered at law in the shape of damages for the breach of the contract. (*r*) Thus equity will not in general decree specific performance of a contract to deliver a quantity of corn, hops, stock, or other articles of merchandize, which might be readily purchased elsewhere; and on the same ground equity will not

6. Injunctions to prevent breaches of contract. (*r*)

(*m*) *Ante*, 123, 124, 304; *Rawstone v. Parr*, 3 Russ. 424, 529; Chit. Eq. Dig. tit. Mistake, and tit. Agreement.

(*n*) See cases, Chitty on Bills, 8 ed. 290.

(*o*) *Collet v. Jaques*, 1 Chan. Cas. 120; Chit. Eq. Dig. 1193.

(*p*) *Clark v. Lubley*, 2 Cox, 173; Chit.

Eq. Dig. 664.

(*q*) *Fain v. Ayers*, 2 Sim. & Stu. 533.

(*r*) See in general Eden on Injunctions, 308; Madd. Ch. Pr. Index, tit. Injunction; Chit. Eq. Dig. 1053, 1056, and *id.* title Specific Performance.

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interfere by injunction to prevent a breach. (s) But there are exceptions to that rule, and if it can be shown that the breach of a personal contract of considerable importance would be productive of *very considerable continuing or permanent* loss, which could not be adequately compensated at law, then equity will interfere. (t) As if, immediately after payment for horses or goods, the vendor should fraudulently or forcibly obtain possession, and attempt to sell them, if the purchaser were put to his action at law the parties might turn out insolvent, and he might lose his money, his property, and costs, when, by summary and immediate relief, a Court of Equity would prevent such injustice. (u) And therefore, in a late case, which was several times before the Master of the Rolls, and the Vice-Chancellor and the Lord Chancellor, a contract for the delivery of sixteen horses, purchased and paid for by the plaintiff, to work the Red Rover Brighton coach, was enforced in equity, and the horses restored to the plaintiff, without compelling him to proceed at common law. (x) So, in the case of a contract for the purchase of a

(s) *Baxter v. Lister*, 3 Atk. 383; *Capper v. Harris*, Bunb. 135; 1 Mad. Ch. Pr. 402, 163; 3 Wadd. Vi. L. 464.

(t) See instances 1 Madd. Ch. Pr. 403, and observations Newland on Contracts, 93, where it is stated that Lord Hardwicke seemed to think that if a person should contract for the purchase of a great quantity of timber, as a ship carpenter, by reason of the vicinity of the timber, or should contract to sell timber, wanting to clear his land, in order to turn it to a particular sort of husbandry; in these cases the performance of the contract in specie ought to be decreed, in *Burton v. Lister*, and *Taylor v. Moche*, 3 Atk. 584, and *Buckingham v. Ward*, cited *id.* and 10 Ves. 162; *Nutbrown v. Thomson*, 10 Ves. 159.

(u) *Id.* *ibid.*

(x) *Pounsett v. Humphreys*, Court of Chancery, 28 March, 1833, *cor.* Lord Chancellor. His lordship, in giving judgment in this case, said it was a question respecting costs. An agreement had been entered into between the parties, by which, upon payment of 800*l.* the defendant was to deliver up to the plaintiff 16 horses to work the Red Rover Brighton coach. The plaintiff paid down the money; and, after some delay on the part of the defendant, he obtained possession of four of the horses, but it did not appear distinctly how. Many appointments were made between the parties to put the plaintiff in possession of the horses, but they were not kept by the defendant. At length, on the 22d of October, 1832, the horses were delivered up to the plaintiff, and were worked for a short time upon the Brighton

road. The defendant again recovered 13 of the horses, but it did not appear distinctly how, it seemed to be by force, and delivered them over to Alexander, a livery stable keeper, who immediately advertised the horses for sale by auction. His lordship then stated the terms of the affidavits and facts, and the prior proceedings under which the plaintiff had, by the decision of the Master of the Rolls, recovered back his horses, so that the only point now to be determined was the Costs. His lordship said, that from these facts he was of opinion that Alexander could not set up against the plaintiff any lien or claim for the keep of the horses, they having been placed with him by Humphreys, whose property they were not; his claim could be against Humphreys alone, who had and could have no authority to deliver the horses to him. This part of the case must be determined in favour of the plaintiff. *His honour below was evidently of the same opinion, for he ordered the horses to be delivered up to the plaintiff.* It was true that the Vice-Chancellor made the plaintiff pay for the keep of the horses before they were delivered up; but this was without prejudice; and, as it appeared to his lordship that Alexander had no right to the keep or expenses of the horses, this money must be repaid into Court. He was satisfied that Alexander ought not to be allowed his costs in the manner in which they were allowed; it was any thing rather than clear that he had no knowledge of the horses being sold before he received them. In his second affidavit he made a

coach concern, where the vendor agreed not to run another coach in opposition, but did so, and which breach, if suffered to continue, would have been productive of immeasurable loss, an injunction was granted. (y) But the Chancellor afterwards observed, that he had interfered in that case with *some doubt* whether he was not *degrading the Dignity of the Court*; and that he had only so interfered in that *particular case*, because he saw his way, one party having *covenanted absolutely* against interfering with the business, which he had sold to the other. (x) In case of the sale of the *good-will* of a shop and trade therein, although with an express stipulation not to carry on the same business in the neighbourhood, it has been laid down in a work of high authority that an injunction may be obtained against the vendor from afterwards attempting to set up the same trade in the same place. (a) But in other cases a contrary rule has been supposed to prevail, and the courts have refused to enforce specific performance of such a contract, and left the party to law; (b) and have also refused to interfere by injunction to prevent the vendor from afterwards setting up in the same business. (b) But where the exclusive use of a secret of dying bombazeen, in a certain trade, was sold together with the good-will, it appears to have been considered that an injunction might be obtained to prevent the vendor from disclosing the secret, which would be permanently ruinous to the purchaser, who had paid the price of the good-will, (c) and the remedy at law might therefore in that case be inadequate. (d) So an agreement to assign a debt upon the purchase of it may be enforced. (e) But it is said that a proceeding of this nature, in aid of a mere personal contract, ought to be with great caution. (f)

If a contract relate to *Real property*, and the breach might be *permanently* injurious, then it seems an injunction may be obtained; as if a lease contain a covenant to leave a certain

general denial, without regard to particular circumstances; but such a denial might arise from confidence rather than fairness, and may proceed upon calculation rather than ingenuousness; for though he denies generally, he does not pledge himself to any detail. He would, upon the whole, order the money to be paid into court, and reverse that part of his honour's order giving Alexander costs.

(y) *Williams v. Williams*, 2 Swanst. 253; *Smith v. Fromont*, Id. 330; *Harrison v. Gardner*, 2 Madd. R. 198.

(z) *Smith v. Fromont*, 2 Swanst. 332.

(a) 1 Madd. Ch. Pr. 163, referring to *Crutwell v. Lye*, 17 Ves. 342; and see *Day v. Day*, A. D. 1816, Eden on Inj. 314.

(b) *Shackle v. Baker*, 14 Ves. 468; *Bexley v. Connelly*, 1 Jac. & Walk. 576; *Crutwell v. Lye*, 17 Ves. jun. 335; Chit. Eq. Dig. tit. Good-will, and tit. Trade; but see *Day v. Day*, 1816, Eden. Inj. 314.

(c) *Bryson v. Whitehead*, 1 Sim. & Stu. 74; and *Williams v. Williams*, 2 Swanst. 253; and *Yeovall v. Winyard*, 1 Jac. & W. 394.

(d) *Flint v. Brandon*, 8 Ves. 163.

(e) *Wright v. Bell*, 5 Price, 325.

(f) *Mitchell v. Reynolds*, 1 P. Wms. 181; *Shackle v. Baker*, 14 Ves. 468; *Crutwell v. Lye*, 17 Ves. 335; *Harrison v. Gardner*, 2 Madd. R. 198; *Davis v. Mason*, 5 T. R. 118.

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stock of a certain amount at the expiration of the lease, there may be an injunction to compel observance, and also to prevent pulling down buildings, and removing materials; (g) and an injunction may be obtained to prevent waste by breach of a covenant not to dig up ground. (h) So an injunction has recently been granted to restrain the Commissioners of Woods and Forests from building upon part of the site of Carlton palace, in violation of the terms of *an agreement* entered into by them with the plaintiffs for a building lease of an adjoining part of the site, and the injunction may be in effect for the removal of the buildings which had been commenced, though the injunction in that case was singularly in the negative, viz. "and also from permitting such part of the buildings as have been already erected from remaining," &c. (i) But it has been considered that a breach of a *common covenant to repair* demised premises is more properly remediable at law, and a bill for specific performance of such a covenant was dismissed with costs; (k) and although formerly specific performance of a covenant to *rebuild* was enforced, the subsequent cases render that point doubtful. (l) Analogous cases bearing upon this subject will be considered in a following chapter respecting *Specific Performance*.

In order to support a motion for an injunction, it must in general appear that there has been an *inception of*, or at least proceedings towards *an injury*, for otherwise in these cases the application will be considered premature. (m)

7. To prevent a breach of Confidence or good faith, or to prevent other loss.

7. In considering injunctions against agents, we have seen that disclosures of *Confidential Communications* will be prevented. (n) So an injunction will be granted to restrain the *disclosure of Secrets* that came to the defendant's knowledge in the course of any confidential employment; (o) and an injunction was granted to restrain a defendant from communicating certain recipes for remedies and vending them, on the ground that he had obtained a knowledge of the mode of preparing them by a breach of trust, (p) although from a prior case, it seems doubtful whether a Court of Equity will interfere by

(g) *Nutbrown v. Thornton*, 10 Ves. 161; *Mayor of London v. Hedger*, 18 Ves. 355.

(h) 4 Bro. P. C. 395.

(i) *Rankin v. Huskisson*, 1 Clark & F. 13.

(k) *Flint v. Brandon*, 8 Ves. 159; 1 Madd. Ch. Pr. 403; Newl. on Cont. 95; *Whistler v. Mainwaring and others*, in Chancery, Mich. T. 1773; 3 Woodd. V.L. 464, note (z); 3 Atk. 512; 1 Ves. 12.

(l) *Lucas v. Commerford*, 3 Bro. C. C. 167; but see *Mossly v. Virgin*, 3 Ves. 184; 1 Mad. Ch. Pr. 403, 404; Newland on Contr. 94, 95; 3 Woodd. Vin. Lec. 465.

(m) *Longman v. Broderip*, 3 Anst. 645.

(n) *Ante*, 705, 706.

(o) *Evitt v. Price*, 1 Sim. R. 485.

(p) *Yoral v. Wingard*, 1 Jac. & W. 594; and see Chit. Eq. Dig. tit. Trade, 1284, 1285.

injunction to restrain a party from divulging a secret in medicine unprotected by a patent. (q)

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8. In some cases, where a *Payment* is improperly about to be made, or a *Sale* of property, the right to which is in dispute, is threatened, or where a sale is about to be precipitately and injuriously made, an injunction to prevent such sale, or to prevent a conveyance, may be obtained *ex parte*. (r)

8. To prevent improper *Payments*, *Sales* or conveyances.

9. When a person is *apprehensive* of being subjected to a future loss or inconvenience, *probable* or even *possible* to happen, or be occasioned by the neglect, inadvertence or culpability of another, or where any property is bequeathed to another after the death of a party in existence, and which the former is desirous of having secured safely for his use, against the effects of any accident which may happen to it previous to the accruing of his right of possession; in either of these cases a bill *quia timet* (*because he fears loss*) may be filed, which on the one hand will quiet the party's apprehension of a future loss or inconvenience, by removing the causes which may lead to it; and on the other, will actually secure for the use of the party the property, by compelling the person in the present possession of it to guarantee the same, by a proper security, against any subsequent disposition or wilful destruction. (t) It will be observed that this is laid down without the qualification of requiring any adequate ground, but in many cases *some adequate ground* must be shown for requiring a person, who may perhaps be a mere trustee, to incur the trouble, and sometimes perhaps difficulty, of procuring adequate securities. But where the party himself ought to have prevented the necessity for the proceeding, then he cannot complain. Thus, if a person have become surety for another for his paying a debt on a certain day, and the time has elapsed, the surety may file a bill to compel him to pay, although such surety has not as yet been troubled or molested for the debt, since it is unreasonable that a surety should always have such a cloud over him. (u) In other cases, when a *trustee* or *executor* might readily pay the fund into court, a legatee of a sum payable at a future distant

9. Bills *Quia Timet* to prevent loss or inconvenience. (s)

(q) *Williams v. Williams*, 3 Meriv. 75; and see *Newberry v. James*, 2 Meriv. 446; 2 Chit. Com. L. 198; and see *ante*, 436.

(r) Chit. Eq. Dig. tit. Practice, xlvii. and see *infra*.

(s) See in general, 1 Mad. Ch. Pr. 218 to 225; Chit. Eq. Dig. tit. Pleading, xii.

781. Boundary bills and bills for perpetuating testimony may also be considered as of this nature, see *post*, 722.

(t) 1 Mad. Ch. Pr. 219.

(u) *Ranelagh v. Hayes*, 1 Vern. 190; 1 Eq. Ab. 79; *Lee v. Rook*, Mos. 318; 1 Mad. Ch. Pr. 223.

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10. To prevent
waste of person-
al property by
an Executor or
Administrator.
(z)

time may, by a bill of this nature, call upon an executor to secure it for his benefit, and set a sum apart for the purpose, and this without showing any particular reasons, such as wasting assets or insolvency. (x) But where, as in the case of a remainder over of goods, a tenant for life is entitled to the use of the goods, there must be *real danger* in order to require security, and the court, without its being shown, will only decree the delivery of an inventory. (y)

10. A bill may be filed and injunction obtained to prevent an *Executor or Administrator* from wasting and sometimes from suing for or receiving assets, and a receiver may be appointed to conduct actions, (a) and to compel him to pay into court all that he is not entitled to retain for his own use, (b) and sometimes to direct him to pay a share of the residue to a party beneficially entitled. (c) So if persons are about to pay money to an insolvent executor, the court will restrain him from receiving it, and if the debtors to the estate collude with him they may be parties to the bill. (d) But the mere circumstance that an executor is poor and in mean circumstances, without any fact of misconduct, is not a sufficient ground for this application. (e) If an executor admit himself to be a debtor to the testator at his death, he may be ordered by the Court of Chancery to pay the debt into court. (f) So where an answer contains a clear admission that there is trust money in the hands of the defendant, the court will always, on an interlocutory application, order it to be paid into court. (g) The decision before referred to, that the sureties in an administrator's bond are not liable to be sued at the instance of a legatee or party entitled to the residue, unless there has been a *decree* in the Ecclesiastical Court, and the possibility of death or bankruptcy occurring before such decree can be obtained, render it highly expedient for all parties interested, in cases of any importance, to file a bill of this nature shortly after the death. (h)

(x) 1 Chan. Ca. 121; and other cases, 1 Mad. Ch. Pr. 220, 221.

(y) *Foley v. Burnett*, 1 Bro. C. C. 279; 1 Mad. Ch. Pr. 220; 2 Bla. Com. by Chitty, 398, in notes.

(z) See in general, Eden, 300; 1 Mad. Ch. Pr. 160, 224.

(a) 1 Chan. R. 257; 2 Bla. C. 513, in notes; *Hathornthamite v. Russell*, 2 Atk. 126; *Taylor v. Allen*, Id. 213; *Mangfield v. Shaw*, 3 Mad. 100; Chit. Eq. Dig. 1037; *Scott v. Becker*, 4 Price, 346; 1 Ch. Ca. 75.

(b) *Rogers v. Rogers*, 1 Anst. 174.

(c) *Otley v. Limes*, 7 Price, 274.

(d) *Ullerson v. Mann*, 4 Bro. C. C. 277; *Elmslie v. Macaulay*, 3 Bro. C. C. 624.

(e) *Howard v. Passera*, 1 Mad. Rep. 142; Eden, Inj. 300.

(f) *Rothwell v. Rothwell*, 2 Sim. & Sta. 218.

(g) Id. *ibid.*

(h) *Ante*, 552; *Archbp. Canterbury v. Tuffen*, 8 Bar. & Cres. 150; and *Archbp. Canterbury v. Robertson*, Eschoquer, 22 April, 1833, Easter Term, where the court took time to consider. See the result of that case stated in the *Addenda* at the end of the second volume.

11. An injunction may be obtained to restrain the *Sailing of a Ship* in some cases, as between *Part Owners*. (k) But the Court of Chancery will not restrain the sailing of a vessel containing goods sold to a person who had become insolvent, and over which the plaintiff retained a right of *stoppage in transitu*, which he might exercise himself. (l) The Court of Admiralty is open all the year round to applications by a part owner, whose share is fixed and certain, to arrest and detain and restrain the sailing of a ship without his consent, until security by bond be given to the amount of his share; (m) and if the ship should be lost, the payment of the stipulated sum into court may be immediately enforced. (n) But a part owner cannot originate a suit for an *account* in the Court of Admiralty. (o) The Court of Chancery, especially where the shares are not ascertained, will exercise a *concurrent jurisdiction* by injunction to restrain the sailing of a ship until the share of the party complaining shall have been ascertained, and security given to the amount of it; and it will be referred to the master to make the inquiry and to settle the security accordingly. (p) But where the ship was intended to sail the next day, and it did not appear by the affidavit filed in support of the motion that there were any circumstances to account for the plaintiff's delay in applying, the court refused an injunction to restrain the sailing of a ship upon the application of a part owner. (q) It seems that the jurisdiction of the Court of Admiralty, in cases of disputes between part owners of a ship, has been much narrowed by construction, and that a part owner cannot originate a suit there for an account; and that consequently an application to a Court of Equity by a part owner is preferable to proceedings in the Admiralty. (r) In a recent case, a very experienced and learned civilian, on being consulted as to the propriety of taking proceedings in the Admiralty Court on behalf of a half owner, an infant, against his co-owner, (who had rendered false accounts, and received the profits,) to stay the vessel from proceeding on her then voyage to *Hamburgh*, *advised*, "that proceedings in the Admiralty Court were not in that case expedient, because as such

(i) See in general 1 Mad. Ch. Pr. 163.

(k) Chit. Eq. Dig. titles, Ship, Jurisdiction and Practice, Injunction, xx., Eden's Inj. 297, 298. See the practice in the Court of Admiralty, *Case of the Apollo*, 1 Haggard's Rep. 306.

(l) *Goodhart v. Lowe*, 2 Jac. & W. 349.

(m) *Case of the Apollo*, 1 Hagg. 306.

(n) Id. *ibid.*; Abbott, Part I. c. 3, s. 4; Holt on Ships, 202, 2 ed.

(o) *Case Apollo*, 1 Hagg. Rep. 310, 313.

(p) *Haly v. Goodwin*, 2 Met. 77. From

the report of the case of the *Apollo*, 1 Hagg. 307, it appears that an injunction may be obtained in five days. It should seem from the observations in the case *Apollo*, 1 Hagg. 317, 318, that if one part owner should injure the other by pre-judicial reports relative to the state of a ship, the remedy would not be in the Court of Admiralty.

(q) *Christie v. Craig*, 2 Meriv. 137.

(r) See *Apollo*, 1 Hagg. R. 306 to 320.

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proceedings were usually against vessels employed upon very *long* or *dangerous* voyages; and as the vessel in that particular case was employed only in a continuation of *short* voyages to Hamburgh, it would be useless to apply to the court for security on one such voyage, which security would be vacated as soon as that voyage should be completed; and it might be necessary to apply for other security on each succeeding voyage, and that it appeared to him that the court could not compel security in anticipation of *future* voyages being taken; and even then, the risk being small and expenses of such application great, no good would be obtained." Whereupon a bill in Chancery was filed, stating all the facts, and charging that the defendant had received all profits, and was insolvent, &c., and praying *inter alia* an account, and paying off complainant's just share, and a sale of his moiety in case a master should certify that it was for the infant's benefit; and that the defendant might be restrained from selling or incumbering the vessel, or at least complainant's moiety; "and that he, his servants and agents, might in like manner be restrained from removing or causing to be removed or taken away from the jurisdiction of the court the said ship or vessel until the further order of the court; and that the defendant might be decreed to deliver up the bill of sale of plaintiff's moiety, and that proper accounts might be taken, and all proper inquiries made, and all proper directions given for effectuating the purposes aforesaid, plaintiff submitting to account and do that which to the court should seem just, and for further relief." (s)

12. Injunctions against infringement of *Copyrights* and *Patents*, and rights of that nature. (t)

12. The prevention by injunction of *Piracies*, or imitations of a *Copyright* in books or music, busts and sculptures, engravings and prints, patterns for printing linens, cottons, and muslins, and of *Patents* of various descriptions, is one of the most common branches of jurisdiction of a Court of Equity. The various statutes for the protection of those several inventions usually give a penalty and an action at law for certain actually completed and *specified injuries* to those rights. (u) And although the acts are silent as to the interference of Courts of Equity, yet those courts will interfere *summarily* in protection of the legal right, for otherwise an injury might be committed with

(s) *Steinhauser, (an infant, &c.) v. Louder*, bill filed August, 1832.

(t) See in general 1 Mad. Ch. Pr. 137, 149; Chit. Eq. Dig. tit. Copyright, 248, and tit. Practice, Injunction, xv., 1054; and *Hill v. Thompson*, 3 Meriv. 622; Eden, 260, 261.

(u) See statutes, Chit. Col. Stat. 181

to 198, and notes. Besides the specified injuries and remedies in the statutes, it should seem that provided the statute right can be established, then the common law would also provide a remedy for any other injury, though not specified in the acts, see *Beckford v. Hood*, 7 Term Rep. 628.

impunity, or the party might have to seek redress against a mere pauper. And a Court of Equity will even restrain a *theatrical representation* of a tragedy or play, the copyright of which is vested in the complainant, although the statutes only provide for a *particular injury*, viz. the *publishing* or *selling* a similar book. (v) Where there has been a length of exclusive enjoyment under a patent, the court will grant an injunction in the first instance without previously putting the party to establish his right by an action at law; but otherwise where the patent is recent, or the piracy or imitation has been doubtful. (x) In the latter case the court will direct an issue or action; and after the patent right and piracy have been established, an injunction may be obtained, and an account taken of the extent of the defendant's piratical sales and profits. (y)

A Court of Equity will also interfere to protect a *Copyright* in a book from piracy on the behalf of a party who appears to have a good *equitable* title, even though it should not appear that his *legal* title is complete. (z) But this Court will not protect a foreigner's copyright. (a)

Where the party has suffered considerable time to elapse, after he had knowledge of the infringement of the right, before he applies to the court, he will not obtain an injunction until after a trial at law; (b) nor will the court grant an injunction before trial, pending the construction of the effect of an agreement not under seal, (c) though it should seem it would be otherwise in case of a covenant. (d)

Sometimes, although an injunction may be refused in the first instance, yet the court will direct the defendant to keep and be prepared to render an account of his sales between the time of the application and the final hearing and decree, so that the party complaining may have evidence of the measure of damage to be recovered. (e)

(v) *Morris v. Kelly*, 1 Jac. & Walk. 481; and *Johanning v. Hawkes*, 20 Feb. A. D. 1830; Tomkins's Temple Solicitor, MS. contra to *Coleman v. Walker*, 5 Term R. 245.

(x) *Hill v. Thompson*, 3 Meriv. 622; *Harmer v. Plune*, 14 Ves. 130; *Tonson v. Walker*, 3 Swanst. 672.

(y) Vice-Chancellor's Court, Thursday, Feb. 21, 1833. *Jones v. Pearce*. Mr. Knight obtained an injunction in this case on the part of the plaintiff. The bill had been filed to restrain the defendant from imitating certain iron wheels, for which invention the plaintiff had obtained a patent, and which he alleged had been infringed by the defendant. The Vice-Chancellor, on a former application, feeling doubtful as to whether the wheels ma-

nufactured by the defendant were an infringement of the plaintiff's patent, directed an issue at common law. An action had accordingly been brought, and a verdict obtained by the plaintiff. The court granted the injunction upon the present motion, and also directed an account to be taken of the wheels which had been manufactured by the defendant.

(z) *Mawman v. Tegg*, 2 Russ. 385.

(a) *Delondre v. Shaw*, 2 Sim. 237; *Platt v. Button*, Coop. 303; 19 Vesey, 447, S. C.

(b) *Platt v. Button*, 19 Ves. 447; *Southey v. Sherwood*, 2 Meriv. 435.

(c) *Walcot v. Walker*, 7 Ves. 1.

(d) *Barfield v. Nicholson*, 2 Sim. & Stu. 1.

(e) *Wilkins v. Aikin*, 17 Ves. 422; 1 Mad. Ch. Pr. 150.

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Besides the reasons in favour of injunctions in general, (f) there is one particularly favourable to the application in the case of copyright. Adequate relief could not be given by any action for damages, for it is impossible to lay before a jury the whole evidence as to all the publications which go out to the world to the plaintiff's prejudice; and the sale of copies by the defendant is in such instance not only taking away the profit upon the individual book which the plaintiff probably would have sold, but may injure him to an incalculable extent, which no inquiry into the extent of damages can ascertain. (g)

With respect to *Letters*, we have seen (h) that no injunction to restrain their publication can be obtained on the ground that they are *libellous*, or that their publication would be painful to the feelings of the writer. (h) But when an injunction to restrain the publication of letters is granted, it is founded only on a right of property in the writer. (h) Where letters written by the plaintiff to the defendant having been returned by him, with a declaration that the latter did not consider himself entitled to retain them, the publication of copies taken before the return, without the knowledge of the plaintiff, was restrained by injunction, though represented by the defendant as necessary for the vindication of his character. (h) And it has been held that in general the sending of a letter bearing the character of a literary composition, does not give the person to whom it is transmitted the right to publish it for his own benefit, unless it be clearly essential to vindicate his character from false imputations cast upon him by the writer; (i) and an injunction on the application of an executor was granted to restrain the publication of letters written by his testator; (k) and against an executor to restrain him from publishing letters to his testator; (l) and it has been laid down as a general rule that a receiver of letters has at most but a joint property with the writer, and possession does not give him license to publish them; (m) and it further appears that an injunction will be granted to restrain the printing of an unpublished manuscript, a copy of which had been, by the representation of the author, given to a person under whom the defendant claimed, but not with the intention that he should publish it. (n)

(f) *Ante*, 696, 697; *Hogg v. Kirby*, 8 Ves. 225; *Wilkins v. Aikin*, 17 Ves. 424; Eden, 264; 1 Mad. Ch. Pr. 150.

(g) *Ante*, 696, 697; *Hogg v. Kirby*, 8 Ves. 225; *Wilkins v. Aikin*, 17 Ves. 424; Eden, 264; 1 Mad. Ch. Pr. 150.

(h) *Ante*, 697; and see in general 1 Mad. Ch. Pr. 151, 153, and *Gee v. Pritchard*, 2 Swanst. 403; Eden, 276 to 279.

(i) *Lord Percival v. Phipps*, 2 Ves. & B. 19; *Pope v. Curl*, 2 Atk. 342.

(k) *Granard v. Dunkin*, 1 Ball & B. 207.

(l) *Thompson v. Stanhope*, Ambler, 757.

(m) *Pope v. Curl*, 2 Atk. 342.

(n) *Duke of Queensberry v. Shebbeare*, 2 Eden, 329.

Where an author, having sold the copyright of a work, published under his own name, and covenanted with the purchaser not to publish any other work to prejudice the sale of it, it should seem that another publisher, who had no notice of this covenant, would be restrained from publishing a work, subsequently purchased from the same author and published under his name on the same subject, and though there is no piracy of the first work.(o)

In order to obtain an injunction against the violation of a patent, the party must swear to his belief at the time of applying that he is the original inventor.(p) Where there has been a length of exclusive enjoyment under a patent, the Court of Chancery will grant an injunction in the first instance without previously putting the party to establish his right by an action at law; but where the patent is recent and the injunction is opposed, by endeavouring to show that there is no good specification or is otherwise defective, the court will require the patentee to establish the validity of his patent in a court of law before it will grant him an injunction,(p) sometimes will direct an issue, and at other times leave him to his action; sometimes also directing an account of sales and profits in the meantime.

It has been laid down that an injunction will not lie to restrain one trader from making use of the same mark with another.(q) But in a late case an injunction was granted by the Vice-Chancellor to restrain the defendant from sending to Constantinople certain watches with the word "*Pesendede*," in Turkish characters, (meaning "*warranted*,") in imitation of the watches of the plaintiff, by which they had for very many years been distinguished, and by which he had obtained great credit in the Turkish trade.(r) And there are other cases where although the plaintiff may not have obtained a patent, yet he may obtain an injunction against a breach of confidence or trust in disclosing the secret of his invention.(s)

To restrain
other imita-
tions.

III. The proceedings in equity to *prevent* injuries to *Real Property* are principally,—1. *Boundary Bills*. 2. Injunctions to

III. Bills of
injunction, &c.
relating to *Real Property*.

(o) *Burfield v. Nicholson*, 2 Sim. & Stu. 1.

(p) *Thompson v. Hill*, 3 Meriv. 624.

(q) *Blanchard v. Hill*, 2 Atk. 484; 1 Mad. Ch. Pr. 163.

(r) *Gout v. Aleplogla and others*, Vice-Chancellor's Court, Easter Term, 1833.

(s) *Yovat v. Wingard*, 1 Jac. & Walk. 394; and see Cbit. Eq. Dig. 1053.

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prevent Wasteful Trespasses or Disturbances of Franchises. 3. Injunctions to compel the Exercise of Lawful Works in the least injurious manner. 4. Injunctions to Quiet Possession after recovery at law; and 5. Injunctions to prevent Waste.

1. Bills to pre-
serve Bounda-
ries. (t)

1. We have before adverted to the importance of securing evidence of *Boundaries* between different estates, and especially between freehold and copyhold property. (t) An agreement between two owners to take measures to ascertain the correct boundary is binding without any other consideration than the mutual agreement. A Court of Equity will in general, upon a bill filed, issue a commission for the purpose of fixing the boundary, and thereby *preventing* future disputes and litigation, and to fix the value, if the ancient boundary cannot be ascertained, especially where lands have been intermixed by unity of possession. (u) So to distinguish copyhold from freehold lands within the manor, (x) and a tenant is bound to preserve the boundaries of his landlord distinct, and if by his default they become confused, he must substitute land of equal value, to be ascertained by commissioners. (y) Boundaries also are frequently ascertained in an action or issue at law under an inclosure act or by the direction of the court. (z)

2. To prevent
Wasteful Tres-
passes or dis-
turbances of a
franchise,
&c. (u)

2. With respect to *Real* property, injunctions may be obtained to prevent *wasteful trespasses*; to *quiet possession*; to prevent *waste*, or *private or public nuisances*. (a)

If a person either forcibly or wrongfully gets into or retains possession of land or other tenements, and is digging mines or committing *Wasteful Trespasses or irreparable Damages*, although the owner may be entitled to retake possession if he can do so without committing a breach of the peace, (b) or may be entitled to relief by summary proceedings before a magistrate, under the statutes against forcible entries and retainers, or may sue all the parties in an action of trespass; yet cases may occur where the wrong-doer has too many assistants to resist a retaking by peaceable means, or where magistrates will refuse to act, and

(t) See in general, *ante*, 195, 196, 237, 455; and see Chit. Eq. Dig. tit. Boundary Bill; 3 Bla. C. 426, b. in note 1; *Willis v. Parkinson*, 2 Meriv. 507; 1 Madd. Ch. Pr. 29, 30; 1 Fonbl. Treat. Eq. 22; 1 Thomas's Co. Lit. 701, note, 55.

(u) *Willis v. Parkinson*, 2 Meriv. 507; 1 Swanst. 9, S. C.

(x) *Duke of Leeds v. Earl of Strafford*,

4 Ves. 180.

(y) *Attorney General v. Fallerton*, 2 Ves. & B. 263.

(z) *Cranmer v. Pennington*, 5 Taunt. 167; *Hetherington v. Fane*, 4 Bar. & Ald. 428.

(a) See in general 1 Mad. Ch. Pr. 147; Chit. Eq. Dig. Practice, xlv., 22, page 1058; 1 Eden, Inj. 192 to 196.

(b) *Ante*, 646.

where the wrong-doers being paupers the ultimate remedy by ejectment and action for damages, will be either insufficient or ineffectual, and the estate in the meantime may be ruined. In any such case the proper course is to file a bill in Chancery, stating all the circumstances, and immediately afterwards to file affidavits of the facts, and thereupon by counsel move the Chancellor or Vice-Chancellor *ex parte* for an injunction, which will, upon sufficient ground, be granted, thereby restraining the wrong-doer, his agents, servants and workmen, and every person claiming or pretending to claim through or under the wrong-doer from interfering or intermeddling with the premises, mines, &c. and from entering upon the same; and if after such injunction and before it has been dissolved any party should violate the same, process of contempt will immediately issue to take all parties so offending into custody. (b) In a late case *A. B.* in February, 1830, entered into an agreement to sell certain mines and premises to *C. D.*, the purchase money to be paid by instalments, and *C. D.* was let into possession, and paid one instalment and became bankrupt, but his assignees did not interfere with the estate, and thereupon *A. B.* unadvisedly distrained and sold coals towards payment of the purchase money, but afterwards the residue remaining unpaid *A. B.* took possession and let to *E. F.*, who worked the same for some time, and thereupon *C. D.* re-entered and took up tram-roads and destroyed an engine, and afterwards took forcible possession and worked the mines until 9th August, 1832; and *A. B.* in vain attempted to retake possession, and the magistrates, on account of the distress and cross claim of right, refused to interfere, as well under the statutes against forcible entries and detainers as under 7 & 8 Geo. 4, c. 30, and thereupon *A. B.* filed his bill in chancery on 13th August, 1832, in the name of himself and said *E. F.* his tenant against said *C. D.* and another, and made affidavits sworn on 20th August, and filed on 22d. The Chancellor doubted whether it was a fit case for relief, as it would encourage application to that court in all cases where the proper remedy was an action of trespass. (c) But as he was going out of town, suggested that the

(b) Formerly the exercise of this jurisdiction was denied, but now it is common in case of continuing trespass irreparable or very injurious, *Eden*, 192 to 196. But it is said that where the defendant being a mere stranger might be turned out of possession immediately, an injunction does not lie, *Mortimer v. Cottrell*, 2 Cox, 205;

1 Mad. Ch. Pr. 148; see further *Redesd. Tr. Pl.* 110; 3d ed. 1 Mad. Ch. Pr. 253, n. (s), and (t); *Smith v. Collyer*, 8 Ves. 90, and 9 Ves. 291.

(c) *Ex parte Clegg*, 23 Aug. 1832. The bill fully stated the fact as above abstracted, and concluded with the following prayer:—

“[That the said *C. D.* and *J. H.* their and each of their agents, servants and workmen, and every person claiming or pretending to claim by, from, through or under the said *C. D.* may be restrained by the order or injunction of this Honourable Court from

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plaintiff might apply to the Vice-Chancellor, and who, on motion on 23d August, A.D. 1832, ordered an injunction to issue in the terms prayed. (d) And a proceeding of this nature will not prejudice a subsequent proceeding by ejectment and by action of trespass for prior or subsequent damages. (e)

This practice of the Court of Chancery to grant injunctions against trespasses likely to be continued, and to occasion considerable damages, seems to be well established; (f) and as the ground of gardens, parks, paddocks, courts and yards, are excepted in the power given under the highway act to widen, enlarge or divert roads, an injunction may be obtained to prevent justices from taking any part of a garden, &c. for either of those purposes; (g) but it will not be granted for a mere temporary or trifling trespass. (h) If a lord of a manor inclose, and the commoner break down fences, an injunction will be granted to prevent further pulling down fences till an issue upon the sufficiency of common has been tried; (i) and where sequestrators were forcibly dispossessed the court restored possession by injunction. (k)

Injunction to prevent disturbance of a Franchise or exclusive Privilege.

So where a party can by bill and affidavit establish a strong *prima facie* exclusive right to a *Franchise or Privilege*, as an ancient ferry, or exclusive landing-place for goods, and such

interfering or intermeddling with the said colliery and premises, mines, beds, veins and seams of coal or any other mineral, or part thereof, and from entering upon and working the said colliery, mines, beds, veins and seams of coal or other mineral, or any part thereof, and from doing any spoil, damage or injury thereto, or to any part thereof or to the said premises, and from selling or disposing of any coals or other minerals already got, or which may be at any time got from the said colliery, or the mines, beds, veins and seams of coals, or other minerals, or any part thereof, and from doing any act, matter and thing to impede or interrupt plaintiffs, their agents, servants or workmen in working the said colliery and premises.] * And that an account may be taken by and under the decree and direction of this Honourable Court of the several quantities of coal or other minerals, which have been sold and removed from off the said colliery and premises since the said C. D. last took possession thereof as aforesaid, and of the several sums of money received by him, or by any person or persons by his order, or for his use on account thereof, and that he may be decreed to account for and pay to plaintiff J. C. such sums as shall be found to have been received by him on account thereof; and that he may be decreed to deliver up the peaceable and quiet possession of the said colliery and premises to plaintiff J. C. or as he shall direct; and that plaintiffs may have such further and such other relief in the premises as the nature and circumstances of the case may require, and as shall be agreeable to equity and good conscience, may it please your lordship, &c.

(d) *Casamajor v. Stode*, 1 S. & S. 381; and see *Newmarch v. Brandling*, 3 Swanst. 99, as to restraining a purchaser, who has not paid purchase money; *Crockford v. Alexander*, 15 Ves. J. 138; *Earl Cowper v. Baker*, 17 Ves. 128; *Grey v. Duke of Northumberland*, Id. 281; to prevent commissioners of highways entering gardens, &c. 1 Ves. 188.

(e) *Ante*, 731, note (c); *Attorney Gene-*

ral v. Nichol, 3 Meriv. 687.

(f) *Field v. Beaumont*, 1 Swanst. 208.

(g) 1 S. Geo. 3, c. 78, s. 16; *Bell's Supplement*, Ves. Sen. 105, and see what is a garden, &c.; *Gilbert v. Tannam*, 4 Dowl. & R. 222.

(h) *Coulson v. White*, 3 Atk. 21.

(i) *Arthington v. Faehes*, 2 Vern. 356.

(k) *Lord Pelham v. Duke of Newcastle*, 3 Swanst. 289.

* The injunction only extended to the parts within the brackets.

right is threatened to be forcibly interfered with by others, an *ex parte* injunction may be obtained. (l)

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3. So although parties may have a perfect legal right to perform some act upon or in relation to the real property of an individual, yet if they are about to execute their powers in a manner that would probably be more injurious than is necessary, and if the individual can suggest a preferable course of proceeding, a Court of Equity will by injunction enforce the latter. (m) Thus where a rail-way company, in exercise of the powers conferred upon them by an act of parliament, which gave compensation to persons whose property might sustain damage from their operations, were proceeding to erect an arch over a mill race, for the purpose of sustaining an embankment on which the rail-way was to be constructed, and it appeared that injury would thereby be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions, the Court of Chancery granted an injunction to restrain the company from making the arch of the proposed dimensions,

3. Injunctions to compel the performance of lawful works in the least injurious manner.

(l) In the Vice-Chancellor's Court, March, A.D. 1833, *Anderson v. Sullivan & others*, Mr. Knight made an *ex parte* application to the court, on behalf of the plaintiffs, for an injunction to restrain the defendants from interfering with the exclusive privileges of the plaintiffs, or from interrupting or molesting them in the enjoyment of their exclusive right to land passengers and goods at the landing-place called Prince's Stairs, situate upon the Prince Estate, in Rotherhithe, other than goods of the inhabitants residing on the estate, and also from plying for fares there. The circumstances of the case were these:—In the year 1812, Mr. Stott, to whom this property formerly belonged, let the use of the stairs upon a lease of 14 years, at 15 guineas per annum, to Pullman and other watermen licensed by the Trinity-house, who were tenants residing upon the estate, without any hinderance, except that all the inhabitants who reside upon the estate should have the privilege of landing goods without the payment of any wharfage. The leasees formed an association among themselves, allowing old members to retire, and any vacancies that might from time to time occur to be filled up. On the expiration of the lease, a renewal was given at an increased rent of 18 guineas a-year. The title to the freehold, after the death of Mr. Stott, was litigated, and the plaintiffs, who are ready and anxious to pay the rents to some one, filed the present bill for an injunction, for the protection of themselves. Several attempts having been made by various watermen

on the Thames some time since to infringe upon the privilege of the plaintiffs, from the month of March, 1832, until the 11th of February last, the gates leading to the stairs were closed by the order of the plaintiffs. On the 11th ult. they were reopened, and a notice posted at the stairs declaring them to be private property, and threatening all persons who interfered with the privileges of the tenants with a prosecution according to law. Notwithstanding this notice, ever since the opening of the gates vast crowds of unprivileged watermen had collected on the spot, and several of them had fastened their boats to the landing-place, declaring that unless they were permitted to land passengers they would prevent the plaintiffs from doing so, and also threatened to bring a multitude of other wherry-men to ply at the stairs, unless the plaintiffs would quietly submit to abandon their rights.

The application was made upon several affidavits, one of which was an echo of the bill, and the others particularising in detail the various acts of aggression before alluded to.

The Vice-Chancellor thought a fit case had been made out for the immediate interference of the court, and directed an injunction to issue upon the production of two other affidavits, which had been alluded to by the counsel, before the rising of the court.

(m) *Coats v. Clarence Railway Company*, 1 Turner & Myl. 181.

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4. To Quiet
possession, and
Bills of Peace,
&c. (n)

although the adopting the arch of larger dimensions would occasion more expense to the company. (m)

4. After recovery of a verdict at law or decree in equity, if the successful party still apprehend disturbance, he may, upon bill filed, obtain an injunction *to quiet him in possession*; (a) and a perpetual injunction has been granted after five trials at law on the same point and verdicts the same way; (p) and where many parties are interested, and at law it would be necessary to have numerous actions, a *bill of peace* may be filed so as to have all the rights settled in one issue. (q) But the general rule is, that a party must establish his right at law before he can bring a bill of peace; (r) and after a decree of land, the only proper mode for obtaining immediate possession is to obtain an injunction to deliver possession, which is of course on motion, and if not obeyed, a writ issues to the sheriff to deliver possession. (s) But bills of peace are now less in use than formerly, and they were confined to quieting the possession of corporeal hereditaments, and did not extend to the profits of an office. (t)

5. To prevent
Waste. (u)

5. Bills and injunctions *to prevent Waste* are the most frequent and salutary proceedings in a Court of Equity. (u) In equitable as well as in legal waste, if a *threat* to commit waste, or one even small act of waste be established, the court will immediately, even in vacation, restrain equitable as well as legal waste generally; (x) and even upon threat, without an act done, or where a party insist on his right. (y) And although there would be a remedy at law, yet where the waste

(m) *Coats v. Clarence Railway Company*, 1 Turner & Myl. 181.

(n) See in general, Chit. Eq. Dig. xlv. 19, 1057; Plead. 781; Eden's Inj. 363 to 366.

(o) Id. *ibid.* And in *Wickham v. South*, in Chancery, 23 April, 1833, Sir E. Sugden moved for an injunction to restrain the defendants from dredging for oysters, or destroying or injuring the oyster beds at Milton. The plaintiff was the owner of the beds, and the bill was in the nature of a bill to be quieted in the possession of the property in question, to which the plaintiff's right had been established by the trial of an action at law. The defendants were fishermen, and were very numerous. The Lord Chancellor granted the injunction, giving the defendants, at the same time, leave to move to dissolve the injunction before the Vice-Chancellor if they should be advised to attempt such a course. On 9th May following, the

parties were brought into court upon process of contempt, and on their promise not to offend again were discharged by the Chancellor's order.

(p) *Countess of Gainborough v. Gifford*, 2 P. W. 425; *Earl of Bath v. Sherwin*, 10 Mod. 1.

(q) 1 Mad. Ch. Pr. 166; 3 Bla. C. 427, in notes; and *post*, Chit. Eq. Dig. Pleading, xii. 781.

(r) *Dr. Lister Holt's Case*, 2 Vea. sen. 193.

(s) *Huguenin v. Baxley*, 15 Vea. 180; *Sir W. Lewis v. Morgan*, 5 Price, 468.

(t) Eden's Inj. 332 to 334.

(u) See a useful note 3 Thomas's Co. Lit. 241, M. See in general, 1 Mad. Ch. Pr. 138; Chit. Eq. Dig. Waste and Practice, 1058.

(x) *Coffin v. Coffin*, 6 Mad. 17; *Berry v. Barry*, 1 Jac. & W. 653; 1 Mad. Ch. Pr. 138.

(y) *Gibson v. Smith*, 2 Atk. 182.

would be very injurious to the estate an injunction may be obtained, as to prevent digging contrary to a lessee's covenant. (z) So ploughing pasture lands long unploughed may be restrained, (a) and the cutting ornamental timber (b) even on behalf of a mere tenant. (c) So of underwood, if it be of insufficient growth; (d) removing valuable stone on sea-shore; (e) digging coals in a mine by a trespasser; (f) or against a tenant or under tenant from year to year, after notice to quit, from committing damage or removing crops, manure, &c., contrary to custom of country. (g) But we have seen that a Court of Equity will not interfere to prevent *permissive waste*, contrary to a covenant to repair, (h) or contrary to a covenant not to lop trees or carry off dung; (i) or not to plough pastures (*not ancient meadows*) if stipulated damages, (as 5*l.* per acre,) are to be paid for the breach. (j) The form of the writ of injunction is given in the note. (k) Without any bill having been filed and merely upon *petition* supported by *affidavit*, and even when the Chancellor is not sitting, he will, in urgent cases, to prevent waste, immediately issue his injunction. (l)

6. An injunction may be obtained against stopping *Ancient Windows* until trial of the right; (n) but the court will not on mo-

6. To prevent Nuisances, private or public.
1. Private. (m)

(z) *The City of London v. Pugh and others*, 4 Bro. P. C. 395; *Lord Grey v. Saxon*, 6 Ves. 106; *Drury v. Molins*, Id. 328; *ante*, 700.

(a) *Goring v. Goring*, 3 Swanst. 661.

(b) *Marquis of Downshire v. Sandys*, 6 Ves. 107, 110; *Lord Tamworth v. Lord Ferrers*, Id. 419; *Williams v. M'Namara*, 8 Ves. 70; *Day v. Merritt*, 16 Ves. 375.

(c) *Jackson v. Cator*, 5 Ves. 688.

(d) *Bridges v. Stephens*, 6 Madd. 279.

(e) *Earl Cowper v. Baker*, 17 Ves. 128.

(f) *Grey v. Duke of Northumberland*,

17 Ves. 281; *ante*, 723.

(g) *Onslow v. —*, 16 Ves. 173; *Farrant v. Lovel*, 3 Atk. 723.

(h) *Ante*, 714, n. (k), and (l).

(i) *Rayner v. Stone*, 2 Eden, 128; *Johnson v. Goldswaine*, 3 Anstr. 749; *sed vide Webb v. Clark*, 1 Fonbl. Eq. 142; *Newl. Contr.* 513.

(j) *Rolfe v. Paterson*, 2 Bro. C. C. 426; but a mere clause of forfeiture would be otherwise, *Barrett v. Blagrove*, 5 Ves. 555.

(k) William the Fourth, &c. To A. B. and his workmen, labourers, servants, and agents, and each and every of them, greeting: Whereas it hath been represented unto us in our Court of Chancery, in a certain cause there depending, wherein C. D. is complainant and you the said A. B. are defendant, on the part of the said complainant, that, &c. (*as in the order.*) We therefore in consideration of the premises aforesaid do strictly enjoin and command you the said A. B. and your workmen, labourers, servants and agents, and all and every one of you, under the penalty of one thousand pounds, to be levied upon your and each and every of your lands, goods and chattels, to our use, that you and every of you do from henceforth altogether absolutely desist from felling or cutting down any timber or other trees standing, growing or being in or upon the premises in question, or from committing or doing any other or further waste or spoil in or upon the said premises, or any part thereof, until our said court shall make other order to the contrary. Witness, &c.

Writ of injunction to stay cutting of trees or other waste.*

(l) 1 New Ch. Pr. 234; *ante*, 700, 1 Mad. Ch. Pr. 155 to 157.

n. (z). (n) At law, a person may in a peaceable and proper manner abate or remove

(m) See Eden's Injunction, 231 to 238;

* Eden's Injunctions, 375, where see several other forms; and see fully 3 Thomas's Co. Lit. 243, 244, and notes.

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tion make an adverse order to *pull down* what has been done ; (o) therefore when an injunction is apprehended, it is the practice to work even all night to complete the building before the injunction can be obtained, and before the actual obtaining or service of which the parties would not be in contempt. The court will grant an injunction before answer for a plain apparent nuisance, on a certificate, affidavit and notice to the party, his clerk in court, or solicitor ; but in case of a special nuisance, the court expects the party to show his right, and how he is particularly aggrieved, before the writ can be granted. (p) And an injunction was granted *ex parte* to restrain the owner of a house from making any erections or improvements, so as materially to darken or obstruct the ancient lights or windows of an adjoining house. (q) But if the nature of the alleged injury do not require preventive interposition before a trial at law, and the legal right be doubtful, (r) or if the damage would not be very material or adequately compensated by the payment of damages, (s) or the obstruction will only partially affect the light, (t) or the party complaining has delayed applying for relief a considerable time, as three years, (u) an injunction will not be granted before a trial at law. In a late case, an injunction to restrain the obstruction of ancient lights was refused, the nature of the alleged injury not requiring preventive interposition before a trial, and the legal right being doubtful ; and the Master of the Rolls observed, that the injury of postponing a building which the party might be entitled to erect, may not in every instance be equal to the injury of permitting him to proceed with one which is a nuisance ; cases arise in which a Court of Equity, seeing that the injury might be irreparable, as where loss of health, loss of trade, destruction of the means of existence, might ensue from erecting a building, would exercise its jurisdiction of preventing injury, without waiting the slow process of establishing the legal right, when delay would be itself a wrong ; on the other hand, it may be perfectly clear

a private nuisance, (ante, 647,) or he may bring repeated actions for every continuance. But there is not at law any writ *de nocumento amovendi* to remove a private nuisance, as upon a judgment against a public nuisance. In cases therefore where a party could not himself, or with the assistance of others, abate a private nuisance, his only direct course of proceeding to get rid of it seems to be in a Court of Equity.

(o) *Ryder v. Bentham*, 2 Ves. 533. See a negative injunction not to permit to remain ; ante, 714, n. (i).

(p) *Hind's Ch. Pr.* 591.

(q) *Back v. Stacy*, 2 Russ. 121.

(r) *Wynstanley v. Lee*, 2 Swanst. 333 ; *Fishmongers' Co. v. East I. Co.*, 1 Dickens, 165.

(s) *Attorney-General v. Nichol*, 16 Ves. 333.

(t) *Morris v. Lesses Berhaly*, 2 Ves. 453 ; *Fishmongers' Co. v. E. I. Company*, Dick. 164.

(u) *Weller v. Smeaton*, 1 Cox's Ch. C. 102.

that the plaintiff is entitled to succeed in an action of trespass, and yet a Court of Equity will not interpose by injunction, the nature or degree of injury not being such as to require that extraordinary relief. (v) But the court, on dissolving the injunction, will impose terms on the defendant to remove the building, in case the verdict should establish that it is a nuisance. (v) Courts with reluctance grant injunctions to stay the working of collieries or mines, or restrain a man in the exercise of his trade, and will not usually grant it before answer. (w) A brewhouse is not considered to be necessarily a nuisance. (x)

Where a private nuisance has been erected, a temporary acquiescence will not prevent the interference of the court, (y) and after a verdict at law finding the nuisance, and not before, a Court of Equity, will cause it to be removed. (z) Where an ordinary current of water running to a mill has been illegally stopped, a Court of Equity will immediately afford relief, though in some cases such a complaint has been referred to the commissioners of sewers. (a)

2. The Court of King's Bench will not, except in certain peculiar cases, interfere by *prohibition*, mandamus, or otherwise, to restrain a public nuisance, but will refer the parties complaining to the ordinary remedy by indictment, though they certainly have jurisdiction; (c) and after conviction of a public continuing nuisance, the judgment is usually to pay a fine, and to prostrate or remove the nuisance, and a writ issues from the crown office to the sheriff to abate the same. (d) But the latter is not always essential or proper; thus where the building itself is unobjectionable, though some noxious trade has been carried on therein, there need be no judgment that the nuisance shall be abated; (e) and where only a part of an erection is complained of, judgment should be given to remove only that part which has been found injurious. (f) And in the case of steam engines, there is an express enactment to this

2. Public
Nuisances. (b)

(v) *Per Master of the Rolls in Wynstanley v. Lee*, 2 Swaust. R. 335, 336.

(w) *Anonymous*, Ambl. 209; *Jackson v. Barnard*, Ridgw. 259.

(x) *Gorton v. Smart*, 1 S. & S. 66, 68.

(y) 2 Eq. Ab. 522.

(z) *Weller v. Smeaton*, 1 Cox, 102; *In re Sir Lister Holt*, 2 Ves. S. 193; *Swan v. Rogers*, Carey, 26.

(a) *Swan v. Rogers*, Carey, 26; but see 1 Bro. Ch. C. 588.

(b) See in general Chit. Eq. Dig. tit.

Nuisance.

(c) *Rex v. Justices of Dorset*, 15 East, 594; *Rex v. Commissioners of Dean*, 2 Maule & S. 80; *Rex v. Corporation of Plymouth*, A. D. 1832, K. B.

(d) Bro. Ab. Nuisance, 49; *Rex v. Stead*, 8 T. R. 142; 1 Chit. Crim. L. 716; 3 Id. 575, 607, b.

(e) *Puppineau's Case*, 2 Stra. 686; 2 Sess. Ca. 34; *Rex v. Justices of Yorkshire*, 7 T. R. 467; Com. Dig. Indictment, N.

(f) *Rex v. Stead*, 8 T. R. 142.

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effect. (g) But on a prosecution in K. B. there can be no prostration until after judgment; there is, however, a summary remedy before what is termed an annoyance jury; and we have seen what acts may be justified in removing a dangerous building. (h) But a court of equity will frequently interfere, as when a defendant had taken several old houses which were empty as temporary warehouses for stowing sugar, in which he was depositing such quantities of sugar that two of the houses had actually fallen, and others were in the most imminent danger, Lord Rosslyn granted an injunction upon petition and affidavit; (i) and it should seem that the court would interfere to restrain the carrying on a noxious trade destructive to the health and comfort of the neighbourhood. (k) But where the effect of an injunction would be to stop a great trading concern, the jurisdiction is exercised with caution, and not *ex parte*, but after notice, with the opportunity of opposing by affidavit. (l) In general, manufactories, such as soap and black ash manufactories, sugar houses, brewhouses, or brick-kilns, have not been considered such nuisances in proper neighbourhoods as will be stopped in the first instance by injunction, but should be first tried; though the obstruction of highways or harbours may be stayed by injunction before trial; (m) and an injunction to restrain the building an inoculating hospital was refused, that not being considered as a nuisance. (n) But a nuisance by an offensive and unwholesome process in any trade will, after a trial and verdict that it is a nuisance, be ordered by a Court of Equity to be removed. (o)

Where there is a corning house to powder mills, from site, construction, &c., imminently dangerous to the neighbours and public, and likely to cause irreparable injury to property, though as a public nuisance it may be an object of prosecution by the attorney general, yet an injunction was granted, with directions for the speedy trial of an indictment, and preventing immediate danger in the mean time. (p)

And where there is an obstruction to a public river as the Thames, an injunction may be obtained, and continued until after trial of an indictment respecting its erection; (q) though

(g) 1 & 2 Geo. 4, c. 41, s. 2, 3;
3 Burn's J. Nuisance, 912, 913.

(h) *Ante*, 654, 655, n. (e).

(i) *Mayor of London v. Bolt*, 5 Ves. J. 129.

(k) *Eden on Injunctions*, 226.

(l) *Crowder v. Tinkler*, 19 Ves. 618.

(m) *Attorney-General v. Cleaver*, 18

Ves. 211, 220; see in general *Eden*, 226 to 231; and *Gorton v. Smith*, 1 S. & S 66 to 68.

(n) *Baines v. Baker*, Amb. 158.

(o) *Attorney-General v. Cleaver*, 18 Ves. 211.

(p) *Crowder v. Tinkler*, 19 Ves. 617.

(q) 2 Wils. 87.

in case of works by the commissioners of sewers, the court has refused to interfere on motion, stating it would be more proper to apply to the Court of King's Bench. (r) It is said to be usual, in case of public nuisance, to proceed by information at the suit of the attorney general, but that private individuals may apply to the court. (s) Where a Court of Equity has granted an injunction against the erection of a nuisance, the court will not on motion give leave to re-erect before the hearing of the cause; but will at most put the question of right in a speedy course of trial. (t)

Having thus enumerated the principal instances of *Preventive* remedies by *Injunction*, to protect the person or personal or real property in particular, there remain to be considered some preventive remedies in courts of justice, connected with suits, and of great practical importance. These are, principally; 1. Bills and writs of *ne exeat*, to prevent persons from leaving the kingdom to avoid payment of an equitable debt; 2. Bills to perpetuate testimony; 3. Bills to restrain or qualify actions in courts of law and other courts; and 4. Bills of interpleader. The first and second of these may be here properly considered as preventive remedies before any other suit. But bills to restrain actions at law or in other courts, bills of interpleader and motions of that nature, being respectively proceedings to be instituted after the commencement of action or suit, will be more properly arranged and considered in the chapter which treats of the proceedings to be taken by a *Defendant*, immediately after an action or suit has been commenced.

Other Preventive Remedies connected with suits, but antecedent to the same.

When there is a *legal* debt of £20 or upwards, and the creditor apprehends that his debtor will not be forthcoming at the end of the suit, he may, upon making an affidavit, cause him to be arrested and to remain in prison until he give security, with two bail, for the payment of the debt, or his rendering himself to prison upon the judgment when obtained, and in some cases of torts, although no certain debt can be sworn to, a judge will, upon special affidavit, showing that the wrongdoer is about to quit the kingdom, make an order to hold to bail for a sum fixed in the order. (x) But there are many

Bills and writs of *Ne Exeat* to prevent equitable debtors from quitting the kingdom. (u)

(r) Eden, 230.

(s) Id. ibid. 230, 231.

(t) *In re Sir Lister Holt*, 2 Ves. S. 193.

(u) See the history of the writ of *ne*

exeat in part discussed in *Fleck v. Holme*, 1 Jac. & W. 413 to 415.

(x) Tidd's Prac. 172, 9 ed.

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equitable and *ecclesiastical* claims, in respect of which either no proceedings can be had at law, or at least no arrest. (r) The Court of Chancery or the Master of the Rolls (y) therefore, will in these cases issue a writ of *ne exeat regno*, which requires the party to find sureties in the nature of equitable bail, that he will not quit the kingdom, (s) or go into Scotland or Ireland; (o) and this is extended also to common law debts, when they constitute matters of *account*. (b) This writ was originally issued to prevent attempts against the safety of the state, and to hinder persons from going abroad and communicating important intelligence to an enemy; but the Court of Chancery has gone on from more to more until at length it has assumed and established its present extensive jurisdiction under this act. (c)

A *Wife* may obtain a *ne exeat regno* for an arrear of alimony and costs, in aid of a decree or sentence of an ecclesiastical or spiritual court, (d) and perhaps before decree, pending proceedings, (e) but not pending an appeal from the decree. (f) But the *ne exeat* cannot be obtained upon affidavit of the wife, as her evidence against her husband is only admissible in cases of breach of peace. (g)

If a *Child* were grown up and about to leave the kingdom, even to Scotland, the chancellor may, by *ne exeat regno*, prevent him, and if gone, might, by great or privy seal, call on him to return, and if not obeyed, take his property. (h) So against husband and wife, *executrix* or *administratrix*, (i) but not by *feme* alone; (j) so it lies for a legatee against an executor, (k) and a surety may obtain this writ against his principal, although he is merely liable, and has not yet paid any thing in respect of his liability. (l)

The demand for which a *ne exeat* may be issued must in general be *equitable*, and not legal, excepting in the case of an account. (m) It must be completely due, and must be such a debt that the sum to be marked on the writ may be ascertain-

(s) *Swift v. Swift*, 1 Ball & Beatty, 327.
(y) *Boehm v. Wood*, 1 Turn. & R. 343.
(s) *Haffey v. Haffey*, 14 Ves. J. 261;
Shaftoe v. Shaftoe, 7 Ves. 171, 173; see
in general 2 Madd. Ch. Pr. 226; Chit.
Eq. Dig. Husband and Wife, 522; and
Id. Practice, Writ, iv. 1157.
(a) 2 Mad. Ch. Pr. 230.
(b) Per Lord Chancellor in *Flack v.*
Holme, 1 Jac. & W. 413, and post.
(c) *Ante*, 731, note (c).
(d) *Shaftoe v. Shaftoe*, 7 Ves. 171, 173;
Cases Chit. Eq. Dig. 522.

(e) *Coglar v. Coglar*, 1 Ves. J. 94.
(f) *Boehm v. Wood*, 1 Turn. & R. 322.
(g) *Sedgwick v. Watkins*, and *quere*, 1
Ves. J. 49; 3 Bro C. C. 11; *De Manne-*
ville v. De Manneville, 10 Ves. 56, S.C.
(h) *De Manneville v. De Manneville*, 10
Ves. 63; Chit. Eq. Dig. 528.
(i) *Moore v. Hudson*, 6 Mad. 218.
(j) *Pannell v. Tayler*, 1 T. & R. 96.
(k) Chit. Eq. Dig. 1159.
(l) *Sealey v. Laird*, 3 Swanst. 368.
(m) *Swift v. Swift*, 1 Ball & B. 327.

ed. (n) But where the party was a factor or agent to account, and he usually reside abroad, this writ may issue; though he might have been held to bail at law for the balance of the account, (o) but not against a captain just before sailing, and after long delay. (p) It may be obtained by an Englishman against a foreigner who happens to be in this country, to enforce the adjustment of an account upon a foreign transaction, although, according to the law of that country, the foreigner could not there have been held to bail. (q)

The *affidavit* of a threat or intention to go abroad must be positive, not upon information and belief; (r) but the court acts on evidence of intention to go, without regard to denial; (s) and no notice of motion for the writ need be given, for that might defeat its object; (t) but a *bill* must be first filed. (u) The form of the writ of *ne exeat regno* is given in the notes. (x)

2. Bills to *Perpetuate Testimony* are also in the nature of a preventive remedy to prevent loss of evidence in case of any *vested* interest, but which cannot be *immediately* litigated, because it is in remainder or reversion pending an estate for life, or years, or where the evidence will be important to resist a claim which may afterwards be litigated; (y) but it has been

2. Bills to perpetuate testimony. (y)

(n) *Boehm v. Wood*, 1 T. & R. 343; *Whitehouse v. Partridge*, 3 Swanst. 377.

and see *De la Vega v. Vianna*, 1 Bar. & Adolph. 284, S. C. at law.

(o) *Flack v. Hulme*, 1 Jac. & W. 405; *Stewart v. Graham*, 19 Ves. 313; *Howden v. Rogers*, 1 Ves. & B. 129; *Jones v. Sampson*, 8 Ves. 593.

(r) *Amsinck v. Barklay*, 8 Ves. 597; *Jones v. Alephson*, 16 Ves. 470.

(s) *Whitehouse v. Partridge*, 3 Swanst. 375.

(p) *Dick v. Swinton*, 1 Ves. & B. 371.

(t) *Collinson v. —*, 18 Ves. 335.

(q) *Flack v. Holme*, 1 Jac. & W. 405;

(u) *Beames*, 26; 6 Ves. 92.

(x) William the Fourth, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, &c. To our Sheriff of Middlesex, greeting. Whereas it is represented to us, in our Chancery, on the part of A. B. complainant against C. D. defendant, (amongst other things) that he the said defendant is greatly indebted to the said complainant, and designs quickly to go into parts beyond the sea, (as by oath made in that behalf appears) which tends to the great prejudice and damage of the said complainant. Therefore, in order to prevent this injustice, we do hereby command you, that you do, without delay, cause the said C. D. personally to come before you, and give sufficient bail or security in the sum of £ —, that the said C. D. will not go, or attempt to go, into parts beyond the seas, without leave of our said court. And in case the said C. D. shall refuse to give such bail or security, then you are to commit him the said C. D. to our next prison, there to be kept in safe custody untill he shall do it of his own accord. And when you shall have taken such security, you are forthwith to make and return a certificate thereof to us in our said Court of Chancery, distinctly and plainly, under your seal, together with this writ. Witness ourself at Westminster, the — day of —, in the — year of our reign.

Writ of *ne exeat regno*.*

(y) See in general Chit. Eq. Dig. Perpetuating Testimony, 590, 772, 782; 1 Mad. Ch. Pr. 185 to 196; 2 Mad. Ch.

P. 250, 546, 547; and see 1 W. 4, c. 32; and *Angell v. Angell*, 1 Sim. & Stu. 83, 88, 89.

* *Beames on ne exeat regno*, 19.

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doubted whether Chancery has jurisdiction to entertain a bill to perpetuate testimony in case of a claim to a *Dignity*. (z) A bill of this description is proper whenever a person has a vested claim or defence, which by the death of a then living witness he might hereafter be unable to establish. (a) But the bill must always show that the party filing it *cannot immediately* bring his action, or compel his opponent to bring his action to try the right, or it will be demurrable. (b)

The witness expected to die must be old and infirm, and usually of the age of *seventy* years, (c) but there is an instance of a surviving witness to a will only *sixty* years old, but afflicted with the gravel and living in Virginia, having been examined under such a bill; (c) and it has been proceeded upon in other cases where there has been only one witness living. (d) But the defendant's costs of such a bill must be paid by the applicant. (e) It should seem, on principle, that when a claimant has no immediate power to commence a suit, or where a party would properly be defendant in any proceeding, and has no power to compel the creditor or claimant to sue immediately, he should be allowed immediately to examine witnesses conditionally, even when much younger than 70 years old. But this proceeding it is said, is not in general favored, and is considered as open to great objection. (f) The recent act, enabling the courts to examine witnesses on interrogatories, only applies when an action is actually *depending*, (g) nor can a commission to examine a witness be obtained in a Court of Equity until a suit in which he is to be examined has been actually commenced. (h)

We will postpone the consideration of bills to restrain proceedings at law and in other courts, and bills of interpleader, to the chapter in which will be stated the conduct to be adopted by a *Defendant* improperly sued.

IX. Preventions
of loss in other
particular cases.

IX. Besides these *preventive* measures, which it will be observed are of a *general* nature, there are some peculiar preventive measures of a limited or local nature, to which we shall

(z) *The Earl of Belfast v. Chichester*, 2 Jac. & W. 439. 88, 89.

(a) 1 Madd. Ch. Pr. 185 to 196.

(b) *Angell v. Angell*, 1 Sim. & Stu. 83. 89.

(c) *Fitzhugh v. Lee*, Ambl. 65.

(d) *Angell v. Angell*, 1 Sim. & Stu. 83. 88, 89.

(e) 1 Mad. Ch. Pr. 195.

(f) *Angell v. Angell*, 1 Sim. & Stu. 83.

(g) 1 Wm. 4, c. 22.

(h) *Angell v. Angell*, 1 Sim. & Stu. 83.

merely advert, viz. *Protests for Better Security* and proceedings against a person who it is suspected is about to become a *Fugitive Debtor*.

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1. By the custom of the merchants, if the *drawee* of a foreign bill of exchange abscond before it is due, the holder may *protest it*, in order to obtain *better security* for the payment, and which is usually thereupon given by the drawer and indorsers. (i) But it may be collected, that although the drawer and indorsers should neglect or refuse to give any further security, the holder must, nevertheless, wait till the bill be due before he can sue either of those parties, though the refusal will be considered as an imputation on the mercantile conduct of the refusing party. (k)

1. Of Protests
for better security

2. By the custom of London, if a creditor will swear, and cause others to swear that his debtor is about to *abscond*, or technically termed become *Fugitive*, he may, although the credit has not expired, arrest him, and compel him to find security. This proceeding is somewhat in the nature of a writ of *ne exeat regno*, which we have already considered. (l)

2. Of proceedings in London
against a
fugitive debtor.

(i) *Anon.* Lord Raym. 743; Mar. 27, 111, 114; Beawes, tit. Bills of Exchange, pl. 22, 24, 26, 27, 29. The following is an extract from the code of laws at Antwerp, relating to bills of exchange. "In the case of failure (*de faillite*) of the acceptor before the usance (*l'escheance*) the holder may cause it to be protested, and put in force his recourse."

(k) Beawes, pl. 26; Chitty on Bills, 8 ed. 374.

(l) As to this custom in general, see Emmerson's Pract. Mayor's Court, 62; *Horton v. Beckman*, 6 Term R. 760; *Smith v. Dr. Bouchier*, 2 Stra. 993; *Anonymous*, Lord Raym. 743; Ashley's Prac. Mayor's Court, and Bohun's Priv. Londini, and Norton's do.

CHAPTER IX.

OF THE STATUTES OF LIMITATIONS, AND OF THE CONSEQUENCES OF LACHES AND LAPSE OF TIME INDEPENDENTLY OF THOSE STATUTES.

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| <ol style="list-style-type: none"> 1. Of the Statutes of Limitations. <ol style="list-style-type: none"> 1. The General Outline of same. 2. Alphabetical List of. 3. Their Object, Utility and Principle. 2. The peculiar Operation and Practical Application of each. <ol style="list-style-type: none"> 1. At Law. <ol style="list-style-type: none"> 1. As respects Real Property and Actions. <ol style="list-style-type: none"> 1. When a holding over not adverse. 2. Construction of Disabilities excepted. 3. Common Law Prescriptions in favour of Right after 20 Years. 2. As respects Personal Actions. <ol style="list-style-type: none"> 1. The Enactments. 2. The Exceptions. 3. When acknowledgment takes Case out of Statute. | <ol style="list-style-type: none"> 4. Presumption of Payment after 20 Years. 5. Penal Actions. 6. Actions against Justices, &c. &c. <ol style="list-style-type: none"> 3. Construction of Time in general. 2. In Courts of Equity. <ol style="list-style-type: none"> 1. Construction of Statutes. 2. Principles there in analogy to Decisions at Law. 3. Pendency of a Bill, its operation. 4. Of pleading Statute in Equity. 3. In Bankruptcy. 4. In Cases of Executors and Administrators. 5. In Ecclesiastical and Spiritual Courts. 6. Respecting Tithes. 7. In Admiralty Courts. 8. In Criminal Cases. 9. Consequences of Laches or Delay, independently of the Statutes of Limitations. |
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WE are now to suppose that it is in vain to attempt to prevent the commission of the *injury*, and that it has actually been *completed*, whether a *breach of contract* or a *tort* unconnected with contract, and that the party injured is anxious to compel either *specific relief* or performance, by the delivery, or conveyance, or recovery of a chattel or real property, or other exact performance of the contract, or of recovering *damages* for the breach of contract or tort. But here a *preliminary inquiry* is essential, viz. whether all or some and what remedy may not have become barred by a *Statute of Limitations*, or by the established practice of all or a particular court. In some cases parties are allowed even *sixty years* and in others *not so many days*, and the enactments and rules upon this important subject should in regular order be considered in this chapter. As observed in Sugden's Vendor and Purchaser, sometimes these acts bar the *Right*, in others only the *Remedy*; (a) and in either case, as by lapse of time on one hand, the party originally entitled *loses* his right or remedy; so on the other hand, his opponent, by the same lapse of time, in effect *acquires a right or title* to an estate; though it is properly ob-

(a) Sugden, Vend. & P. 8th edit. 349; 764, note q; 766, note p.

served, that a *title* by mere lapse of time, being subject to many exceptions, is not a right upon which any purchaser should too readily rely. (b)

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LIMITATIONS.

2. *Vigilantibus non dormientibus leges subservient* is a well-known maxim, reduced to certainty and practical utility either by the *statutes* passed for limiting the times within which legal proceedings must be commenced or by the practice of the court. The Statutes of Limitation principally relate to *Common Law* proceedings, (c) but some apply to Courts of *Equity*, (d) others to the Ecclesiastical and Spiritual Courts, (e) others to Courts of Admiralty, (f) and still more acts to proceedings for *Penalties* and small offences, and even some to *Criminal proceedings*, though in general there is no limitation of *Indictments*, a rule which will hereafter be fully considered. (g) A very numerous class of limitations also is that protecting *Justices of the peace* (h) and *Inferior Peace Officers and others*, acting in the supposed execution of the authority given by numerous modern acts, and who may have exceeded their powers.

General object and outline of the provisions in the Statute of Limitations.

Some of these Statutes of Limitations relating to *Real Actions* still allow even *sixty* years, (i) and others only *twenty*; (k) and as to personal actions, some *six* years, others *four*, others *two*; (l) and suits for tithes have recently been limited to *six years* (m). Suits in the Spiritual Courts for words must be commenced within *six calendar months*; (n) and suits in the same courts for fornication or incontinence, or striking or brawling in a church or church-yard, *eight calendar months*. (o) Actions on *penal* statutes, by an informer, *one year*, and by the king *two years*, from the expiration of such year. (p) And actions against justices and peace officers *six calendar months*; (q) against custom-house and excise officers three *lunar months*; (r) and various

(b) Sug. V. & P. 8th ed. 348 to 358.

(c) 32 Hen. 8, c. 2; 1 Mary, s. 2, c. 5; 31 Eliz. c. 5; 21 Jac. 1, c. 16; 4 & 5 Ann. c. 16; 24 Geo. 2, c. 44, s. 8; 9 Geo. 3, c. 16; 7 & 8 Geo. 4, c. 53, s. 115; 9 Geo. 4, c. 14; 2 & 3 Wm. 4, c. 71 & 100.

(d) 53 Geo. 3, c. 127, s. 5.

(e) 27 Geo. 3, c. 44; 53 Geo. 3, c. 127, s. 5.

(f) 4 & 5 Ann. c. 16, s. 17.

(g) *Dover v. Maester*, 5 Esp. R. 92; 1 Chit. Crim. L. 160. Motions for a criminal information must, by the practice of the Court of King's Bench, be made within a limited time, Tidd, 9th edit. 498, and *post*; after which time a prosecutor can only proceed by indictment.

(h) 24 Geo. 2, c. 44, &c. See the list of the principal acts, *post*, 738 to 740.

(i) 32 Hen. 8, c. 2.

(k) 21 Jac. 1, c. 16, as to *corporeal* hereditaments; and 2 & 3 Wm. 4, c. 71 & 100, as to *incorporeal*.

(l) 21 Jac. 1, c. 16; 9 Geo. 4, c. 14.

(m) 53 Geo. 3, c. 127, s. 5.

(n) 27 Geo. 3, c. 44, s. 1.

(o) *Id.* sect. 2.

(p) 31 Eliz. c. 5, *post*, 770.

(q) 24 Geo. 2, c. 44, s. 8.

(r) 28 Geo. 3, c. 37, s. 23; notwithstanding 7 & 8 Geo. 4, c. 53, s. 115, says *calendar*, see Tidd, 9th edit. 20, *sed quere*.

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other statutes contain other limitations, even to a few days, as appears by the following alphabetical table. And motions to set aside an *Award* in respect of any extrinsic objection must, in general, be made before the last day of the next term after it was made; (s) and in general a rule nisi for a *Criminal Information* against a magistrate, for misconduct in the execution of his office, ought to be moved for within the first term after the supposed offence. (t) Nor will a *Mandamus* in general be issued where there have been many years delay. (u) So in equity, *Bills for Specific Performance* must be instituted promptly and without slumbering on the right. (w) These few instances will suffice to evince the expediency for parties injured being *on the alert*, and for the absolute necessity of considering the time for taking proceedings in any court before actually embarking in litigation.

The principal Statutes of Limitations may, with reference to the actions and proceedings which they affect, be alphabetically arranged as follows:—

| | | | |
|---|---|-------------------------|---|
| Alphabetical list of statutes of limitations. | Account, action of | 6 years | 21 Jac. 1, c. 16, s. 3. |
| | Admiralty, suits for seamen's wages | 6 years | 4 Ann. c. 16, s. 17. |
| | Annuity, action of, no limitation | | { 10 Ves. 453; M'Clel. 495; Tidd, 9th ed. 15. |
| | Army, navy, and marine officers, &c. actions against | 6 lunar months | 6 Geo. 4, c. 108, s. 97. |
| | Assault, battery, and false imprisonment | 4 years | 21 Jac. 1, c. 16, s. 3. |
| | Assignees, &c. in bankruptcy .. | 3 calendar months | { 6 Geo. 4, c. 16, s. 44; construction, 2 M. and P. 429; 8 B. & C. 697; 5 Bing. 276. |
| | Assumpsit, action of | 6 years | { 21 Jac. 1, c. 16, s. 3; 1 B. & Adolp. 15. |
| | Award, motion to set aside, when | In next term after made | { 9 & 10 Wm. 3, c. 15, s. 2. |
| | Bankrupt act, action against commissioners, &c. | 3 calendar months | { 6 Geo. 4, c. 16, s. 44; 2 M. & P. 429; 8 B. & Cres. 697; 5 Bing. 276. |
| | Bond or specialty, no statute of limitation, but presumption of payment after 20 years, when .. | 20 years | { 2 Moore & P. 429; 8 Bar. & C. 697; 1 T. R. 270; Tidd. 18. |
| | Building act | 3 calendar months | 14 Geo. 3, c. 78, s. 100. |
| | Case (except for words actionable in themselves) | 6 years | 21 Jac. 1, c. 16, s. 3. |
| | Commissioners of West India and London Dock Companies, &c. against | 6 calendar months | { 39 Geo. 3, c. lxi. s. 184; 5 Taunt. 534; 39 & 40 Geo. 3, c. xlvii, s. 151; 1 R. & M. 161; 1 C. & P. 547; 2 C. & P. 264. |
| | Commissioners, Brighton act, &c. | 6 calendar months | { 6 Geo. 4, c. 179, s. 255; 6 Bing. 489. |

(s) 8 & 9 Wm. 3, c. 15; see cases, post, *In re Burt*, 5 Bar. & Cres. 668; 8 D. & R. 421, S. C.

(t) Tidd, 9th edit. 498, and post.

(u) *Rex v. The Commissioners of Cochemouth Inclosure Act*, 1 Bar. & Adolp. 578.

(w) 1 Mad. Ch. Pr. 415, and post.

| | | |
|---|-------------------|--|
| Company, Commercial Dock, &c. | 6 calendar months | 50 Geo. 3, c. ccvii. s. 94; 10 B. & C. 277; 1 B. & Adol. 277. |
| Constables, &c. see "Justices," | 6 calendar months | 24 Geo. 2, c. 44, s. 8. |
| Covenant, see "Bond." | | |
| Criminal conversation | 6 years | 21 Jac. 1, c. 16, s. 3. |
| Criminal information against magistrates, usually | In next term | Tidd, 498. |
| Customs and excise officers, &c. actions against | 3 lunar months | 28 Geo. 3, c. 37, s. 23, notwithstanding 7 & 8 Geo. 4, c. 53, s. 115, says calendar; Tidd, 20. |
| Dehauching daughters, &c. | 6 years | 21 Jac. 1, c. 16, s. 3. |
| Debt (if not on specialty) | 6 years | 21 Jac. 1, c. 16, s. 3. |
| Debt on specialty, see "Bond." | | |
| Debt, <i>qui tam</i> , see "Penal statutes." | | |
| Deed, see "Bond." | | |
| Detinue | 6 years | 21 Jac. 1, c. 16, s. 3. |
| Dock acts, see "Commissioners," &c. "Companies," &c. | 6 calendar months | West India, 39 Geo. 3, c. 69, s. 184; 5 Tannt. 534. |
| Ditto, London Docks | 6 calendar months | 39 & 40 G. 3, c. xlvii. s. 151; 4 Man. & Ry. 130; 1 Ry. & M. 161; 1 Car. & P. 541. |
| Ecclesiastical courts— | | |
| Suits for verbal defamations .. | 6 calendar months | 27 Geo. 3, c. 44. |
| For incontinence, brawling or striking in church, &c. | 8 calendar months | Id. <i>ibid</i> . |
| Ejectment | 20 years | 21 Jac. 1, c. 16, s. 1. |
| Entry, writ of | 30 years, &c. | 32 Hen. 8, c. 2, s. 1, 2; 3 Bla. Com. 188. |
| Error, writ of | 20 years | 10 & 11 Wm. 3, c. 14; T. 1141. |
| Excise officers, actions against .. | 3 lunar months | 28 Geo. 3, c. 37, s. 23, notwithstanding 7 & 8 Geo. 4, c. 53, s. 115, says calendar; T. 20. |
| False imprisonment, see "Assault," | 4 years | 21 Jac. 1, c. 16, s. 3. |
| Fornication | 8 calendar months | 27 Geo. 3, c. 44. |
| Formedon | 20 years | 21 Jac. 1, c. 16, s. 1. |
| Game, proceedings for penalties | 3 calendar months | 2 & 3 Wm. 4, c. 32, s. 41. |
| —, actions against officers, &c. | 6 calendar months | Id. <i>ibid</i> . s. 47. |
| Highway act | 3 calendar months | 13 Geo. 3, c. 78, s. 81; 1 B. & Adolp. 391. |
| Hundred | 3 calendar months | 7 & 8 Geo. 4, c. 31, s. 3; 4 Man. & Ry. 130; ante, 577. |
| Notice within | 7 days | Ante, 578. |
| Imprisonment, see "Assault," | 4 years | 21 Jac. 1, c. 16, s. 3. |
| Justices, constables, &c. actions against | 6 calendar months | 24 Geo. 2, c. 44, s. 8; Tidd, 19; Chit. Col. Stat. 650. |
| Larceny act, actions for illegal apprehensions, &c. | 6 calendar months | 7 & 8 Geo. 4, c. 29, s. 75. |
| Legacies, presumptive payment | 20 years | 2 Mad. Ch. Pr. 5. |
| Libels | 6 years | 21 Jac. 1, c. 16, s. 3. |
| London police act | 6 calendar months | 10 Geo. 4, c. 44, s. 41. |
| Malignant injuries, actions for illegal apprehensions, &c. .. | 6 calendar months | 7 & 8 Geo. 4, c. 30, s. 24, 41; 5 Bing. 336. |
| Metropolis act | 3 calendar months | 57 Geo. 3, c. 29, s. 126; 5 Bing. 429. |
| Navy, see "Army," | 6 lunar months | 6 Geo. 4, c. 108, s. 97. |
| Penal statutes by common informer | 1 year | 31 Eliz. c. 5; Tidd, 14; 3 Wils. 250; 2 Bla. R. 792. |
| Penal statutes, by king | 2 years | 31 Eliz. c. 5; Tidd, 14; post, 770. |
| Prescription | 20 years, &c. | 2 & 3 Wm. 4, c. 71; post, 745, notes. |

| | | | |
|--------------------------|--|--------------------------|--|
| CHAP. IX. | Qui Tam, see "Penal statutes." | | |
| STATUTES OF LIMITATIONS: | Quit rent | { No presumption against | { Cowp. 214; ante, 228. |
| | Rent charge, no statute of limitation, see "Bond," | { | { T. 15; 10 Ves. 455; M'Clel. 495; post. |
| | Replevin | 6 years | 21 Jac. 1, c. 16, s. 3. |
| | Right, writ of | 60 years | 32 Hen. 8, c. 2. |
| | Scire facias, no statute of limitation | { | { Tidd, 16, 18, 1105, 1106; 3 Bla. R. 995. |
| | Seamen's wages | 6 years | 4 Ann. c. 16, s. 17; Tidd, 16. |
| | Servant, debauching, see "Debauching daughter." | | |
| | Slander, verbal (unless special damage, Sid. 95)..... | 2 years | 21 Jac. 1, c. 16, s. 3. |
| | Slander, written, see "Libel,".. | 6 years | Id. ibid. |
| | Slander, verbal, Ecclesiastical court..... | 6 calendar months | 27 Geo. 3, c. 44. |
| | Specialties, see "Bond." | | |
| | Spiritual Courts, see "Ecclesiastical Courts," | 6 or 8 cal. months | Id. ibid. |
| | Taxes, actions against officers.. | 6 calendar months | 43 Geo. 3, c. 99, s. 70. |
| | Tithe, not setting out, or suits for | 6 years | { 53 Geo. 3, c. 127, s. 5; Cro. Car. 513. |
| | Trespass (except assault, battery, wounding, or false imprisonment)..... | 6 years | 21 Jac. 1, c. 16, s. 3. |
| | Trover | 6 years | Id. ibid.; 5 B. & Cres. 149. |
| | Tunpike act | 3 calendar months | { 13 Geo. 3, c. 84, s. 85, &c.; Tidd, 21. |
| | Vagrant act | 3 calendar months | 5 Geo. 3, c. 83, s. 18. |
| | Words, see "Slander," | 2 years | 21 Jac. 1, c. 16, s. 3. |
| | Wounding, see "Assault,".... | 4 years | Id. ibid. |
| | Wages, seamen, Admiralty.... | 6 years | 4 Ann. c. 16, s. 3. |

All acts of this nature have been emphatically termed *statutes of repose*, and being all *in pari materia* and passed with the same object, they ought all to be liberally and beneficially expounded in furtherance of that object. (x)

As the statutes of limitations relate to *Real Property*, they in most cases absolutely preclude all investigation and all remedy in *every* case where there has been an *adverse* possession for more than sixty years, and in some cases though not for more than thirty years; (y) and in many cases even where the possession of a house or land, or other corporeal property, has been *adverse for twenty years*, pending an ownership in fee simple and adverse to such owner. (x) But as has been cautiously observed, there are many exceptions that will prevent even sixty years' undisturbed possession from constituting a complete bar,

(x) *Murray v. The East India Co.* 5 Bar. & Ald. 214; *Tolson v. Kaye*, 6 Moore, 558; *White v. Parnter*, Knapp's Rep. 226, &c.
(y) 32 Hen. 8, c. 2. But a possession during a long term of years, or during a tenancy for life, would not be adverse as to a remainder-man, &c. see Com. Dig. Temps.; post, 747, note (a); *Doe v. Pike*, 3 Bar. & Adolp. 738; *Doe v. Phillips*, Id. 753.
(z) 21 Jac. 1, c. 16, s. 1, 2.

such long continued possession, without showing that it has been consistent also with the right, is by no means a title to be confided in. (a) However, as the policy of these statutes is favoured, they have, as we have seen, been recently extended to *incorporeal interests*, such as rights of *common* and ways and watercourses, and other easements, to which the former acts did not extend, (b) and by that act twenty years' adverse possession of or exclusion from a right of *common* or *way* or *watercourse*, or *other easement*, pending an ownership in fee simple in possession, is conclusive for or against the right, though not so if pending a tenancy for life or years, and without the acquiescence of the owner in fee. So, on the other hand, the frequent interruption of a right of this nature during the last twenty years, frequently at common law, and independently of any statute, constitutes a bar to any action for the recovery of the supposed right. (c)

Actions for *debts* or *breaches of contract*, not founded on instruments of *record* or *under seal*, are barred, unless they be commenced within *six years* after the cause of action accrued, and in some cases of personal wrongs, as assaults and batteries, the action must be commenced within *four years*, and actions for words within *two years*, (d) and no *verbal* acknowledgment of a debt, excepting it has been so substantial an admission as a *part payment*, is sufficient to prevent the operation of the statutes. (e)

Several *reasons* have concurred in introducing these enactments. Thus with regard to *real property*, after upwards of *sixty years*' adverse possession, or even a shorter time, upon every principle of justice and with the exception of *fraud*, a person should be quieted and rendered secure in his possession, for although he or his ancestor might, if sued within a reasonable time after he first obtained possession, been able to produce documents and adduce evidence in proof of a legal right, such evidence, by accident or lapse of time, may have become wholly lost, and it would be unjust to require him, in favour of so latent and torpid a claimant, to prove his title; besides, by death and descent or devise, or by alienation, a new succession of persons

The object, principle, and utility of these acts in general.

(a) Sugd. V. & P. 8 ed. 348 to 357.

(b) 2 & 3 Wm. 4, c. 71; ante, 284 to 286; and see the whole act, post, 745, 746, in notes.

(c) As to the consequences of non user in general, see *Moore v. Hanson*, 3 Bar. & Cres. 332; and as to the destructive con-

sequences of interruptions within twenty years, not successfully litigated, see *Benest v. Pison*, Knapp's Rep. 60; ante, 284.

(d) 21 Jac. 1, c. 16, s. 3.

(e) 9 Geo. 4, c. 14; and why, see *White v. Parnther*, Knapp's Rep. 226, 227.

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may have become the occupiers, and under such circumstances it would be most unjust, at a great distance of time, to dispossess the owner or occupier, whose children have probably been educated in the faith of having shares of the property, and the loss of which might plunge them into utter ruin. (f) Whereas a claimant, after such a lapse of time, and after sleeping so long on his strict legal rights, would sustain no just disappointment by being deprived of the means of pursuing so stale a demand. (f)

So with respect to claims of a *personal* nature, as for supposed *debts* or *damages*, the lapse of six years from the time when the party injured might have sued, induces a presumption that the claim has really been satisfied, and that the receipt or other evidence has been accidentally destroyed, lost or mislaid; (g) or if not, that the claimant has considered the claim as too weak to prosecute or not worth proceeding for; and therefore there is no injustice in these cases in enacting that such long delays shall operate as a fixed and perpetual bar.

And in regard to *assaults* and *batteries* and *verbal slander*, as the proof of these injuries generally depends on doubtful and conflicting parol evidence, and as a party who will slumber upon the insult for years cannot be considered a favoured object of the courts, it is highly expedient that shorter time, as four and two years, should be allowed for actions to compensate them than for injuries to *property*.

Reasons for the
exceptions
thereto.

But to provide protection for *infants* and *married women*, and persons *imprisoned* or *beyond sea*, who may not be able to prosecute their rights within the prescribed times, (excepting as regards *real actions*, (h)) further time is allowed to them to proceed after their disability has been removed. (i) And in order to prevent its being *compulsory* on a creditor to sue his debtor in cases where he may be disposed to indulge, it is provided that by *adequate acknowledgments* made by the debtor, the demand may be allowed to continue outstanding beyond the prescribed period, from the time when the cause of action first accrued; but that to prevent perjury, this acknowledgment should be made either substantially by a part payment, or in writing, signed by the party himself to be affected by it; (k) and

(f) See observations in *White v. Parnther*, Knapp's Rep. 227.

(g) It was on that presumption that the 21 Jac. 1, c. 16, was passed, per Lord Ellenborough, *Leaper v. Tatton*, 16 East, 420.

(h) See Sugd. Vend. & P. 8 ed. 349, and Bro. Reading, 60, where the mistake

in Bacon's Abridgment is pointed out, and it is shown that the exception in 32 Hen. 8, c. 3, only extends to then existing disabilities.

(i) 32 Hen. 8, c. 2, s. 9; 21 Jac. 1, c. 16, s. 7.

(k) 9 Geo. 4, c. 14; see decisions, post, 767.

there is a similar provision where the wrong-doer is out of the kingdom at the time the cause of action accrued. (l)

With respect to *Justices of the Peace*, and other *public officers and individuals* acting under particular powers for the benefit of the public, without any private benefit to themselves, inasmuch as they have many arduous and sometimes perilous duties to perform, and the construction of the statutes under which they have to act are frequently exceedingly nice and difficult, it has been considered necessary to protect them more particularly, and to prevent actions for trespasses arising from an error in judgment being long kept hanging over their heads, and until they may have lost the evidence in support of their defence; and therefore actions against Justices of the peace, constables, headboroughs, and other officers, or persons acting by their order and in their aid, for any act mistakenly done under colour of their office, or of the particular power, are to be brought generally within *six calendar months* after the act committed. (m) So actions against officers and others, acting under the laws for the protection of the *Customs and Excise*, must be brought within *three lunar months*; (n) and actions against persons for acts done under the larceny act, (o) and malicious injury act, (p) must also be brought within *six calendar months*. And an action for any thing done under the vagrant act is limited to *three calendar months*. (q)

Clauses of this nature will be found in almost every act, whether general or local, that has been enacted since the year 1760, and it is to be regretted that they are not uniform in their enactments, they being sometimes *three lunar months*, sometimes *three calendar months*, in others *six lunar*, and in others *six calendar months*; sometimes *ten days*, or twenty-one days, &c., which variations with the requisites of demand of inspection of the warrant, notice of action, local venue, and other restrictions, too frequently constitute difficulties and grounds of defeat or nonsuit (we might say *traps*,) in cases where, in real justice, a party injured under colour of authority is entitled to very considerable damages, but which, by the shortness of time allowed for suing, are lost by its turning out too late to retrace the formal steps which may have been incorrectly taken

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Reasons for limiting actions against justices, &c.

The variations of these provisions, and necessity for a general uniform act.

(l) 4 & 5 Ann. c. 16, s. 19.

(m) 24 Geo. 2, c. 44, s. 8; *post*.

(n) *Lunar months*, 28 Geo. 3, c. 37, s. 23, notwithstanding 7 & 8 Geo. 4, c. 53, s. 115, says *calendar*; see Tidd, 9 ed. 20.

(o) 7 & 8 Geo. 4, c. 29, s. 75.

(p) 7 & 8 Geo. 4, c. 30, s. 24, 41; 5 Bing. 336.

(q) 5 Geo. 4, c. 83, s. 18.

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Practical con-
siderations of
each act in par-
ticular.

I. At Law.

1. As to Real
property.

21 Jac. 1, c. 16.

in pursuit of justice. One general uniform act relative to these injuries, and regulating the proceedings, seems essential to complete justice.

Having given an outline of those enactments, and adverted to the principles upon which they with their exceptions and qualifications are founded, it will now be necessary to take a more *practical view* of the enactments and the decisions thereon, and upon their operation in the different courts.

The principal statute having practical (*r*) application to *Real property Corporeal*, as houses, buildings, and land, is 21 Jac. 1, c. 16, entitled, "An Act for Limitations of Actions, and for avoiding of Suits in Law." The first section enacts, for quieting of men's estate, and avoiding of suits, That all *writs of Formedon* in descender, formedon in remainder, and formedon in reverter, shall be sued and taken *within twenty years next after the title and cause of action first descended or fallen*. And that no person shall *make any entry* into any lands, tenements, or hereditaments, but within twenty years next after *his right or title first descended or accrued to the same*, (*s*) and in default thereof such person so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary notwithstanding. (*t*)

Section 2 then provides, nevertheless, That if any person entitled to such writ, or that shall have such right or title of entry, be, at the time of the said right or title *first descended or accrued*, come or fallen within the age of *twenty-one years, feme covert, non compos mentis, imprisoned or beyond the seas*, that then such person and his heir shall, notwithstanding the said twenty years be expired, bring his action or make his entry as he might have done before this act; so as such person or his heir shall within *ten years* next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years.

The 4 & 5 Ann. chap. 16, s. 16, also enacts, that no *claim* or

(*r*) It would be beyond the scope of this summary to comment on the statute of limitations, 32 H. 8, c. 2, limiting *Real* actions, some to sixty and some to thirty years. They are ably considered as constituting a bar to the Right or Remedy in Sugden's Ven. & P. 8 ed. 348 to 357, and Adams' Law of Eject. 3d ed. 4.

(*s*) See the materiality of the words *first descended*, Sug. Ven. & P. 319, and

Chitty's Col. Stat. 698, note (*g*).

(*t*) The subsequent statute, 4 & 5 Ann. c. 16, s. 16, provides, that if the *entry* be made within the *twenty years*, then it shall suffice to commence an action of ejectment within a year after such entry, thereby in effect giving nearly *twenty-one years* in some cases for proceeding by action of ejectment; and see Adams' Ejectment, 3 ed. 102.

entry to be made of or upon any lands, tenements, or hereditaments, shall be of any force or effect to avoid any *fine* levied or to be levied with proclamations, according to the statute, of any lands, tenements, or hereditaments, or shall be a sufficient entry or claim within the statute made on the 21 Jac. 1, c. 16, unless upon such entry or claim an *action* shall be commenced within one year next after the making of such entry or claim, and prosecuted with effect."

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4 & 5 Ann.
c. 16, s. 16.

The 2 & 3 Wm. 4, c. 71, for shortening the time of prescriptions in certain cases, deserves the fullest attention, and has been before in part abstracted and commented upon. (u) It relates to *real property incorporeal*, such as actions relating to right of common, rights of way and watercourses, ancient windows and lights, and other profits, and easements on or connected with land, and in general establishes rights relating thereto which have been exercised adversely for twenty years, with certain exceptions and qualifications. There is also another act of the same session, of the same nature, for shortening the time required in claims of *modus decimandi*, or exemption from or discharge of *Tithes*. (x) The statute 2 & 3 Wm. 4, c. 71, is so important in its provisions, that it is stated in the subscribed note. (y)

2 & 3 Wm. 4,
c. 71.

(u) *Ante*, 285, 286, and see further, *infra*, note (y).

(x) 2 & 3 Wm. 4, c. 100, and see *Lord Kensington v. Pugh*, 1 Young's Rep. 125.

(y) The Act 2 & 3 Wm. 4, c. 76, is intitled "An Act for shortening the Time of Prescription in certain cases." It recites,

Whereas the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted, by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit, to be taken and enjoyed from or upon any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the duchy of Lancaster or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

II. And be it further enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the duchy of Lancaster or of the duchy of Cornwall, or being the property of any eccle.

Claims to right of common and other profits *à prendre*, not to be defeated after thirty years' enjoyment by showing the commencement; after sixty years' enjoyment the right to be absolute, unless had by consent or agreement. In claims of right of way or other easement, the periods to be twenty years and forty years.

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As regards *Real property Corporeal*, the statutes of limitation are principally the 32 Hen. 8, c. 2, and the 21 Jac. 1,

Decisions on the operation of the statutes of limitations as to *Real property Corporeal* at law.

Use of light for twenty years indefeasible, unless with consent.

What not an interruption.

In actions on the case the claimant may allege right generally. In pleas to trespass, the period of enjoyment mentioned in this Act to be alleged and exceptions to be replied specially.

Restricting the presumption to be allowed in support of claims herein provided for. Proviso for infants, &c.

What time to be excluded in computing the term of forty years appointed by this Act.

siastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter, as herein last before mentioned, shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

III. And be it further enacted, That when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose, by deed or writing.

IV. And be it further enacted, That each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

V. And be it further enacted, That in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

VI. And be it further enacted, That in the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act, as may be applicable to the case and to the nature of the claim.

VII. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been, or shall be an infant, idiot, *non compos mentis*, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

VIII. Provided always, and be it further enacted, That when any land or water, upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

IX. And be it further enacted, That this Act shall not extend to Scotland or Ireland.

c. 16, (z) and the 9 Geo. 3, c. 16, limiting claims on behalf of the king; and as to *real property Incorporeal* (such as right of common, or way, or watercourse, and certain other easements,) the 2 & 3 Wm. 4, c. 71. (z) The following observations will be found principally extracted from the works referred to in the note, with some additional recent decisions, and principally as regards actions of *ejectment*. (x) *Real* actions commenced for the recovery of property after the right of entry has been barred by twenty years' adverse possession, are but of rare occurrence, and though fully considered in the next volume, in discussing the jurisdiction and practice of the Court of Common Pleas, will here be only occasionally noticed.

By the enacting and the saving clauses of 21 Jac. 1, c. 16, s. 1 and 2, all writs of *Formedon* are to be issued, and all *Entries* made, or action of ejectment commenced, within *twenty years* next after the right or title *first descended or accrued*, (a) and then it is *provided*, that if at *that time* the party *then* entitled be within the age of 21, feme covert, non compos mentis, imprisoned, or beyond the seas, then such party or his heir may

The twenty years for commencing *Formedon* or *Ejectment* begin to operate from the time the right *first descended*.

X. And be it further enacted, That this Act shall commence and take effect on the first day of Michaelmas term now next ensuing.

XI. And be it further enacted, That this Act may be amended, altered, or repealed during this present session of parliament.

(x) For the decisions upon these statutes as relates to real property *Corporeal*, see Sugd. V. & P. 8th ed. 348 to 359; and Adams on Ejectment, 3d ed. 46 to 59; Chitty's Col. Stat. tit. Limitations, a careful perusal of which will be found essential. Reference should also be had to *White v. Parnter*, Knapp's Rep. 226 to 230; and *Benest v. Pison*, Id. 60, for the *principles* upon which the statutes of limitations and prescriptions proceed. It will be observed that in the former work, p. 349, the dictum in Bacon's Abridgment, that there is any saving in the 32 Hen. 8, in favour of infants, feme coverts, persons in prison and beyond the sea, is corrected, and that the saving in that act is confined to disabilities existing at the time *that statute was made*.

(a) As the twenty years for making an entry do not commence until the *right* to make the same has *accrued*, it has been observed and held that even upwards of sixty years' apparent adverse possession will not necessarily constitute a perfect title, and that it is possible that an estate may be enjoyed for even hundreds of years, and yet the same may at last be recovered by a *remainder-man*; for instance, suppose an estate to be limited to one *in tail*, with *remainder over* to another in fee, then although the tenant *in tail*

may have become barred of his remedy by the statute of limitations, yet as it is evident that whilst *his estate subsisted* the *remainder-man's* right of entry could not take place until the failure of issue of the tenant *in tail*, and which may not happen for an immense number of years, and after which, and at any time within twenty years after the death of the last issue *in tail*, the *remainder-man* might maintain ejectment. Sugd. V. & P. 353; and *Taylor v. Hords*, 1 Burr. 60; 5 Bro. C. C. 247; Cowp. 689, S. C. So in a late case, where an heir *in tail* brought ejectment against a defendant who had been in receipt of the rents *thirty years*, during the life of the ancestor *in tail*, and seven years after his death; but it appeared that the ancestor *once* had *seisin*, and there was evidence to explain under what circumstance the defendant had had such long-continued receipt of the rents; it was held that such possession by the defendant was no bar to the action of ejectment, and that the lessor of the plaintiff was not bound to rebut the presumption arising from such possession, by showing that the ancestor had *not* conveyed by fine and recovery, or otherwise than by an innocent conveyance. *Doe v. Smith v. Pike and another*, 3 Bar. & Adolp. 738; *Doe v. Phillips*, Id. 753.

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Twenty years' adverse possession when a bar, and what possession is to be deemed adverse or not so.

What are not adverse possessions.

bring his action or make his entry, provided he do so within *ten years* after the ceasing of such disability.

With respect to the statute 21 Jac. 1, c. 16, (b) which only applies to *Real property Corporeal*, it will be observed that, according to the ancient doctrine of *nullum tempus occurrit regi*, the *King* is not bound by the same, nor are *Ecclesiastical persons* (c) within it, because it would be an indirect means of evading the statutes made to prohibit their alienations; but that with respect to *all other persons* the statute applies if they were capable of a right to enter; and therefore if it appear that there has been *a possession by the defendant, or those under whom he holds, for the last twenty years' adverse to the title of the claimant*, and that the claimant has not been prevented from prosecuting his claim earlier by reason of some of the *disabilities* allowed by the statute, he will be barred of his remedy by ejectment.

It is therefore necessary particularly to consider when or not the possession is to be considered as *Adverse*. And here there are four general rules when it is not so, viz. *first*, when both the parties claim under the *same* title; *secondly*, when the possession of the one party is *consistent* with the title of the other; *thirdly*, when the claimant has never, in contemplation of law, been out of possession; and *fourthly*, when the occupier has acknowledged the claimant's title.

First, As an instance of the first description, where the parties claim under the same title, this case has been put. If a man seised of certain land in fee have issue two sons and die seised, and the younger son enter by abatement into the land, the statute will not operate against the elder son; for when the younger son so abated into the land after the death of his father, before an entry made by the elder son, the law intends that he entered claiming as heir to his father, by which title the elder son also claims. (d). So also if the defendant should make title under the sister of the lessor of the plaintiff, and prove that she had enjoyed the estate above twenty years, and that he had entered as heir to her, the court would not regard it, because her possession would be construed to be by courtesy, and not to make

(b) See this statute, *ante*, 744.

(c) By the stat. 9 Geo. 3, c. 16, the king is disabled from claiming title (except to liberties and franchises), unless the same shall accrue within the space of sixty years next before suit or claim; and consequently an adverse possession of lands for sixty years will now be a good

title even against the crown. The 2 & 3 Wm. 4, c. 71, further affects the King, as well as Ecclesiastical persons, with respect to *Incorporeal* rights, such as commons and other profits or benefits, except tithes, rents, and services.

(d) Co. Litt. s. 396.

a disherison, but by silence to preserve the possession of the brother, and therefore not within the intent of the statute; though if the brother were once in actual possession, and ousted by his sister, it would it seems be otherwise, for then her entry could not possibly be construed to be to preserve his possession. (e)

Secondly, As an instance where the possession of one party is consistent with the title of the other, the following case has been put. Where by a marriage settlement a copyhold estate of the wife was limited to the use of the survivor in fee, but no surrender was made to the use of the settlement, and after the death of the wife the husband was admitted to the lands, pursuant to the equitable title acquired by the settlement, it was held that if he had had no other title than the admission, a possession by him for twenty years would have barred the heir of the wife; but as it appeared that there was a custom in the manor for the husband to hold the lands for his life in the nature of a tenant by the courtesy, *and this without any admittance after the death of the wife*, the possession of the copyhold by the husband was referred to this title, and not to the admission under the settlement; and such possession being consistent with the title of the heir at law, he was allowed to maintain ejectment against the devisee of the husband within twenty years after the husband's death, though more than twenty years after the death of the wife. (f) So although one third part of the premises had been settled many years before the marriage upon a third person for life, and the steward of the manor appointed by the heir and her husband had constantly debited himself with the receipt of two-thirds of the rent for the husband on account of his wife, and the remaining one-third for the annuitant, yet as no surrender had been made to the trustees of the annuitant, it was held that such payment to him must be taken to be with the consent of the person entitled by law to the whole premises, so as to do away the notion of adverse possession by the husband of that third, distinct from his possession of the other two-thirds as tenant by the courtesy after the wife's death. Again, where a party devised a certain estate to his nephew and two nieces as tenants in common, and one of them died in the testator's life time, leaving an infant daughter; and after the testator's death the nephew and surviving niece covenanted to convey one-third to

(e) Bull. N. Pr. 102; Co. Litt. 242;
Sharrington v. Stratton, Plowd. 298, 306.

(f) Doe d. Milner v. Brightwen, 10
East, 588.

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a trustee, upon trust to convey the same to the infant if she attained twenty-one, or otherwise to themselves; but no conveyance was executed pursuant to the deed, but a third of the rents were received by the trustee for the use of the infant during her life; it was held that there was no adverse possession until the death of the infant, and that the devisee of the nephew might maintain ejectment for his share of the undivided third within twenty years after the infant's death, although more than twenty years after the death of the nephew. (g) So also where the rents of a trust estate were received by a *cestui que trust* for more than twenty years after the creation of the trust, without any interference of the trustees, such possession being consistent with and secured to the *cestui que trust* by the terms of the trust deed, the receipt was held not to be adverse to the title of the trustees, so as to bar their ejectment against the grantees of the *cestui que trust* brought after twenty years. (h) And indeed it has been observed, that as the *cestui que trust* is always to be considered as a tenant at will to the trustees, (i) and his possession is to be considered as that of the trustees, the statute will never operate between trustee and *cestui que trust* except in very particular cases. (k) But that rule holds only between *cestui que trust* and trustee, and not between *cestui que trust* and trustee on one side and strangers on the other. (l) Thus where a *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against both. (m) And even if a *cestui que trust* sell or devise the estate, and the vendee or devisee obtain possession of the title deeds and enter, and do no act recognizing the trustee's title, the statute will operate from the time of such entry; (n) but it has been observed that this is a case of rare occurrence, and not a title to be relied upon by any purchaser. (m)

In like manner the non-payment of any part of principal or of interest within twenty years after, if the deed was executed, and after the principal became due, will nevertheless not be considered as affording proof of twenty years adverse posses-

(g) *Doe d. Colclough v. Hals*, 3 B. & Cres. 757. But on the other hand, where copyhold lands had been granted to A. for the lives of herself and B., and in reversion to C. for other lives; and A. died, having devised to B., who entered and kept possession for more than twenty years; it was held that C. was barred by the statute after B.'s death from maintaining ejectment, for that C.'s right of possession accrued on the death of A., inasmuch as there could not be a general

occupant of copyhold land. *Doe d. Foster v. Scott*, 4 Bar. & Cres. 706.

(h) *Keane d. Lord Byron v. Dourdon*, 8 East, 248; and see Sugd. V. & P. 8th ed. 354, fully.

(i) *Gree v. Rolfe*, 1d. Raym. 716.

(k) Sugd. V. & P. 8th ed. 354.

(l) *Id. ibid.* 354, 355, where see the cases of adverse possession in cases of trust fully collected and observed upon.

(m) *Id. ibid.*

sion so as to bar the remedy by ejectment, because such possession is consistent with the original agreement of the parties. (n)

Mr. Serjeant Adams, in his valuable work on Ejectments, (o) observes, as to *inclosures from the waste*, that it is as yet a very unsettled point whether an encroachment upon the waste adjoining to the demised premises made by a lessee, and uninterrupted possession thereof by him for twenty years, shall give to such lessee a possessory right thereto, or whether he shall be deemed to have inclosed the waste in right of the demised premises, for the benefit of the lessor after the expiration of the term. Lord Kenyon, C. J., Lee, C. J., and Thompson, B., held that the encroachment belonged to the lessee; whilst on the other hand Heath, J., Butler, J., Perryn, B., and Graham, B., held that the landlord is entitled to it. (p) But that at all events it seems clear that such possession will be adverse to the rights of the commoners, and indeed to the lord himself, excepting as landlord, at the expiration of the lease. (q) It is submitted, that in general when the presumption is that the land inclosed belonged to the landlord, it would at the expiration of the tenancy belong to him, notwithstanding more than twenty years since the first inclosure have expired. (r)

It seems clear, that if an inclosure has been originally made by permission, or if there has been an admission of permission or tenancy within twenty years, then the statute of limitation will not bar; (s) and on that principle, where a party inclosed a small piece of waste land and occupied it for thirty years, without paying rent, but at the expiration of that time the owner of the adjoining land demanded sixpence rent, and the party who had inclosed paid the same on three several occasions, it was held that this evidence, in the absence of all other circumstances, was conclusive to show that the occupation of the defendant began by permission. (t) So where a cottage, standing in the corner of a meadow, (belonging to the lord of a manor) but separated from the meadow and from a highway by a hedge, had been occupied for about twenty years without any payment of rent, and then, upon possession being demanded by the lord, was reluctantly given up; and having been so given up, was re-

(n) *Hatcher v. Finch*, Lord Raym. 740; *Hall & Doe d. Surtees*, 5 B. & A. 687; cited *Doe v. Pike*, 3 Bar. & Adolp. 741; Sugd. V. & P. 8th ed. 355 to 357.

(o) Adams on Ejectment, 3d ed. 51, 52; and *ante*, 237, note.

(p) *Doe d. Colclough v. Mulliner*, 1 Esp. 460; *Cresch v. Wilmot*, 2 Taunt. 160, in notes; *Doe d. Challinor v. Davies*, 1 Esp. 461; *Bryan d. Child v. Winwood*,

1 Taunt. 208.

(q) *Cresch v. Wilmot*, 2 Taunt. 160, in notes; and see 2 & 3 Wm. 4, c. 71; *ante*, 285.

(r) And see *ante*, 237, note (n).

(s) Adams's Eject. 3d ed. 51, 52, 237; Bull. Ni. Pri. 104.

(t) *Doe d. Jackson v. Wilkinson*, 3 B. & Cres. 413.

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stored to the party, he being at the same time told, that if allowed to resume possession, it would only be *during pleasure*, and he kept possession for fifteen years more, and never paid any rent; it was held that the jury were warranted in presuming that the possession had commenced by the permission of the lord. (u)

Thirdly, We have seen that an adverse possession will be negatived when the party claiming title has never, in contemplation of law, been out of possession. As when *A.* devised lands to *B.* and his heirs, and died, and *B.* died, and afterwards the heir of *B.* and a stranger entered, and took the profits for twenty years; upon ejectment brought by the devisee of the heir of *B.* against the stranger, it was held that this perception of the rents and profits by the stranger was not adverse to the devisee's title; because, when *two* men are in possession, the law adjudges it to be the possession of him who hath the right; the lessor of the plaintiff and the defendant were not tenants in common, for the defendant was a mere stranger, and though he took a moiety of the profits, that would not make him a tenant in common; for a man cannot disseise another of an undivided moiety as he might of a part of the land. (x) So upon the principle that the possession of one joint-tenant, parcener, or tenant in common, is *prima facie* the possession of his companion, (y) it follows that the possession of the one can never be considered as adverse to the title of the other, unless it be attended by circumstances demonstrative of an adverse intent; or in other words, whenever one joint-tenant, tenant in common, or parcener, is in possession, his fellow is, in *contemplation of law*, in possession also, and it is necessary to prove an *actual* ouster to rebut this presumption. Some ambiguity seems formerly to have prevailed as to the meaning of the words *actual ouster*, as though it signified some act accompanied by real force; (x) but it is now clear that an actual ouster may be inferred from circumstances, and which circumstances are matter of evidence to be left to the jury. Thus thirty-six years' sole and uninterrupted possession by one tenant in common, accompanied with other strong circumstances, and without any account to, or demand made, or claim set up by his com-

(u) *Doe d. Thompson v. Clarke*, 8 B. & C. 717.

(x) *Reading v. Rawsterne, Ltd.* Raym. §29.

(y) *Ford v. Gray*, Salk. 285; *Smales*

v. Dale, Hob. 120; *Doe d. Barnet v. Keen*, 7 T. R. 386.

(z) *Fairclain d. Fowler v. Shookleton*, Burr. 2604; as to what is an actual ouster, ante, 374, 375; Co. Lit. 199, b., 200, c.

panion in the mean time, were held to be sufficient grounds for a jury to presume an actual ouster of the co-tenant. (a) So, if upon demand by the co-tenant of his moiety of the rent, the other should refuse to pay, and deny his title, saying he claims the whole, and will not pay, and continue in possession, such possession from that time would be deemed adverse. And where there were two joint-tenants of a lease for years, and one required the other to quit the house, and he did so, this was held to be an actual ouster; (b) and although the entry of one is, generally speaking, the entry of both, yet if one enter, claiming the whole for himself, it will be an entry adverse to his companion. (c) But a mere perception of the whole rents or profits by one tenant in common for twenty-six years, would not alone be deemed adverse. (d) And where a tenant in common levied a fine on the whole premises, and afterwards took all the rents and profits for only five years, but it did not appear that he held adversely at the time of levying the fine, it was held that such fine and receipt were not sufficient evidence of an ouster of his companion. (e) But the possession of one heir in gavelkind is not the possession of the other, if he enter with adverse intent to oust the other. (f) If an estate descend to parceners, one of whom is under a disability, which continues more than twenty years, and the other does not enter within twenty years, the disability of the one does not preserve the title of the other after the twenty years have elapsed. (g)

It should seem that the circumstance of there having been *long unexpired leases* of property will not, of itself, prevent the statute from running, excepting perhaps where a mere pepper corn rent has been reserved; for in cases where any considerable rent has been reserved and, pending such a lease, for upwards of twenty years no payment of rent, nor other acknowledgment of a tenancy, has taken place, the possession would be deemed adverse, and the statute would run; for otherwise, even sixty years, without any acknowledgment of a tenancy, might defeat the operation of the act. (h)

(a) *Doe d. Fisher v. Prosser*, Cowp. 217; *ante*, 374, 375. But see observations on that case in *Doe v. Pike*, 3 Bar. & Adolp. 741; the circumstances of adverse possession were in that case particularly strong.

(b) *Doe d. Fisher v. Prosser*, Cowp. 217; *Doe d. Hellings v. Bird*, 11 East, 49.

(c) Vin. Ab. 14, 512.

(d) *Fairclain d. Fowler v. Shackleton*, 5 Barr. 2604, but there there was an admission. See, however, further; *Doe v. Pike*, 3 Bar. & Adolp. 738; *Doe v. Phillips*, Id. 733; and see *ante*, 749,

n. (e); the possession by a mortgagor without payment or acknowledgment within twenty years is considered the possession of the mortgagee, *ante*, 752, n. (ii); but see *supra*, n. (a).

(e) *Peaceable d. Hornblower v. Read*, 1 East, 568, 574; see *vide* *Storg v. Windsor*, 2 Atk. 630, 632.

(f) *Davenport v. Tyrrell*, 1 W. Bla. 675.

(g) *Roe d. Langdon v. Rowston*, 8 Taunt. 441.

(h) See observations in *Cholmondeley v. Clinton*, 1 Turner & Russ. 118, 119.

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Fourthly, When the possessor has acknowledged a title in the claimant, then the possession will not be deemed adverse. As where a lease for a long term had been granted by the lord of the manor to the rector, in which the lessee covenanted for himself, his executors and assigns to pay, during the continuance of the term, a certain annual rent, and also all the tithe straw of wheat and rye within the parish; and the lessee and his assigns (the succeeding rectors) continued in possession for twenty years and upwards after the expiration of the term, without payment of rent, but during that twenty years suffered the heir of the lessor to take the tithe of the wheat and rye straw, it was held that such sufferance was evidence of an agreement between the lessor and lessee, or their heirs and assigns respectively, that the lessee or his assigns should continue in possession if the lessor and his heirs were permitted to receive the tithe as before, and that consequently there was no adverse holding in the assignee of the lessee. (i) We have also seen other acknowledgments that are sufficient to prevent the possession from being deemed adverse. (k)

When a holding over after forfeiture does not constitute an adverse possession.

With respect to *Forfeitures*, though they *immediately* create a right of entry, yet it is not compulsory on the owner or remainder-man immediately to exercise that right, and he may waive or suspend his claims until a subsequent time, and even until the lease for years, or estate for life, has determined by effluxion of time or other natural event, so that the twenty years do not *necessarily* run from the time of the forfeiture. (l) Thus, where a copyholder, with license, leased the copyhold for forty years, with a clause of re-entry upon non-payment of rent, and then devised such copyhold to A. and died, twenty years of the lease being then unexpired, and the heir received the rent from the lessee from the time of the death of the copyholder until the expiration the lease, and for ten years afterwards, when the devisee brought an action of ejectment: it was decided that the devisee was not barred by the statute, although more than twenty years had elapsed from the time of the death of the testator, and the forfeiture of the lease by non-payment of rent to the devisee; for until the termination of the lease, the devisee had no right to enter, except for the forfeiture, and although he might have entered by reason of the forfeiture, yet he was not bound to do so. (m)

(i) *Roe d. Pellat v. Ferrars*, 1 Bos. & Pul. 542.

(k) *Ante*, 751, n. (t); 752, n. (u).

(l) *Doe v. Dancers*, 7 East, 299; *Hovenden v. Lord Annetley*, 2 Scho. & Lef. 624; so in equity, see *Fausset v. Carpen-*

ter, 2 Dow. Rep. N. Series, 232; but see observations respecting what has been said in the House of Lords in *Chelmsdeley v. Clinton*, 1 Turn. & Russ. 118, 119; *ante*, 753, n. (h.)

(m) *Doe d. Cook v. Dancers*, 7 East, 299.

So it has been held, that where there is a proviso in a lease that it shall be void in case of a breach, the landlord alone can treat it as void, and which he may do at any time on a subsequent breach. (m)

The saving clause in the statute 21 Jac. 1, c. 16, s. 2, only extends to the person on whom the right first descends, and therefore when the time once begins to run, nothing can stop it. So that on the death of a person in whose life the time first *began to run*, his heir must enter within the residue of the ten years, although he laboured under a disability at the death of his ancestor. (n) In other words, to enable a party to take advantage of the extension of time granted by the second section of this statute, it is necessary that the disability to enter should exist at the time when the title under which he claims, whether to him or his ancestor, *first* accrued, for if he or his ancestor had the power to enter but for an instant no subsequent disability will be sufficient to arrest the operation of the statute, and the principle is the same where a disability existing at the time of the commencement of the title is afterwards removed, and a subsequent disability ensues, the statute continuing to run notwithstanding the second disability. It was once indeed endeavoured to distinguish between cases of voluntary and involuntary disability in this respect, and to maintain that an involuntary disability, as insanity, occurring after the statute had begun to run, would suspend its progress; but the argument was overruled upon the principle that a different construction had always been given to all the statutes of limitations, and that such nice distinctions would be productive of mischief. (o)

It was said by Lord Chancellor Hardwicke, that if a man both of non-sane memory and out of the kingdom, come into the kingdom, and then go out of the kingdom, his non-sane memory continuing, his privilege as to being out of the kingdom is gone, and his privilege as to non-sane memory will cease from the time he returns to his senses. (p) So when the ancestor, to whom the right first accrues, dies under a disability which suspends the operation of the statute, his heir must make his entry within ten years next after his ancestor's death,

(m) *Rede v. Farr*, 6 M. & S. 121; *Doe d. Bryan v. Banks*, 4 Bar. & Ald. 401, S. P.

(n) Sugd. V. & P. 8th ed. 349, 350, cites *Doe v. Jones*, 4 T. R. 300; *Cotterell v. Dutton*, 4 Taunt. 826, *infra*.

(o) *Doe d. Duroure v. Jones*, 4 T. R. 300; *et vide Stowell v. Lord Zouch*, Plow. 366; *Cotterell v. Dutton*, 4 Taunt. 826, see observations on last case, Sugd. V. & P. 8th ed. 352.

(p) *Sturt v. Mellish*, 2 Atk. 610, 614.

Disabilities
excepted in 21
Jac. 1, c. 16, s.
2, as to Real
property, and
cases thereon.

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provided more than twenty years have elapsed from the time of the commencement of the ancestor's title to the time of the expiration of the ten years. (q) It was once indeed contended that the meaning of this second section of the statute was to allow every person at least twenty years after his own title accrued, if there were a continuing disability, from the death of the ancestor last seised, and ten years more to the heir of the person dying under a disability, which ten years were, in addition to the twenty years, allowed by the first clause; but it was justly observed by the court that if that construction could prevail there was no calculating how far the statute might be carried, by parents and children dying under age, or continuing under other disabilities in succession, and that the word *death*, in the second clause, meant and referred to the death of the person to whom the right *first* accrued, and was probably introduced in order to obviate the difficulty which had arisen in the case of *Stowell v. Lord Zouch*, (r) upon the construction of the statute of fines, from the omission of that word, and that the statute meant that the heir of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor to whom the right first accrued during the period of disability, and who died under such disability, notwithstanding the twenty years from the first accruing of the title to the ancestor should have before expired. (s)

Rent charges,
quit rents, &c.

The statute 21 Jac. 1, c. 16, does not however extend to rent charges created by deed, and as to which there is no prescribed limitation of time at law or in equity, (t) or to quit rents, (u) or to rents arising by grant under seal, or will. (x) So that any number of years' arrears of them may be recovered, unless there be evidence to presume payment, which presumption might be allowed, as in case of a bond. (y)

Common law,
presumption in
favour of some
Incorporeal
rights after
twenty years'
enjoyment.

There is a species of *common law limitation* of some rights and the power of disputing the same which, independently of

(q) *Doe d. George v. Jesson*, 6 East, 80; see observation *thereon*, Sugd. V. & P. 351, 352.

(r) *Flow*, 366; Sugd. V. & P. 8th ed. 350, 351.

(s) *Doe d. George v. Jesson*, 6 East, 80.

(t) *Cusht v. Jackson*, M'Clel. Rep. 495, and 18 Price, 721, S. C.; and see *Collins v. Goodhall*, 2 Vern. 235, and *Stackhouse v. Barnston*, 10 Ves. J. 467; but there may be a presumption of payment as in case of a bond, *Id. ibid.*

(u) *Eldridge v. Knott*, 1 Cowp. 214, According to that case, mere length of time, short of the period fixed by the statute of limitations, and unaccompanied with any circumstances, is not of itself a sufficient ground to presume a release or extinguishment of a quit rent; see also, *ante*, 228.

(x) *Collins v. Goodhall*, 2 Vern. 235.

(y) *Stackhouse v. Barnston*, 6 Ves. J. 467.

the act 2 & 3 Wm. 4, c. 71, has ever affected and still affects rights of common, ways, watercourses and other incorporeal rights, profits and easements, viz., *twenty years' undisturbed enjoyment*, which has long been considered as affording at least *prima facie* evidence of what is termed a *Prescriptive right*; or where the easement cannot in law be claimed by prescription, but only by custom, then of a *Customary right*. (s) Thus a *presumptive* right and title to common (except common appendant) upon the land of another, may be acquired merely by twenty years' user or enjoyment without any actual conveyance or deed or other grant or title; (a) and the same presumption of a perfect grant of a right of way, (b) or of the use of ancient lights, (c) was always to be inferred from twenty years' exercise of such a right. And the same rule prevails as to *Customs*, whether affirmative or negative, with respect to which a usage for twenty years has long been considered as at least presumptive *prima facie* evidence of a corresponding right. (d)

Upon the other hand, possession, necessary to constitute a title by such *prescription*, must have been *uninterrupted* and *peaceable*, both according to the civil law, the law of England, and that of France, Normandy and Jersey. (e) It must "have been *possessio longa, continua et pacifica, nec sit legitima interruptio*, long continued and peaceable. (f) *Pour pouvoir prescrire il faut une possession continue et non interrompue, paisible, publique et a titre de propriétaire*. (g) And though the right is not to be considered interrupted by mere trespassers, if the trespassers were unknown, yet if they were known, and if the trespasses have frequently happened, and no legal proceedings have been instituted in consequence of them, they then become the *legitimate interruptions*, which Bracton speaks of, and are converted into adverse assertions of right, (h) and if not promptly and *effectually litigated* they defeat the claim of rightful prescription; and a mere *threat* of action for the trespasses, without following it up, will have no effect to preserve the right." (i) And

But there must not have been any interruption submitted to.

(s) *Ante*, 282 to 286.

(a) *Moore v. Rawson*, 3 Bar. & Cres. 339; and see *ante*, 282 to 286.

(b) *Knight v. Halsey*, 2 Bos. & Pul. 206; *Campbell v. Wilson*, 3 East, 294; *Lidell v. Wilson*, 3 Bing. 115; *Moore v. Rawson*, 3 Bar. & Cres. 339.

(c) *Lewis v. Price*, 2 Saunders, 175, 176, n. 2; *Cross v. Lewis*, 2 Bar. & Cres. 686.

(d) *Re Jolliffe*, 2 Bar. & Cres. 54; 3 Dowl. & R. 240, S. C.

(e) *Benest v. Pison*, Knapp, R. 60; *ante*, 284, a case in privy council, appeal from Jersey, which should be carefully read by every student.

(f) Domat. lib. 1, tit. 13 sect. 1, in notes; Bracton, fols. 52 & 222, 226; Co. Lit. 113, b.

(g) Code Civil, liv. 3, tit. 20, article, 23, 29.

(h) *Benest v. Pison*, Knapp, Rep. 70.

(i) *Id. ibid.* 71.

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as a lord of the manor cannot establish a claim to the exclusive right of cutting sea weed on rocks, situate *below low water mark*, except by a grant from the king, or by such long and undisturbed enjoyment of it as to give him a title by prescription, it was held that as it appeared that others had also taken such sea weed without having been sued for so doing, the lord in that case had not established his claim. (k) So if a bar has been for many years maintained across a way and occasionally shut, though it may have been knocked down once, the former exclude presumption of right, and show that the way or other easement has been merely by permission. (l)

At common law, and independently of the above act, as observed by Lord Kenyon, from upwards of twenty years' *exclusive* and *uninterrupted* enjoyment of an easement or profit *à prendre*, a grant or even one hundred grants will be presumed, and this even against the king, if by possibility they could legally have been made; (m) and though before the above act it was essential to the validity of a prescription or custom that it should have existed before the commencement of the reign of Rich. I, A. D. 1189, yet in practice, proof of a regular usage for twenty years, not explained or contradicted, was that upon which many private and public rights were held, and sufficient for a jury in finding the existence of an immemorial custom or prescription, or of a lost grant. (n) But still twenty years or longer uninterrupted user was not conclusive, for it might be shown to have commenced during a long term of years, as pending a lease for ninety-nine years, at the expiration of which the owner in fee might insist on the determination of the easement; (o) or it might be shown that the use of a way or other easement commenced during an estate for life, and consequently that it did not bind the remainder-man or reversioner. (p) These exceptions it will be observed are provided for and continued by the foregoing act. (q)

*Incorporeal
Rights, as Com-
mons, Ways,
Watercourses,
&c. as regulated
by 2 & 3 Wm.*

With respect to the operation of the before-mentioned statute, 2 & 3 Wm. 4, c. 71, upon incorporeal rights and

(k) *Benest v. Pisson*, Knapp, Rep. 60; *Lowe v. Govett*, 3 Bar. & Adolp. 863.

(l) 2 Saund. 175, note (e); *Rex v. Lloyd*, 1 Campb. 260; *Rex v. Barr*, 4 Campb. 16; *Woodyer v. Hadden*, 5 Taunt. 125; *Trustees of Rugby Charity v. Meryweather*, 11 East, 376.

(m) *Roe d. Johnson v. Ireland*, 11 East, 284; *Goodtitle v. Baldwin*, Id. 495; and see 2 Bla. Com. edit. Chitty, 31,

note, 20; 35, note 35; 265, n. 4.

(n) *Rex v. Joliffe*, 3 D. & R. 240; 2 Bar. & Cres. 54, S. C.; *Parsons v. Bellamy*, 4 Price, R. 198; 2 Saund. 175, a., n. (d); 1 Saund. 323, n. (a).

(o) *Wood v. Veal*, 5 Bar. & Ald. 454.

(p) *Daniel v. North*, 11 East, 372; 2 Saund. 175, a.

(q) *Ante*, 745, where see the act stated at length.

easements, it will be observed, that it has introduced most important and useful regulations, as well respecting *incorporeal rights themselves* as with regard to the mode of pleading. Formerly, although twenty years' non-user of a right of common might prevent a party from sustaining an action on the case for any subsequent infraction of his right, yet still he might proceed by the ancient writ of *assize*, (*r*) and the greatest prolixity and difficulty sometimes arose in the pleadings; whereas by the new regulations, in most cases, twenty years exercise of either of the enumerated rights or other easement, profit or benefit, excepting tithes, rent and services, (pending an ownership in fee in possession, but not during a mere tenancy for life,) *conclusively* establishes the right, and twenty years' *non-user* precludes a party from establishing his claim. (*s*) And instead of setting out the original grant or showing a prescriptive right from the owner in fee, it now suffices in pleading "to allege the *enjoyment* of the *common*, or *way*, or *watercourse*, &c. *as of right* by the occupiers of the tenement, in respect whereof the same is claimed, for and during such of the periods mentioned in the act as may be applicable to the case," and without claiming in the name or right of the owner of the fee, as was usually done before the act. The exceptions enumerated in the last-mentioned act keep in view and provide for the possibility of the twenty years, or other time of enjoyment, having been during a tenancy for life or a long term of years, an acquiescence in which by temporary owner did not before the act, nor ought now to prejudice the party claiming in remainder or reversion. (*t*)

When the legislature has limited a period for *proceeding at law*, (and in which alone, it will be observed, the Statutes of Limitations *profess* to operate, (*u*)) a Court of Equity will, as respects *Real Property*, in *analogous* cases, consider itself bound to act and decide according to the same limitation as courts of law are imperatively bound. (*u*) And equitable rights in general will, by the like analogy, be affected by time in the same manner as legal estates. And as respects *Trusts*, the distinction in equity is, that if the trust be constituted by the act of the *parties*, the possession of the *trustee* is the posses-

Limitations in
Courts of
Equity relative
to real property.

(*r*) *Hawke v. Bacon*, 2 Taunt. Rep. 159.

(*s*) As to the effect of non-user or of interruption of a right within twenty years not effectually litigated, particular reference should be had to *Benest v. Pisson*, Knapp, 60; *Moore v. Rawson*, 3 Bar. & Cres. 332; and *ante*, 284 to 286.

(*t*) See *Daniel v. North*, 11 East, 372;

see *Wood v. Veal*, 5 Bar. & Ald. 454, where at the end of a lease for ninety-nine years, the reversioner effectually stopped a right of way exercised during that term.

(*u*) Sugd. Vend. & Pur. 8th edit. 354 to 356; and per Lord Camden, *Clay v. Clay*, 3 Bro. C. C. 639; and *post*, 779, 780, 786.

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sion of the *cestui que trust*, and no length of such possession will bar; (x) but if a party is to be constituted a trustee by the *decree of a Court of Equity*, founded on *fraud* or the like, his possession is then considered adverse, and the Statute of Limitations will run from the time that the circumstances of *the fraud were discovered*. (y) And every new right of action in equity must be acted upon within twenty years after it accrues. (z) Where a party in possession of an equitable life estate—under a conveyance from the equitable tenant for life without impeachment of waste, holds over after the death of the tenant for life against the trustee, and who holds the legal estate as well for the tenant for life as for the remainder-man; such adverse possession as against the trustee does not commence till the death of the tenant for life, and till then the Statute of Limitations does not begin to run. (a) But in general where there has been adverse possession not accounted for by some disability, as coverture or infancy, for twenty years, a Court of Equity ought not to interfere, (b) nor could a bill for a discovery be sustained. (b) And Courts of Equity so regard the express enactments relative to the disabilities, although they only imperatively operate at law, that, with analogy to them, persons labouring under any such disabilities have in equity been allowed the like protection with respect to the enlargement of time for asserting their equitable claims as they would be entitled to in the case of a legal claim. (c) Hence the necessity for the knowledge of all the cases whether decided at law or in equity.

The Statutes of Limitations relating to *Personal Actions* and their exceptions. (d)

With respect to *Personal actions* at the suit of a party injured, (and which include most actions not for the *specific recovery* of Real Property itself,) the principal *general enactments* are 21 Jac. 1, c. 16, sections 3, 4, 5, 6 & 7, and 4 & 5 Ann. c. 16, s. 19, and 9 Geo. 4, c. 14, sect. 1, 2, 3, 4, 8, 9, 10. The 21 Jac. 1, c. 16, s. 3, enacts, (e) that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account and upon the case, (other than for such so-

(x) *Ante*, 759, n. (u), cites *Willis v. Shorral*, 1 Atk. 476; *Stackhouse v. Bamston*, 10 Ves. 466; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 630; *Lord Egremont v. Hamilton*, 1 Ball and Beatty, 516.

(y) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633; *Cholmondeley v. Clinton*, 1 Turn. & Russ. 118, 119.

(z) *Id.* 636.

(a) *Fausset v. Carpenter*, 2 Dow. & Clark, 252.

(b) *Cholmondeley v. Clinton*, 1 Turn. & R. 108.

(c) *Sugd. V. & P.* 357, and cases, *id.* note (h).

(d) The decisions upon the statutes of limitations respecting *Personal actions*, are very clearly stated in *Tidd's Pract.* 9th edit. 14 to 33, see also *Chitty's Col. Stat.* 702 to 710, and the recent cases *post*.

(e) There is a similar act as to *Ireland*, 10 Car. 1, sess. 2, c. 6.

counts as concern the trade of merchandize between merchant and merchant, their factors or servants,) all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearsages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them, shall be commenced and sued within the time and limitation hereafter expressed and not after; that is to say, the said actions upon the case, (other than for slander,) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within six years next after the cause of such action or suit and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said action upon the case for words within two years next after the words spoken and not after.

Sect. 4, nevertheless, enacts, that if in any the said actions or suits judgment be given for the plaintiff, and the same be reversed *by error* or a verdict pass for the plaintiff, and upon matter alleged in *arrest of judgment*, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if any the said actions shall be brought by original, and the defendant therein be *outlawed*, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment be given against the plaintiff or outlawry reversed, and not after.

Further time provided after judgment or outlawry has been reversed.

Sect. 7, nevertheless, provides and enacts, that if any person or persons that is or shall be *entitled (f)* to any such action of trespass, detinue, action sur trover, replevin, actions of account, actions of debt, actions of trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case *for words*, (g) be or shall be at the time of any such cause of actions given or accrued, fallen or come within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same

Exceptions in favour of infants, feme coverts, &c.

(f) This section only applies to the absence of a creditor and not of a debtor, *Fladong v. Winter*, 19 Ves. 200, and therefore the 4 and 5 Ann. c. 16, s. 19, was passed.

(g) It will be observed that other actions on the case are not re-enumerated in this clause. This it should seem was accidental and not intended, see 4 & 5 Ann. c. 16, s. 19.

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Action against
persons beyond
sea may be
brought at any
time within six
years after their
return.

Limitation of
suits for *Tithes*.

Enactments of
9 Geo. 4, c. 14,
to prevent
verbal admission
except pay-
ments being
available. (l)

within such times as are before limited *after their coming to* (h) or being of full age, discovert, of sane memory, at large, or returned from beyond the seas, as other persons having no such impediment should have done. And a proviso to the same effect was enacted as to the recovery of *seamen's wages* by 4 & 5 Ann. c. 16, s. 18.

The 4 & 5 Anne, c. 16, s. 19, enacts, that if any person or persons (i) *against whom* there is or shall be any cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, actions sur trover or replevin for taking away goods or cattle, or of action of account or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding and imprisonment, or any of them, be or shall be, at the time of any such cause, or suit, or action given or accrued, fallen or come, beyond the seas, that then such person or persons who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person or persons after their return from beyond the seas, so as they take the same after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before by this act, and by the said other act made in the 21 Jac. 1, c. 16.

The 53 Geo. 3, c. 127, s. 5, expressly limits suits for the penalty for not setting out *Tithes*, and suits for tithes themselves, whether at law or in equity, to six years, before which act there was no limitation to such proceedings. (k)

The 9 Geo. 4, c. 14, (reciting the English act, 21 Jac. 1, c. 16, and the Irish act, 10 Car. 1, sess. 2, c. 6, and that various questions had arisen in actions founded on simple contract as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments, and that it was expedient to prevent such questions and to make provision for giving effect to the said enactments and to the intention thereof, enacts, that in actions of debt or upon the case grounded upon any *simple contract*, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said

(h) A foreigner who always resides abroad and has never come to England, is not affected by these statutes, *Greig v. Somerville*, 1 Russ. & M. 338, 346, n. (a).

(i) As to one of several persons being absent, see *Perry v. Jacob*, 4 Term R.

516; *Sturt v. Mellish*, 2 Atk. 612; Chit. Eq. Dig. 664.

(k) *Talory v. Jackson*, Cro. Car. 513.

(l) The decisions on this act will be found in Chitty on Bills, 8th edit. 607 to 613.

enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be *signed by the party chargeable thereby*, (m) and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them. Provided always that nothing herein contained shall alter or take away or lessen the effect of *any payment* of any principal or interest made by any person whatsoever. Provided also that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

Sect. 3 enacts, that *no indorsement* or memorandum of any payment, written or made after the time appointed for this act to take effect upon any promissory note, bill of exchange or other writing by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operations of either of the said statutes.

Sect 4 enacts, that the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant either by plea, notice, or otherwise. (n)

Sect. 8 enacts, that no memorandum or other writing made necessary by this act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps. (o)

Simple contract debts alleged by way of set-off.

Memorandum exempted from stamps.

It has been decided that the statutes of limitations, as regards

Decisions on these acts limiting *Personal* actions. (p)

(m) So that a signature by an agent is not sufficient, *Whippy v. Hillary*, 3 Bar. & Adolp. 399.

(n) It has been previously so decided upon the statute 21 Jac. c. 16, s. 3, *Remington v. Stevens*, 2 Stra. 1271; Bal. N. Pri. 180.

(o) Sect. 9 enacts, that this act shall not extend to Scotland, and sect. 10 provides that the act shall commence and take effect on the 1st day of January, 1829.

(p) *Higgins v. Scott*, 2 Bar. & Adolp. 415.

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debts and personal actions, merely bars the *Remedy* and not the *debt*, and therefore, where an attorney for a plaintiff had obtained judgment, and the defendant was afterwards discharged under the Lords' Act, but at a subsequent period a *fieri facias* issued against his goods, and the sheriff levied the damages and costs, it was held that the attorney, although he had taken no step in the cause within six years, had still a *lien* on the judgment for his bill of costs, and the court directed the sheriff to pay him the amount out of the proceeds of the goods. (q)

What actions, proceedings and claims are within the acts as to personality.

It will be observed that actions of *Covenant* are not mentioned in the statute 21 Jac. 1, c. 16, and though actions of *Debt* are named, yet the words are actions of debt grounded upon any lending or contract without *Specialty*, consequently it is clear that this Act does not affect actions of *covenant*, which can only be founded upon a specialty under seal, (r) and though the statute includes in terms actions of debt for arrearages of rent, yet it is clear that it does not extend to rent reserved by indenture under seal, (s) nor to a rent charge. (t) So the statutes of limitation did not extend to an action of debt for treble the value of the tithes set out, (u) though that action is now expressly limited at Law as well as in Equity and Ecclesiastical Courts to six years, (x) nor did it extend to an action of debt for an escape, (y) nor to an action of debt on an award, (z) nor debt for a copyhold fine, (a) nor to an action against a sheriff for not paying over money under a *fi. fa.* (b) It was a maxim at common law that contracts under seal should be dissolved or discharged by an instrument of an equally solemn nature, and therefore, after six years, and any time short of that hereafter noticed, there is no statute of limitations or presumption of payment. But a warrant of attorney is not a specialty. (c) Other limitations are proposed to be introduced by a bill now before the houses of parliament. (d)

Time how calculated under these acts.

In cases within these acts it has been considered that the day upon or in which the cause of action accrued is to be

(q) *Higgins v. Scott*, 2 Bar. & Adolp. 413; and see post, 766, n. (p). See in general Tidd, 9 ed. 14 to 33; Chitty's Col. Stat. 702 to 710, in notes; Tidd on Bills of Exchange, 606 to 613; and Chit. Ed. Eq. Dig. 663 to 665.

(r) *The Mayor of Hull v. Hornes*, Cowp. 109.

(s) *Freeman v. Stacy*, Hutton's R. 109; *Leigh v. Thornton*, 1 Bar. & Ald. 625; 1 Saund. 38.

(t) *Cupit v. Jackson*, M'Clel. R. 495; 13 Price, 171, S. C.

(u) *Talory v. Jackson*, Cro. Car. 513.

(x) 53 Geo. 3, c. 127, s. 5.

(y) *Jones v. Pope*, 1 Saund. 38; 1 Lev. 191.

(z) *Scoble, Hodgson v. Harris*, 1 Lev. 273; 2 Saund. 63, *aliter* if submission not under seal.

(a) *Hodgson v. Harris*, 1 Lev. 273.

(b) *Hall v. Wybank*, 3 Mod. 312.

(c) *Clarke v. Figgis*, 2 Stark. R. 234.

(d) Not yet passed; see Addenda to the last part.

included in the calculation; (e) but according to more recent decisions, it should seem that it ought in general to be excluded. (f) And as to the expiration, as the acts require the action to be brought within the limited time, it should seem that at least the writ or process should be issued upon the last day of the six years, or months, or other time specified, exclusive of the day on which the cause of action accrued.

There is no *cause of action* till the claimant could legally sue, therefore the statute does not run from the making of a promise, if it were to perform something at a future time, but only from the expiration of that time, though, if the party promised to pay *on demand*, or *generally*, then he would be liable to be sued immediately he made the promise, (g) or committed the breach of duty or wrong, and consequently the statute then begins to run; and the circumstance of the claimant being ignorant of the breach of duty or wrong committed, will not at law enable the injured party to sue after the expiration of the limited time from the day the breach of duty or wrong took place, (h) So at law an action of trover must be brought within six years after a *secret conversion*, although unknown to the owner of the goods. (i)

Cause of action, when considered to have accrued.

But the term "*cause of action*" implies not only a right of action, but also that there is *some person in existence who could assert it*, and also a person to be sued; and therefore where a payee of a bill was dead at the time when it fell due, it was held that the statute did not begin to run until letters of administration had been obtained by some one, (k) and where the testator resided and died abroad, it was held that his executor in England might be sued within six years after his taking out probate. (l) But it would not excuse an attorney for not suing within six years, to show that he had not delivered his bill till within that time, although he is prohibited from suing until a month after such delivery. (m) If the statute of limitations once begins to run it continues to do so, and if the cause of action were complete in a testator's life-time, then the

(e) *Rees v. Arundel*, Hob. 109; *Clarke v. Dovey*, 4 Moore, 465; 2 Bla. C. 141, n. 3; *Lloyd v. Wisney*, 6 Bing. 489; 1 Burn's J. 805, 806.

(f) *Lester v. Garland*, 15 Ves. 248; *Pellw v. Inhabitants of Worsford*, 9 B. & Cres. 134; *Hardy v. Ryle*, Id. 609; *Higgins v. M'Adam*, 3 Young & J. 1 & 16; 1 Man. & R. 300, note (b); *Pellw v. East Worsford*, 4 Man. & R. 130.

(g) *Clayton v. Gosling*, 5 Bar. & Cres. 360; *Thorpe v. Coombe*, 8 Dowl. & R.

346; *Chitty on Bills*, 2 ed. 608, 609.

(h) *Batley v. Faulkner*, 3 Bar. & Ald. 288; *Short v. M'Carthy*, 3 Bar. & Ald. 626; *Howell v. Young*, 5 Bar. & C. 259.

(i) *Granger v. George*, 5 Bar. & Cres. 149; 7 Dowl. & Ry. 729, S. C. See post, as to relief in equity.

(k) *Douglas v. Forrest*, 4 Bing. 686.

(l) *Murray v. E. I. Company*, 5 Bar. & Ald. 212.

(m) *Semble, Rothery v. Munnings*, 1 Bar. & Adolp. 15; 3 Eev. 367.

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statute begins and continues to run from that time, and not from his death, or the time of obtaining the probate. (n) And it has been held in equity, that if there be a known executor *de son tort*, he must be sued within six years, though there be no rightful executor. (o) In case of a continuing lien, although the statute may be a bar to an action for the debt, it seems that the lien continues. (p) But the statutes equally affect cross demands, and therefore the statute is an answer to a plea of set-off. (q) If a set-off be pleaded, then the plaintiff must reply the statute, (r) but if only a notice of set-off has been delivered, the statute may be given in evidence. (s)

Doubt at law
as to exceptions
of fraud.

It has been suggested that even *at law* a case might be taken out of the statute of limitations, by showing that the wrong-doer *by fraud* concealed from the party injured the knowledge of the cause of action until after the limited time had elapsed; (t) but the case appears to have been put rather as a possible than a positive exception, and in these cases it seems at least better to resort to a Court of Equity, (u) or by an injunction in that court to prevent the defendant from setting up the lapse of time as a bar. (x)

Infancy, on
what day it de-
termines.

Under the clause respecting *infants*, it is to be observed that a person becomes of age on the first instant of the last day of the twenty-first year *next before* the anniversary of his birth; thus, if a person were born at any hour of the first of January, A. D. 1801 (even a few minutes before twelve o'clock of the night of that day,) he would be of full age at the first instant of the 31st of December, A. D. 1821, although nearly forty-eight hours before he had actually attained the full age of twenty-one, according to years, days, hours, and minutes, because there is in law no fraction of a day, and it is the same whether a thing is done upon one moment of the day or another; (y) and as the party *might* make his will of lands at the first instant of the 31st December, 1821, so he might issue his writ, and the statute of limitations begins to run on that day. (y)

Exemptions be-
yond sea.

With respect to the exception in favour of persons beyond sea, if a foreigner or other person have never been in England,

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|---|---|
| (n) <i>Hickman v. Walker</i> , Willes, 27. | 7 Dowl. & R. 729, S. C.; <i>Howell v. Young</i> , |
| (o) <i>Webster v. Webster</i> , 10 Ves. 93. | 5 Bar. & C. 259; Tidd, 9 ed. 21. |
| (p) <i>Spears v. Hartley</i> , 3 Esp. R. 81; | (u) See post. |
| and ante, 764, n. (q). | (x) <i>Whalley v. Whalley</i> , 3 Bligh's Rep. |
| (q) <i>Remington v. Stevens</i> , 2 Stra. 1271, | 2, and post. |
| and see express enactment in 9 Geo. 4, | (y) <i>Herbert v. Torball</i> , 1 Sid. 162; 1 |
| c. 14, s. 4, ante, 763. | Keb. 589, S. C.; <i>Anonymous</i> , 1 Salk. 44; |
| (r) <i>Remington v. Stevens</i> , 2 Stru. 1271. | <i>Herbert v. Tuckal</i> , Raym. 84; 1 Bla. Com. |
| (s) Bull. N. P. 180. | 463, 464, note (13). |
| (t) <i>Granger v. George</i> , 5 Bar. & C. 149; | |

the statute of limitations never commences to operate, (z) and therefore a foreign sovereign, who has never been in England, has a right, even after the lapse of twenty-three years, to come in and prove by his ambassador a debt against the estate of an intestate, part of which still remains in court in consequence of the infancy of the party entitled to the residue, (a) and this notwithstanding successive advertisements and decrees in an amicable suit, (b) but after such delay, the residuary legatee is in equity only liable to bear a relative proportion of the claim. (c)

With respect to torts and breaches of special contracts, not for payment of debts, it is clear that no subsequent bare *acknowledgment* can create a new cause of action, and therefore where a tort has been committed upwards of six years, or other limited time, before the commencement of an action, no subsequent acknowledgment within the time will prevent the operation of the statutes as regards an action for such tort. (d) But with respect to *debts*, it has been long held at law, and also in equity, that a bare even verbal acknowledgment, made within six years, that the *debt* remains unsatisfied, raised an implied new promise to pay it, and being within six years, took the case out of the statute, (e) it having been considered that they were only intended to protect persons who, having *paid* their debts, were liable to be called upon to pay them again, in consequence of the loss of vouchers, and that if they admitted that the debt was unsatisfied, the case was not within the intention of the legislature. (f)

What acknowledgment or payment will take a case out of statute as to personal actions.

Before the late act, a *payment* of a part of the debt, or of the interest, was considered so substantial an admission of continuing liability, that it took the case out of the statute, not only as against the party making the payment, but as to all co-contractors; (g) and a *verbal* acknowledgment also had the same effect, (h) but as that occasioned much perjury in swearing to an explicit *verbal* admission, when perhaps none was made, or it was qualified, the above act 9 Geo. 4, c. 14, was passed,

(z) *Sturt v. Mellish*, 2 Atk. 612; *Strihorst v. Grames*, 3 Bla. R. 725; 3 Wils. 143, S. C.—N. B. In *Greig v. Somerville*, 1 Russ. & M. 338, the Emperor of Russia had been in England, but that was after the death of intestate.

(a) *Greig v. Somerville*, 1 Russ. & M. 338.

(b) *Lashley v. Hogg*, 11 Ves. 602; *Angell v. Haddon*, 1 Madd. 529; *Greig v. Somerville*, 1 Russ. & M. 338.

(c) *Greig v. Somerville*, 1 Russ. & M. 338.

(d) *Hurst v. Parker*, 1 Bar. & Ald. 92; *Pittman v. Foster*, 1 Bar. & Cres. 256; 2 Dowl. & R. 363, S. C.; 2 Saund. 64, a., note (w); *Boydell v. Drummond*, 3 Campb. 160.

(e) 2 Saund. 63, j., note (l).

(f) See observations in *White v. Parnther*, Knapp's R. 226; and *Leaper v. Tatton*, 16 East, 420.

(g) *Burleigh v. Stott*, 8 B. & C. 36.

(h) *Whitcomb v. Whiting*, Dougl. 652, 653; *Perham v. Raynall*, 2 Bing. 306; *Halliday v. Ward*, 3 Campb. 32.

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excluding verbal admissions, (i) and enacting that a written acknowledgment, which must be signed by the party making it, shall affect only the party signing it and to be charged thereby and not any other person. Since this act, any payment of a part, however small, or a payment of any interest by a single debtor, or by one of several debtors, takes the case out of the statute as to other debtors, and yet such a payment may be as readily sworn as a verbal admission. (k) It however is settled, that if such payment be proved, and the evidence be credited by the jury, it precludes all co-contractors, as well as the party who so paid, from setting up the statute. (l) But a payment by an executor of a co-maker of a promissory note, will not take the case out of the statute as to the survivor. (m) And with respect to a written acknowledgment, it must contain so explicit an admission of a continuing debt, as to afford a just inference of a promise to pay; (n) and if qualified or conditional, the event on which the payment was to be made must be shown to have happened, as where the promise was to pay when able, in which case the ability to pay must be averred and proved. (o) A promise in writing to pay the balance due, without naming any sum, is sufficient under this act to take the case out of the statute, though if the only evidence be the writing, and proof of the original cause of action, without showing what was due, the plaintiff can only recover nominal damages. (p)

The constructions before the late act was passed as to what ambiguous expressions were sufficient to warrant a jury in inferring a promise, are still applicable to a written admission. It was held, in an action on a promissory note, where the statute of limitations had been pleaded, that a letter, expressed in ambiguous terms, not referring to the note in question, or to any other transaction in particular, was proper evidence to be left to the jury to determine whether it referred to the note, and that if they found it did, then it was a sufficient acknowledgment to take the case out of the statute. (q) It must, however,

(i) See *White v. Parther*, Knapp's Rep. 226, 227.

(k) In practice, since the act, instances have occurred of very suspicious evidence having been given of a pretended small payment, so as to take the case out of the statute.

(l) *Bealy v. Greenslade*, 10 Law Journ. 1; *Wyatt v. Hodson*, 17 April, 1832; K. B.; Chitty on Bills, 8 ed. 803.

(m) *Slater v. Lawson*, 1 Bar. & Adolp. 396; *Atkins v. Tvedgold*, 2 Bar. & Cres. 23.

(n) Per Lord Tenterden, *Tanner v. Smart*, 6 Bar. & Cres. 603.

(o) *Laing v. Mackenzie*, 4 Car. & P. 463; *Tanner v. Smart*, 6 Bar. & C. 603; *Scales v. Jacobs*, 3 Bing. 638; *Parr v. Lewis*, 4 Car. & P. 173; *Tatlock v. Smith*, 6 Bing. 343.

(p) *Dickinson v. Hatfield*, 2 Mood. & Mal. 141; 5 Car. & P. 46, S. C.

(q) *Frost v. Bengough*, 1 Law J. 96, C. P. 12 May, 1823; and see *Lloyd v. Maund*, 7 Term R. 760; *Rucker v. Ha-*

be kept in view, that the written admission must be signed by the party himself, and not by an agent. (r) If the drawing of a bill in respect of a prior demand can be considered as a sufficient written acknowledgment of such prior demand within the last act, it must nevertheless be considered as such admission at the time it was drawn, and not at a subsequent time, when it was paid. (s)

But where a written acknowledgment, in its terms sufficient, has been lost, then, on proof of its having existed, and diligent search and loss, parol evidence of its contents is admissible, and will take the case out of the statute. (t)

It appears to have been considered at Nisi Prius that the statement of an account, and striking a balance, and verbally agreeing to the latter within six years, without any signed acknowledgment, is sufficient, because such new account of itself creates a new cause of action. (u)

It has been considered that although the debt was contracted abroad, yet if it be sued for here, the English statutes of limitations would apply. (v) The statute must in general be pleaded; (x) but under circumstances, the jury may after twenty years presume payment under the general issue. (y)

We have seen that there is no statute of limitations affecting debts due on a *specialty* (which are not included), (z) nor debts secured by a judgment or recognisance. (a) But *after twenty years*, if a plea of payment or release be pleaded, the payment or release may be presumed until sufficiently rebutted. (a) But it is said that to warrant such a presumption there must be *full twenty years* from the time when the bond became forfeited. (b) By a bill before parliament, alterations stating the time for suing upon bonds, &c. have been proposed. (c)

Presumption of payment of a Specialty or judgment, &c.

There are some rights the injuries to which must be proceeded for *during the life of the party injured*, or at all events

Limitation at common law of certain actions during life of party injured, or of wrongdoer.

may, 4 East, 604; *Colledge v. Horn*, 3 Bing. 119, 331; *Collyer v. Willock*, 4 Bing. 313; *Tatlock v. Smith*, 6 Bing. 342; *Kendal v. Carpenter*, 2 Young & J. 484; 2 Saund. 61, i., 64, b.; Tidd, 9th ed. 22 to 27; and see *Bailey v. Sibbald*, 3 Bing. 185, 5 Ves. 185, as to what is a sufficient admission; see also Starkie on Evid. 893 to 899, 1st ed.

(r) *Whippy v. Hillary*, 3 Bar. & Adolp. 399.

(s) *Gowan v. Forster*, 3 Bar. & Adolp. 507.

(t) *Haden v. Williams*, 7 Bing. 163.

(u) *Smith v. Forty*, 4 Car. & P. 127.

(v) *The British Linen Company v. Drummond*, 10 Bar. & C. 903; *De La Vige v. Vienna*, 1 Bar. & Adolp. 285; *Hawkey v. Borwick*, 1 Young & J. 376.

(x) *Drape v. Glasstop*, 1 Lord Raym. 153.

(y) *Duffield v. Creed*, 5 Esp. R. 52.

(z) *Ants*, 760, 761.

(a) The cases upon this subject are ably collected in Tidd, 9th ed. 18, 19.

(b) *Colsel v. Budd*, 1 Campb. 27; *William v. Georges*, Id. 217.

(c) See Addenda at end of 4th part.

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during that of the wrong-doer, and to which the maxim applies *actio personalis moritur cum persona*. In case of injuries to the person or reputation this rule always applies, and even in one case of contract, as the breach of promise of marriage. (d) But in general the right of action for the breach of a contract survives. (e) Alterations of the rule *actio personalis moritur cum persona* have recently been proposed to parliament. (f)

Limitation of
Penal ac-
tions. (g)

The statute 31 Eliz. c. 5, s. 5, intituled "An act concerning Informers," enacts that all actions, suits, bills, indictments, or informations, shall be had, brought, sued, or exhibited for any forfeiture upon any statute penal made or to be made, whereby the forfeiture is or shall be limited to the queen, her heirs or successors only, shall be had, brought, sued, or exhibited *within two years* next after the offence committed against such act penal, and not after; and that all actions, suits, bills, or informations, which shall be had, brought, sued, or commenced for any forfeiture upon any penal statute made or to be made (except the statute of tillage), the benefit and suit whereof is or shall be by the said statute limited to the queen, her heirs or successors, and to any other which shall prosecute in that behalf, shall be had, brought, sued, or commenced by any person that may lawfully pursue for the same as aforesaid, *within one year* next after the offence committed or to be committed against the said statute, and in default of such pursuit, that then the same shall be had, sued, exhibited, or brought for the queen's majesty, her heirs or successors, at any time *within two years after that year ended*; and if any action, suit, bill, indictment, or information, for any offence against any penal statute made or to be made (except the statute of tillage), shall be brought after the time in that behalf before limited, that then the same *shall be void* and of none effect.

We have seen that a common informer cannot sue unless expressly enabled by statute to do so; (h) and as there is no *general act* for that purpose, the particular act imposing the penalty must in general be examined. Penalties imposed by the acts relating to the customs or excise, (i) or stamp acts, (k) cannot be sued for by an informer, though he may have a proportion of the penalty, or be rewarded; and in most

(d) *Chamberlain v. Williamson*, 2 Maule & S. 408.

(e) This doctrine is here only alluded to, the cases are collected in 1 Chitty on Pleading, Ch. I.

(f) See Addenda at end of 4th part.

(g) See construction in general, Tidd,

9th ed. 14, 15, and *infra*.

(h) *Ante*, 25, n. (n).

(i) *Fleming v. Bailey*, 5 East, 313; 6 Geo. 4, c. 108; 7 & 8 Geo. 4, c. 56; 7 & 8 Geo. 4, c. 53.

(k) 55 Geo. 3, c. 184; 48 Geo. 3, c. 149.

of the recent acts imposing penalties on conviction of common assaults and batteries, or of petty larcenies, or injuries to personal or real property, or game, the penalties are to be paid as contributions to the county rate, and not as formerly, for the benefit of the poor of the parish. (l)

In cases affected by the 31 Eliz. c. 5, it extends to all penal actions brought upon penal statutes, whereby the forfeiture is limited to the king, or to the king and the party suing, whether made before or since the statute. (m) It extends to offences of omission as well as commission. (n) It extends also to actions brought by the common informer alone. (o) But the statute does not extend to actions brought by the party aggrieved. (p) A latitat is a good commencement of the suit in a penal action. (q) In an action on 12 Anne, c. 16, (usury,) it was held by the court of sessions, that the limitations in 31 Eliz. c. 5, being understood as incorporated in the British statute 12 Anne, applied to Scotland as well as to England, and that decision was affirmed on appeal. (r) For indictments for felonies or other misdemeanors, where there is no forfeiture to the king, or to the king and prosecutor, no time is limited by any statute, but the several acts of general pardon have the effect of a similar limitation, one of the last acts of which kind was that of 20 Geo. 2, c. 52, for certain offences committed before 15th June, 1747. (s)

With respect to the limitation of actions against *Justices of the peace*, and certain *public officers* of different descriptions, they are numerous, and most inconveniently differ in terms; but being all in *pari materia*, and enacted with the same object, the same principle and rules of construction apply to all. It is to be regretted that no general act has been passed consolidating the numerous provisions, and rendering the language uniform, and enacting some general rules of precise construction. We will state the most general clauses; the others will be found by reference to the antecedent general table. (t)

The *general enactment* for the protection of *Justices and inferior peace officers* is 24 Geo. 2, c. 44, s. 8, "Provided also

(l) *Ante*, 22, 23.

(m) *Barber v. Tilson*, 3 M. & S. 434 to 439; *Wynne v. Belman*, 5 Taunt. 754; 1 Marsh. 321, note (a), S. C.; *Robinson v. Garthwaite*, 9 East, 296.

(n) *Whitehead v. Wynne*, 2 Chitty's R. 420; 5 M. & S. 427, S. C.

(o) See Tidd, 8th ed. 13; *Chance v. Adams*, 1 Ld. Raym. 78; Bull. N. P. 195.

(p) *Phillips v. Bury*, 1 Show. 354; Bull. N. P. 196.

(q) *Johnson v. Smith*, 2 Burr. 950; *Morris v. Pugh*, 3 Burr. 1243.

(r) *Surtees v. Allan*, 2 Dow, 254.

(s) *Burn's Justice*, tit. Indictment, III.

(t) *Ante*, 738, 739.

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that no action shall be brought against any Justice of the Peace for any thing done in the *execution* of his office, or against any constable, headborough, or other officer or person *acting as aforesaid*, unless commenced *within* six calendar months after the act committed." (u)

The acts relating to the *Customs* (28 Geo. 3, c. 37, s. 23, three *lunar* months, (v) and 6 Geo. 4, c. 108, s. 97, six *lunar* months), (v) and to the *Excise* (28 Geo. 3, c. 37, s. 23, three *lunar* months, (v) and 7 & 8 Geo. 4, c. 53, s. 115, three *calendar* months), (v) and to *Customs* and *Excise* officers acting in the *British possessions* abroad (6 Geo. 4, c. 114, s. 64, three *calendar* months), and to Officers of the *Army, Navy, Marines*, customs or excise, and any person acting under the direction of the commissioners of his Majesty's *customs*. (6 Geo. 4, c. 108, s. 97, six *lunar* months), limit actions against such public officers to different periods, at all events not exceeding six months. It must suffice to refer to the preceding alphabetical table for the other acts, (x) and we will proceed to notice the construction applicable to all these acts in general.

Construction of these acts relating to Justices and other Public Officers, &c.

It will be observed that the above acts protect every Justice of the Peace for any thing done "*in the execution of his office,*" and *Peace-officers* or *Persons acting in their aid*, and *Revenue-officers*, "*for any thing done by them in pursuance of this act,*" &c. These expressions, so common in these and numerous other acts, are inaccurate, because they would *prima facie* mislead, and would import that the party was only protected when he acted *properly*, and according to the authority of law, but the meaning of the words is not thus restricted, for, as frequently observed, if they were, the enactments were useless, because, if the party had acted precisely as the law authorized, he would not stand in need of the protection professed to be given by the enactments. (y) But the acts were intended to protect magistrates, and subordinate officers and others, in all cases where they *intended* to act according to law, but when by accident or *mistake*, and *not wilfully*, they exceeded or mistook their powers or duty. (z) The statutes suppose some irregularity, in consequence of some excess or want of authority, when the justice or other officer had *reasonable ground*

(u) See general construction, Chit. Col. Stat. 650, note (c).

(v) Mr. Tidd suggests that as 28 Geo. 3, c. 37, s. 23, is still in force, it seems that, notwithstanding 7 & 8 Geo. 4, c. 53, s. 115, an action against an officer of customs or excise must still be brought within three *lunar* months, see Tidd, 9th ed. 20,

sed quare, whether the subsequent acts giving six months are not virtually extensions of the time.

(x) *Ante*, 738, 739.

(y) *Greenway v. Hard*, 4 Term R. 555; *Weller v. Toke*, 9 East, 364.

(z) *Id. ibid.*; *Beechey v. Sides*, 9 Bar. & Cres. 806.

for supposing that the act done by him was in execution of his authority, but it turned out that he had acted erroneously. (a) But when there was *no colour* for supposing the act done to have been authorized, and especially when the magistrate *wilfully* acted erroneously, then, upon the same ground as that on which it has been held that it is not necessary to give a justice a notice of action, (b) it might be inferred, that an action against him for a case of *flagrant excess*, would *not* be barred by the limitation. It must however be observed, the 8th section of the 24 Geo. 2, c. 44, has been considered *more extensive* in its protection than the 6th section, for by its provision a *constable* is protected from liability to be sued after six calendar months for a trespass, although *manifestly* beyond and not in obedience of a warrant; and it has been said, that it is not necessary to consider, after the expiration of the limited time, whether or not the party acted under colour of his office. (c) It seems that at all events the eighth section, limiting actions to six calendar months, protects constables and persons acting in their aid from action for injuries *bonâ fide* committed in execution of their office, although acting without any warrant whatever. (d)

In the case of seizures by Officers of the Customs it has been held that the action must be commenced within three months of the actual seizure, although a suit be pending to try the legality of the seizure in the Court of Exchequer. (e) But when the cause of action is *continuing*, as imprisonment, it is sufficient to show that the action was commenced within the limited time from the expiration of the last day of the imprisonment, at least it would be so as to so much of the injury complained of as has really been sustained within the limited time. (f) Though if the plaintiff give notice of action *pending* the imprisonment, he is bound to proceed within the limited time after giving such notice, and cannot in strictness include therein the subsequent imprisonment. (g) Where *A.* who was

(a) *Weller v. Toke*, 9 East, 364, and other cases, Chit. Col. Stat. 645, in notes; *Beechey v. Sides*, 9 B. & C. 806; *Mills v. Collett*, 6 Bing. 85; *Rogers v. Broderip*, 9 D. & R. 194.

(b) *Cook v. Luard*, and *Lamlar v. Miller*, 6 B. & C. 355; *Morgan v. Palmer*, 2 B. & C. 729, 4 D. & R. 283, S. C.; *Wright v. Horton*, Holt's C. N. P. 458; and see Chitty's Col. Stat. 646, for other cases.

(c) *Smith v. Wiltshire*, 5 Moore, 323; 2 Brod. & B. 619, S. C.; *Theobald v.*

Chriemore, 1 Bar. & Ald. 227; *Parton v. Williams*, 3 Bar. & Ald. 330

(d) *Semble*, see Lord Tenterden's observations in *Parton v. Williams*, 3 Bar. & Ald. 330; and *Smith v. Wiltshire*, 5 Moore, 320; and 2 Brod. & B. 619, S. C.; and see *Beechey v. Sides*, 9 Bar. & C. 806, *sed quere*.

(e) *Goden v. Flins*, 1 Hen. Bla. 14; *Saunders v. Saunders*, 2 East, 254.

(f) *Matey v. Johnson*, 12 East, 67; *Pickersill v. Palmer*, Bull. N. P. 24.

(g) *Weston v. Fournier*, 14 East, 491.

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entitled by act of parliament to all the surplus water, and such as was not necessary for the purposes of a canal, brought an action against a canal company for an illegal abstraction of water, and alleged in his declaration continuing acts of *commission* and *omission* from an antecedent period, by which he was deprived of the water for nine weeks in the year 1825, and for seventeen weeks in the year 1826, it was held that the company were within the protection of the limitation clause of the statute of 30 Geo. 3, c. 82, s. 79, which enacts, that any action for any thing done in pursuance of the act shall be brought within six calendar months next after the fact *committed*, unless there be a continuation of damage, and also that there was no continuation of damage, inasmuch as there was a *cessation* of injury, although the *cause* from which the injury proceeded was continuing. But it was doubted whether acts of *omission* would be within such limitation clause. (*h*)

Construction of
time in these
acts, and no
exceptions.

It will be observed that these acts for the protection of *Justices* and *Public Officers*, and others acting under the authority of the particular act, do not contain any exception in favor of infants, feme coverts, &c., so that the enactment may be considered imperative upon all persons, without regard to particular disabilities. With regard to the *computation* when the month or other limited time *commences* and expires, it is to be observed, that *formerly* the general rule was that the computation from an act done must *include* the day when it was done, (*i*) though *from the day of the date excluded* the day, (*k*) But *now*, at least as to all acts of which a party injured has not *necessarily instant* and immediate notice, the general rule at law, as well as in equity, is to *exclude* the first day, at least when the act was not done to the plaintiff himself, and therefore he might not know of it immediately. (*l*) Thus, although the statute requires that the action shall be brought *within* six calendar months, yet if a party be discharged from an illegal imprisonment upon the 14th of December, the commencement of his action *upon* the 14th day of June following will be in due time. (*m*)

It will be observed that the statutes usually require the

(*h*) *Blakemore v. Glamorganshire Canal Company*, 3 Y. & J. 60.

(*i*) *Castle v. Burdett*, 3 T. R. 623; *Rex v. Tolley*, 3 East, 467; *Norris v. The Hundred of Gawtry*, Hob. 139; *Clarke v. Davey*, 4 Moore, 465; Tidd, 9 ed. 19.

(*k*) *Watson v. Pears*, 2 Campb. 294.

(*l*) *Lester v. Garland*, 15 Ves. 248;

Pellaw v. Wainford, 9 Bar. & C. 134; *Hardy v. Ryle*, Id. 603; *Higgins v. M'Adam*, 3 Young & J. 1, 16; 1 Man. & R. 500, note (*b*).

(*m*) *Hurdy v. Ryle*, 9 Bar. & Ctes. 603; as to acts for *omission*, see *Blakemore v. Glamorganshire Canal Company*, 3 Young & J. 60, ante, 773, 774, n. (*h*).

action to be commenced *within* the specified time, consequently the writ must be issued *on* or *before* the *last day* of the three months or other appointed time, though *exclusive* of the day upon which the injury was committed. (n)

The same construction, *excluding* the *first* day, appears to extend to practical matters. Thus, in *scire facias*, the year is calculated *from* the day of signing judgment, *exclusive* thereof; (o) and by a late rule of court, in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned *exclusively* of the *first* day, and *inclusively* of the *last* day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned *exclusively* of that day also. (p)

With respect to the term *month*, in general when it is used in a statute or law proceedings, with reference to temporal affairs, without the addition of *calendar*, it means a *lunar* month, as well at law (q) as in equity, (r) but when used with reference to *Ecclesiastical* matters, (s) or even in *Mercantile* contracts, (s) it means a *calendar* month. The 7 & 8 Geo. 4, c. 31, requiring certain proceedings against the hundred to be taken, has been construed to be *exclusive* of the day of the demolition. (t) When a month's notice of action is requisite, the month begins *upon* the day it is served, and therefore if notice be served on the 28th day of April, it expires on the 27th of May, and the action may be commenced on the 28th of May. (u) *Six months* will sometimes be construed to mean *half a year* and not merely six lunar months. (x)

2. In Courts of *Equity* the general rule is, that although the statute 21 Jac. 1, c. 16, s. 3, and other acts in terms only provide that certain particular "*actions*" for certain particular causes of action shall be brought *within* the times therein men-

2. How far the statutes of limitation operate in Courts of Equity. (y)

(n) *Ante*, 765.

(o) *Sympton v. Gray*, Barnes, 197; Tidd, 9 ed. 1103.

(p) Rule 8th, H. T. A. D. 1832, in all the courts.

(q) *Lacon v. Hooper*, 6 T. R. 224; *Crooke v. M'Tavish*, 1 Bing. 307; *Lang v. Gale*, 1 M. & S. 111; Chit. Col. Stat. Time.

(r) *Creswell v. Harris*, 2 Sim. & Sta. 476.

(s) *Dyke v. Sweeting*, Willes, 588; *Lang v. Gale*, 1 Maule & S. 111; *In re Swinford*, 6 Maule & S. 227.

(t) *Ante*, 578; and see *Pellaw v.*

Hundred of East Wonford, 4 Man. & Ry. 130; 9 B. & Cres. 134, S. C.; and see *Hardy v. Ryle*, Id. 300, in notes; *Wright v. Wales*, 5 Bing. 339.

(u) *Castle v. Burdett*, 3 Term Rep. 623; *Watson v. Pears*, 2 Campb. 294. See the construction of the words, "at least one calendar month's notice, &c.;" *Pellaw v. Hundred of Wonford*, 4 Man. & Ry. 360, in note, and *post*, vol. 2.

(x) *The Bishop of Peterborough v. Catesby*, Cro. Jac. 167.

(y) See in general Chit. Ed. Eq. Dig. Statute of Limitations, 663; 1 Mad. Ch. Pr. 98.

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tioned and consequently only refer to and affect actions and proceedings *at law*, and do not mention *bills* or *suits* in equity, yet that Courts of Equity, in giving effect to *equitable* claims and affording *equitable* relief, will observe the principle of these enactments in all cases where the *legal* and *equitable* titles to *demands noticed in the acts* correspond and differ only in the court where the right happens to be enforced. (z) And in such cases Courts of Equity act not by *analogy*, as has been supposed, but in *obedience* to the statutes, and upon all legal titles and legal demands Courts of Equity are bound by the statutes, (x) and the statutes of limitations in equity operate in the same manner on equitable estates (a) as the statute would at law have affected the legal estate. (b)

Thus suppose more than six years have elapsed since a bill of exchange became due, and it has been lost, and therefore relief is sought in a Court of Equity, the statute of limitations would be a bar there as much as in a Court of Law, unless there were some circumstances of *fraud* justifying an exception. (c) So where a married woman, indebted in two promissory notes given before her coverture, induced her creditor to give them up and take a bond from her husband for the amount, and he afterwards pleaded infancy, a Court of Equity, upon a bill filed by the creditor, relieved against such fraud and compelled the return of the notes, and prevented the husband and wife from pleading the statute of limitations or any other plea that could not have been pleaded at the time the bond was given. (d) And although Courts of Equity are peculiarly watchful over the interests of infants, yet if an executor or administrator or trustee for an infant should neglect to sue within six years, the statute would be considered by a Court of Equity as binding on the infant there as at law. (e) So although the object of a bill be to obtain discovery from the defendant, to be used at law in order to disprove his plea there that he made no promise within six years, though the defendant is bound to give that discovery, yet he has a right to protect himself in equity by the statute of limitations from making any discovery upon the original constitution

(z) *Medlicott v. O'Donel*, 1 Ball & B. 166; *Hovendon v. Lord Annesley*, 2 Sch. & Lef. 636; *Stackhouse v. Burnston*, 10 Ves. 66, 67; *Johnson v. Smith*, 3 Burr. 961.

(a) *Semble*, *Faussett v. Carpenter*, 2 Dow. Rep. N. S. 232.

(b) *Id. ibid.*; see *ante*, ch. iv. at end

of distributions between legal and equitable interests, 365 to 373.

(c) Editor's instance.

(d) *Clark v. Copley*, 2 Cox, 173; *Chit. Eq. Dig.* 664.

(e) *Wyck v. East India Company*, 3 P. W. 309; *Locken v. Locky*, *Proc. Ch.* 518.

of the debt, or whether it has been paid, and to such last mentioned matters he should plead the statute, and answer fully the rest of the bill. (f)

So although it has been said that the statute of limitation is no bar in equity to an *open account*, (g) that must be taken with qualification, for unless there has been an express *trust* or *agreement* to account or an open *mutual* account with some items on one side within six years, the statute will be as much a bar in equity as at law against any item of claim complete upwards of six years before the commencement of the proceedings; and if all accounts have ceased between merchant and merchant above six years, the statute of limitation is clearly a bar in equity, and the court will not decree an account but leave the party to seek his remedy at law. (h) But it should seem that as well at law as in equity, and whether the parties be or not merchants then under the exception in the 3d section of 21 Jac. 1, c. 16, if there be mutual and running open accounts *on each side*, but not otherwise, then a new item in either account within six years, takes the whole account on both sides out of the statute; each party in that case being considered as having suspended the application for payment of his side of the demand in faith of the set-off and mutual dealings. (i) But when the items are *all on one side*, then the circumstance of one or more items being within six years, will not either at law or in equity take the other prior items upwards of six years old out of the statute. (k) So an account of rent and profits was in equity confined to six years by analogy or with reference to the action for mesne profits. (l) But as well at law as in equity, if an agent or other person were employed or intrusted to receive goods or money from time to time under an express or implied engagement to account *when requested to do so*, then the statute would only run from the *demand* of an account. (m) So a promise or offer to account has before the recent act been considered as entitling the other party to compel an account

(f) *Cork v. Wilcock*, 5 Mad. R. 331.

(g) *Scudamore v. White*, 1 Vern. 456; *Anon.* 2 Freem. 22; 1 Mad. Ch. Pr. 98; 2 Mad. Ch. Pr. 310.

(h) *Foster v. Hodgson*, 19 Ves. 185; *Sherman v. Sherman*, 2 Vern. 276; *Barber v. Barber*, 18 Ves. 286; 1 Mad. Ch. Pr. 98; 2 Saund. 121; *Martin v. Heathcote*, 2 Eden, 169.

(i) *Catling v. Skoulding*, 6 T. R. 189;

Cranch v. Kirkman, Peake's R. 121; 2 Saund. 124, 127, n.

(k) Bull. N. P. 150; *Foster v. Hodgson*, 19 Ves. 185; *Catling v. Skoulding*, 6 T. R. 189.

(l) *Read v. Read*, 5 Ves. 744; *Pearce v. Newlyn*, 3 Mad. 186.

(m) *Topham v. Braddick*, 1 Taunt. R. 572.

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notwithstanding six years have expired,(n) and if in writing would doubtless still have that effect.

It is quite clear however that the statutes constitute no bar in Courts of Equity to any *mere equitable* claim or any demand not enumerated or provided for by the before mentioned act.(o) Thus the statute is no bar to a bill for a *legacy*, for which no action would lie, and which is not named in the act;(p) nor is it a bar where money has been lent or delivered upon *trust* property enforceable in equity,(q) and a claim for *tithes* might, before the express statute to the contrary, have been filed at any distance of time, because not a claim or proceeding noticed in the act.(r) And as no claim under a Record, or Specialty, or Will, is even at law affected by the statutes, so suits in equity, with reference to such demands, and for Rent Charges and Annuities created by Deed or Will, may be prosecuted at any distance of time, subject to the qualifications presently noticed.(s)

And in a late case, although the principle and rule that a Court of Equity will not interfere in favour of a party who omits to avail himself of his *legal* remedy in due time, was fully recognized, and it was fully established that a Court of Equity will not interfere to enable an incumbrancer of parish rates to obtain payment of arrears of interest which he had neglected to claim at the time when they became due;(t) yet it was held that clauses in a local act providing, that persons aggrieved by the decisions of the commissioners appointed to carry it into execution, should appeal to the Quarter Sessions, and that 21 days' notice should be given before any action or suit should be commenced for any thing done in pursuance of the act, *did not apply* to the case of a person claiming as an incumbrancer of the rates, which the act gave authority to assess and levy, and instituting his suit in order to give effect to his incumbrance.(u)

Devises for pay-
ment of debts.

If there be a *general devise for the payment of debts*, although the property constitutes equitable assets, yet such will is no recognition or revival of debts already barred by the statute *before* the death of the testator, although it was for-

(n) *E. Pomfret v. Lord Windsor*, 2 Ves. 485.

(o) 21 Jac. 1, c. 16, s. 3.

(p) *Higgins v. Cratford*, 2 Ves. J. 572; *Smallwood v. Hamilton*, 2 Atk. 71; Mod. Cases, 25.

(q) *Hollis's case*, 2 Ventr. 345; *Milner v. Cowley*, 4 Price's R. 103; 2 Mad. Ch. Pr. 310; *Ex parte Ross*, 2 Glyn. & Jam. 231; *Shelden v. Wildman*, 2 Ch. Cas. 26; *Heath v. Henley*, 1 Ch. Cas. 21; 3

Ch. Rep. 8.

(r) *Warden St. Paul v. Bishop of Lincoln*, 4 Price's R. 86; *Marston v. Claypole*, Bunb. 213; but now see 53 Geo. 3, c. 127, s. 5. as to *Tithes*.

(s) Chit. Eq. Dig. Account and tit. Limitations, Statute of, ante, 778, note (t); Id. 228.

(t) *Drewry v. Barnes*, 3 Russ. Rep. 94.

(u) Id. *ibid*.

merly held otherwise, (x) but such a devise stops the operation of the statute as to all debts *not so previously* barred. (y) So where a deed of trust for creditors generally has been executed, (z) or a commission of bankruptcy issued, (a) the operation of the statute as to all debts not already previously barred is instantly suspended, and entirely ceases to operate, notwithstanding a very great subsequent lapse of time. And when one creditor files a bill on behalf of himself and others against an executor, this will prevent any prospective operation of the statute as to every creditor who afterwards comes in under the decree. (b)

So in cases of *fraud* the operation of the statutes of limitation at law may sometimes be avoided by proceeding *in equity*. Thus if a bill charge *fraud*, and that it was *not discovered* until within six years before filing the bill, the statute cannot be effectually pleaded unless the defendant deny the fraud, or aver that it was discovered more than six years before the filing of the bill; (c) for no length of time can in equity prevent, as it has been figuratively termed, the *unkennelling* of fraud, unless the party after knowledge of it suspends any proceedings for more than six years or other limited time in the statutes of limitations. (c)

It should seem therefore that if an agent or person, entrusted with the care of goods or money, should be guilty of a breach of trust by converting the property to his own use, upwards of six years before any proceeding against him, and such conversion be not discovered till within six years, relief might be obtained *in equity* upon a bill to account, and charging the claimant's ignorance of the fraud till within six years, although it has been held that he could not sustain an action at law. (d)

We have seen that at law, although debts upon records or upon specialties are not within the statutes of limitations, yet, after twenty years, payments will sometimes be *presumed*. (e)

Presumptions in Equity against demands with analogy to the cases of Presumption at Law.

(x) *Burke v. Jones*, 2 Ves. & B. 275; *Stratford v. Blakesley*, 6 Bro. P. C. 630.

(y) *Hughes v. Wynne*, 1 Turn. & R. 307; *Hargreave v. Mitchell*, 6 Mad. R. 326; *Turner v. Goore*, 1 Scho. & Lef. 107; *Rendell v. Carpenter*, 2 Young & J. 484.

(z) *Id. ibid.*; *Boteler v. Marmaduke*, 3 Atk. 459; *Anon. Id.* 313.

(a) *Ex parte Ross*, in *re Coles*, 2 Glyn. & Jam. 46 & 331, qualifying *Ex parte Dewdney*, 15 Ves. 479.

(b) *Sterndale v. Hankinson*, 1 Sim. 393.

(c) *Whalley v. Whalley*, 3 Bligh. Rep. 2; *Rede's Tr. Pl.* 218, 2d ed.; *East India Company v. Wymonden*, 3 P. W. 143, 309; *Lacon v. Lacon*, 2 Atk. 395; *Gill. Ch.* 61; 3 Bro. P. C. 305; 1 Mad. Ch. P. 256; 2 *Id.* 308, 309.

(d) *Granger v. George*, 5 Bar. & C. 149; 7 D. & R. 729, S. C.; *Compton v. Chandless*, 4 Esp. R. 20; see *Brown v. Howard*, 4 Moore, 508; *Short v. Hartley*, 3 B. & Ald. 626; *Howell v. Young*, 5 Bar. & Cres. 259.

(e) *Ante*, 769.

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Captures.

So with analogy to those decisions, a similar doctrine in some cases obtains in equity. Thus a bill for an account of the produce of captures was dismissed on the ground of laches, although the length of time could not be pleaded in bar. (f) So where a party has lain by a great length of time and suffered a personal estate to be distributed he shall not have an account. (g) But this depends on the circumstance of each case. (h)

But length of time in these cases, not expressly within any statute of limitations, cannot be set up by *demurrer* as a complete bar to a mere *equitable* demand; for length of time in that case operates as a bar not *proprio jure*, but as a fact showing *acquiescence*, and a party cannot avail himself of a mere *inference* from facts on a demurrer; (i) but nevertheless, *length of time* may be urged with great effect at the hearing of the cause, for it is a rule founded on principles of public and rational policy, that parties shall not by neglecting to bring forward their demands subject others to insuperable difficulties, (k) and therefore every *presumption* that can fairly be made will be made against a stale demand. (k) Indeed the very forbearance to make a demand is considered as affording a presumption either that the claimant is conscious it has been satisfied or intended to be relinquished. (l) Lord Camden said, "a Court of Equity, which is never active in relief against conscience or public convenience, *has always* refused its aid to stale demands where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence, where these are wanting the court is passive and does nothing. Laches and neglect are always discouraged, and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court." (m)

Where therefore a party has lain by for a great length of time and suffered an estate to be distributed, he cannot insist

(f) *Pearson v. Belcher*, 4 Ves. 627.

(g) *Hercy v. Dinwoody*, 4 Bro. C. C. 257, post, 781, note (n.)

(h) See cases, Chit. Eq. Dig. Account, 13, 19, and tit. Laches, Length of Time and Limitations, Statute of.

(i) *Dolcaine v. Brown*, 3 Bro. C. C. 633; in *Hovendon v. Lord Annesley*, 2 Sch. & Lef. 637, 638, Lord Redesdale objected to that decision, but in the 3d edit. of his Pleadings, 173, 174, he appears to have concurred

(k) *Hercy v. Dinwoody*, 4 Bro. 268; and see the reasoning in *Whits v. Parnter*, Knapps' R. 226, ante, 741, 742.

(l) *Pickering v. Lord Stamford*, 2 Ves. jun. 280, 582, 583; and see *Dolcaine v. Brown*, 3 Bro. C. C. 633; and *Higgins v. Crowford*, 2 Ves. jun. 572; *Brownell v. Brownell*, 2 Bro. C. C. 63; and see *Sturt v. Mellish*, 2 Atk. 610.

(m) *Smith v. Clay*, Amb. 645; but see judgment more fully reported, 3 Bro. C. C. 639, in note taken from Lord Camden's note-book, 2 Sch. & Lef. 631; and see *Lacon v. Briggs*, 3 Atk. 105; *Hovendon v. Lord Annesley*, 2 Sch. & Lef. 630; *Right v. Macnamara*, MS., 2 Cox, 415; 1 Madd. Ch. Pr. 100.

on an account. (n) But on the other hand, there are cases in which, although parties would not be called upon to refund what has been applied, yet the accounts being clear, relief has been given, notwithstanding great length of time has elapsed. (o) In one case an account was directed after even thirty years' acquiescence. (p)

It is settled that the mere pendency of a bill in Chancery against the claimant is not sufficient to take the debt out of the statutes of limitations; (q) and so it is where the bill is dismissed. (r) But it is said that if a party be stayed by injunction it is otherwise, and it has been considered that where the statute has run by retention of a bill or otherwise in a Court of Equity, the court will not allow the statute to be set up. (s) But it should seem that unless the court has previously directed that the statute shall not be set up at law, it will not afterwards entertain a bill or application for that purpose; (u) and therefore the claimant should make a proper application to the Court of Equity pending the proceedings and before the statute has barred the remedy at law; or he should take care and issue and continue proper proceedings at law.

Pendency of
bill, its opera-
tion.

It is laid down that no advantage can be taken of the statute of limitations in Equity, unless it be pleaded or insisted upon by the answer. (x) But in case of a bill to redeem a mortgage and for an account, if it appear upon the face of the bill that the mortgagee has been in possession twenty years, the defendant may demur. (y) And it should seem that if, since the 9 Geo. 4, c. 14, a bill should charge that there was a payment or a written acknowledgment of a debt within six years, although lost, a mere plea of the statute would in equity be insufficient; (z) but that such charges in the bill of payment or ac-

Pleading, &c.
statute in
Equity.

(n) *Hercy v. Dinwoody*, 4 Bro. 257; and see *Smith v. Clay*, 3 Bro. C. C. 539, in n.; 3 C. Ambl. 645, but not so full; see also *Dolereins v. Browne*, 3 Bro. C. C. 646; *Baskerville v. Brain*, 24 February, 1804, MS., 1 Mad. Ch. Pr. 106; but the case of *Greig v. Somerville*, 1 Russ. & M. 338; ante, 767, n. (a); where the ambassador of the Emperor of Russia was allowed to prove a debt before actual and ultimate distribution after very great delay, but still his right was qualified.

(o) As in *Pickering v. Lord Stamford*, 2 Ves. 581; see *Astrey's case*, 2 Freem. 55.

(p) *Lord Kingsland v. Lady Tyrconnell*, 17 Feb. 1734, Dom. Proc. Lord Harcourt MS. Tables; see case in last note, and 1 Mad. Ch. Pr. 100, 106.

(q) *Anon.* 2 Atk. 1; *Dormer v. Fortescue*, 282; contra, *Anon.* 1 Vern. 73, but which an experienced counsel at the Equity bar recently advised was clearly not law, and directly at variance with the better

authorities of *Hurdret v. Caladen*, 1 Ch. Rep. 214; *Craddock v. Marsh*, Id. 203; *Peerer v. Bellamy*, Id. cited 2 Vern. 504; *Lake v. Hayes*, 1 Atk. 282, and 2 Atk. 1.

(r) *Anon.* 2 Ch. Cas. 217, recognized in *Pulteney v. Warren*, 6 Ves. 79; and see *Sturt v. Mellish*, 2 Atk. 610.

(s) *Ibid.*; 2 Mad. Ch. Pr. 310; *Mackenzie v. Pouis*, 4 Bro. P. C. 328.

(t) *Sirdefield v. Price*, 2 Young & J. 73, 75; *Sturt v. Mellish*, 2 Atk. 613, and *supra*, note (r); *Pulteney v. Warren*, 6 Ves. 79; *Grant v. Grant*, 3 Russ. 609.

(u) *Prince v. Heylin*, 1 Atk. 493.

(x) *Id. ibid.*

(y) *Hardy v. Reeves*, 5 Ves. 426; 1 Mad. Ch. Pr. 519; 2 Id. 310; *sed quare*, for in answer to a plea, an acknowledgment might be replied, 1 Mad. Ch. Pr. 520, 521.

(z) *Hayden v. Williams*, 7 Bing. 163; *College v. Horn*, 3 Bing. 121; *Baillie v. Sibbald*, 15 Ves. 185.

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knowledge must be *answered*, but whether by way of averment in the plea as well as in the answer has been doubted. (a)

3. In Bankruptcy.

3. It has been considered that a debtor to a *bankrupt* cannot set up the statute of limitations as a bar to a petitioning creditor's debt in an action at the suit of the assignees against such debtor; (b) but, on the other hand, it has been decided that a debt which could not be recovered in an action in consequence of the statute of limitations having *already* barred the same, will not be sufficient to support a commission or be proveable under it. (c) And unless a debt due from the bankrupt has been barred by the statute of limitations before the bankruptcy, it should seem that as a commission of bankruptcy creates a trust for all the then subsisting creditors, the statute of limitations would, immediately upon the issuing of the commission, cease to operate, so that no subsequent lapse of time, however considerable, would operate as a bar or defeat the right of each creditor to receive a dividend in respect of his debt.

4. Executors pleading statute.

4. It appears to have been considered, with analogy to a decision upon the statute against frauds, that an *executor* is not bound to avail himself of the statute of limitations, and that he may pay a debt although already thereby barred, (d) provided the demand be otherwise well founded; (e) and that an executor is not compellable to plead the statute in aid of the residuary legatee. (f) But it should seem that if he has reason to believe that the claim has been satisfied, he should, in the fair exercise of his trust, by such a plea afford the estate that protection which the law intended where claims remain unrecognized for more than six years, (g) and at the instance of another creditor, or legatee or next of kin, it should seem that an executor may be compelled to plead the statute. (h) We have seen that an executor may retain for a debt due to himself, although all legal remedy would have been barred if he had been put to his action, unless it could be shown that the debt had really been satisfied. (i)

(a) *Bayley v. Adams*, 6 Ves. 586; in Redesd. Tr. Pl. 219, 3d edit. it is said that there must be an averment and an answer; see *Anon.* 3 Atk. 70; and 2 Mad. Ch. Pr. 510.

(b) *Mavor v. Pyne*, 3 Car. & P. 91; *Gregory v. Hurrill*, 5 B. & Cres. 341; *Quantock v. England*, 5 Burr. 2630; *Ex parte Dewdney*, 15 Ves. 491, 493, 494.

(c) *Ex parte Dewdney*, 15 Ves. 479, 498; but see qualification, *Ex parte Ross*, in *re Coles*, 2 Glynn & J. 333; *Chitty on Bills*, 8th edit. 679—681.

(d) 2 Mad. Ch. Pr. Index, tit. Limitations; and *Buckmaster v. Harrop*, 7 Ves. 341; 13 Ves. 427; 1 Mad. Ch. Pr. 368, note (i).

(e) *Norton v. Frecker*, 1 Atk. 526; *ante*, 530, n. (o).

(f) *Lord Castleton v. Fanshawe*, 1 Eq. Abr. 305.

(g) And see *ante* 778, 779, as to a general devise to pay debts not taking an already barred debt out of the statute.

(h) *Ante*, 530.

(i) *Ante*, 534, 535.

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LIMITATIONS.5. Limitations of
proceeding in
Ecclesiastical
and Spiritual
Courts.

5. Independently of any statute of limitations, the death of the wrong-doer is in general a determination of any right to proceed in an *Ecclesiastical Court*, because the proceedings there are *in personam pro salute animæ or animarum*; as in case of an unlawful incestuous marriage, and enjoins the offender to perform a public penance in presence of the congregation. (k) And no such divorce can be obtained excepting during the life of the parties, (l) though a sentence of divorce may be *repealed* or *annulled* in the Spiritual Court after the death of the parties; (m) and though if a divorce take place during the joint lives, on account of the marriage having been incestuous, the children of the marriage are illegitimate; (n) it is otherwise if one of the parties to such marriage die before sentence pronounced. (o)

The 27 Geo. 3, c. 44, intituled, "An Act to prevent frivolous and vexatious suits in Ecclesiastical Courts," after reciting that it is expedient to limit the time for the commencement of certain suits in the Ecclesiastical Courts, enacts "that no suit for Defamatory Words shall be commenced in any of the Ecclesiastical Courts within England, Wales, or the town of Berwick-upon-Tweed, unless the same shall be commenced within *six calendar months* from the time when such defamatory words shall have been uttered;" and the 2d section enacts, "that no suit shall be commenced in any Ecclesiastical Court for *Fornication* or *Incontinence*, or for *Striking* or *Brawling* in any Church or Church-yard, after the expiration of *eight calendar months* from the time when such offence shall have been committed; nor shall any prosecution be commenced or carried on for Fornication at any time after the parties offending shall have been lawfully intermarried." But it has been recently determined that a Spiritual Court, notwithstanding this statute, may take cognizance of charges of fornication or incontinence against clergymen after the expiration of eight months from the time of commission, with a view to suspension, or deprivation or other punishment *merely clerical*. (p)

6. We have seen that no *action* can be brought for the recovery of any *penalty* for the not setting out *Tithes*; nor any *suit* instituted in any Court of Equity, or in any *Ecclesiastical*

6. Limitations of
actions respect-
ing Tithes.(k) *Blackmore v. Bryder*, 2 Phil. Ecc. Cases, 362.(l) 1 Bla. C. 440, *infra*, note (o).(m) Co. Lit. 33, 244; *Kenn's case*, 7 Co. 44; *Bury's case*, 5 Co. 98; but see *Robertson v. Lady Stallage*, Cro. J. 186.

(n) Co. Lit. 235.

(o) *Robertson v. Lady Stallage*, Cro. Jac. 186; *Kenn's case*, 7 Co. 43.(p) *Free v. Burgoync*, 1 Dow. Rep. New S. 115; 5 Bar. & Cres. 400; and 8 D. & R. 179, S. C.

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LIMITATIONS.

Court, to recover the value of any *Tithes*, unless such action shall be brought, or such suit commenced, within *six years* from the time when such tithes became due. (q)

7. Limitation of
suits in the Ad-
miralty Courts.

7. Suits in the *Admiralty Court* for *Seamen's Wages* not having been provided for by, nor construed to be within any prior act, (r) it was enacted by the 4 Ann. c. 16, s. 17, that all suits and actions in the Court of Admiralty for seamen's wages shall be commenced and sued within six years next after the cause of such suit or actions shall accrue, and not after, with a proviso in favour of persons beyond sea, and infants, &c. as before mentioned, relating to personal actions.

8. Indictments
and Summary
proceedings for
crimes before
magistrates.

8. In general there is no limitation of *Indictments* or *Criminal Proceedings*, which being on the behalf of the king are not considered to be *actions* or *suits* within the meaning of these acts. (s) And there have been instances of conviction and capital punishment even for murder more than twenty years after the offence was committed, (t) and no length of time can legalize a public nuisance; (u) but the long continuance of a public nuisance, though not strictly a bar to a criminal proceeding, may nevertheless be strong ground for urging, and for a jury's presuming that it was originally no nuisance, and that it became so only by persons voluntarily becoming inhabitants in the neighbourhood, for otherwise why has it been suffered so long to continue? (x) There are, however, some express limitations, as three years for prosecution for treason, unless against the king's life, (y) and some other instances. (z)

With respect to *Small Offences*, over which *summary* jurisdiction has been given to justices and others, the modern acts generally limit the times of the proceeding. Thus the larceny act, (a) the wilful and malicious trespass and injury act, (b) the act against wilful or malicious injuries to the person, (c) and the act for protection of game, (d) and against an hundred, (e) require the *summary* proceeding to be *commenced* within *three calendar months*.

(q) 53 Geo. 3, c. 127, s. 5, ante, 762; and *Talory v. Jackson*, Cro. Car. 513.

(r) *Ever v. Jones*, 3 Salk. 227; 2 Lord Raym. 934, 8. C.; *Hyde v. Partridge*, Id. 1204; *Hall v. Wyb*, 2 Salk. 421; Tidd, 9 ed. 16.

(s) 2 Hale, 158; Burn, J. Indictment.

(t) *Lieut. Col. Wall's case*; 4 Bla. C. 305, n. 2.

(u) *Weld v. Storney*, 7 East, 199; *Rex v. Cross*, 3 Campb. 227; *Rex v. Smith*, 4 Esp. R. 109; but see *semble*, *contra*,

Rex v. Neville, 1 Peake, C. N. P. 91.

(x) *Rex v. Neville*, 1 Peake, C. N. P. 91.

(y) 7 Wm. 3, c. 3, s. 5 & 6.

(z) Not attending church, &c. 1 East's P. C. 18, 186, 187; Indictments on Penal Statutes, 31 Eliz. c. 5; and see Russ. & R. C. C. 639.

(a) 7 & 8 Geo. 4, c. 29, s. 64.

(b) Id. chap. 30, s. 29.

(c) 9 Geo. 4, c. 31, s. 34.

(d) 1 & 2 Wm. 4, c. 32, s. 41.

(e) 7 & 8 Geo. 4, c. 31, s. 3.

In cases when the time for adopting a civil remedy for an injury has expired, if the injury were also indictable, then the party may still be punished by indictment, although, after a considerable lapse of time, it would scarcely be expedient to institute such proceeding. An exception might occur, as that of a person holding a foreign situation having been libelled just before he left England, and he did not hear of it for more than six years after, or could not conveniently bring his action before his return, and yet in that case the statute would run against a civil action, because he was actually in England at the time the libel was published. In such a case he might with propriety indict for the libel, and thus prevent the calumniator from totally avoiding punishment.

9. Although in all cases affected by the statute of limitation, they impliedly authorize and enable a party to sue at any time within the prescribed periods, yet if he wait till the last moment his claim will frequently *not be favoured*, but treated by a court and jury as stale, especially in cases of injury to character or feeling. Other cases also occur not affected by the statutes of limitations, and when it will be found that, as well at *law* as in *equity*, and in the Admiralty, Spiritual, and other courts, *laches* or great *lapse of time* will at common law *prejudice*, and sometimes operate in bar of a remedy which it is discretionary and not compulsory in the court to afford.

9. Consequences of *Laches*, or great lapse of time independently of the statutes of limitation. (f)

Thus in *Courts of Common Law* a motion for an *Irregularity* in the proceedings must be made in the first instance, or it will be too late to object; (g) and motions for *Criminal informations* against a magistrate for misconduct in the execution of his office, ought in general to be moved for within the *first term* after the supposed offence, though, where no assizes have intervened, it may be moved for in the *second term*, provided it be not so late in the term as to preclude the magistrate from the opportunity of showing cause against it in the same term; (h) and where *twelve months* have elapsed, the court will not interfere, but leave the party complaining to indict, though he only recently became acquainted with the crime. (i) And, though the rules observed by the court respecting the time of moving for a cri-

(f) See in general the observations in *White v. Parnther*, Knapp's Rep. 226.

(g) *Ballantyne v. Wilson*, Forrest's Rep. 51; *Wickham v. Mealing*, 2 Price R. 9; Chitty's Prac. 96 to 99, 381; *Dalton v. Barnes*, 1 M. & S. 230; *D'Argent v. Vi-*

rant, 1 East, 330; *Shawman v. Whalley*, 6 Taunt. 185.

(h) *Rex v. Smith*, 7 T. R. 80; *Rex v. Harris*, 13 East, 270; *Rex v. Smith*, Id. 322; Tidd, 498.

(i) *Rex v. Bishop*, 5 B. & Ald. 612.

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minal information apply in strictness only to *magistrates*, a prosecutor should in every case bring his accusation before the court as early as possible, because any delay which he is unable to explain will operate greatly to his prejudice, and sometimes even induce the court to refuse the application. (j) These are only a few of the very numerous instances in which delay will prejudice at law, independently of any statute of limitation, and which will be noticed in the next volume. (k)

In *Courts of Equity* also delay will generally prejudice; thus if there be laches in seeking relief where a *Trustee* has purchased the trust property, (l) or otherwise to impeach a sale by him, (m) or in applying to the court for *Specific performance* of an agreement, (n) the court will refuse the required relief. In the latter case Lord Alvanley held, that a party cannot call upon a Court of Equity for a specific performance, unless he has shown himself "*ready, desirous, prompt, and eager.*" (o) And we have seen instances where even a day or two's delay in filing a bill or moving for an injunction, would induce the court to refuse it. (p) But a party's resting or remaining in *possession* passive and contented upon an *equitable* without clothing himself with the *legal* title has never been held to be such laches as to preclude relief, or enforce specific performance of an express or implied contract to convey the legal title. (q) And we have seen, that in cases of *fraud*, it suffices in equity if the party defrauded seek his remedy there within the statutory limitations *after* he has discovered the fraud and the cause of complaint; (r) and Courts of Equity, in cases not within the positive enactment of the statutes, consider the absence abroad of the claimant, whilst serving in the army, a reasonable excuse for delay. (s)

(j) *Rex v. Robinson*, 1 Bla. R. 542; *Rex v. Bishop*, 5 B. & Ald. 612.

(k) And see *ante*, 737, 738, and next chapter as to the time of applying for a Mandamus or Bill for Specific Performance; and *Rex v. Cockermouth*, 1 Bar. & Adolp. 378; and *infra*, notes (l), (m), (n).

(l) *Webb v. Rooke*, 2 Sch. & Lef. 672; *Campbell v. Walker*, 5 Ves. 678; *Whithcote v. Lawrence*, 3 Ves. 740, but see *Attorney-General v. Dudley*, Coop. 146; 1 Mad. Ch. Pr. 114.

(m) *Chalmer v. Bradley*, 1 Jac. & Walk. 59.

(n) 1 Mad. Ch. Pr. 415, 416.

(o) *Milward v. Earl Thanet*, 5 Ves. 720, and see *Guest v. Hunfray*, 5 Ves. 818, and 1 Madd. 415 to 418, for instances where relief was refused.

(p) *Ante*, 717, note (q), and 719, (b).

(q) *Crofton v. Ormsley*, 2 Sch. & Lef. 604.

(r) *Ante*, 766, 779.

(s) *Mullins v. Townsend*, 2 Dow. R. N.S. 430.

CHAPTER X.

OF THE REMEDIES TO COMPEL SPECIFIC RELIEF OR PERFORMANCE, AND IN PARTICULAR OF WRITS OF MANDAMUS AND BILLS FOR SPECIFIC PERFORMANCE.

Of SPECIFIC RELIEF in general :

I. Respecting the PERSON, and Rights of Persons.

1. At Law in general.
By MANDAMUS fully.
2. In Equity.
3. In Ecclesiastical and other Courts.

II. Respecting PERSONAL Property.

1. At Law.
2. In Equity.
3. In Ecclesiastical Courts.
4. In Prize Courts, &c.

III. Respecting REAL Property.

1. At Law.
2. In Equity.

IV. Bills and other Proceedings for SPECIFIC PERFORMANCE.

1. The General Rules and Practice as to Bills for Specific Performance of Contracts.
2. Relating to the Person.
3. Relating to Personal Contracts.
4. Relating to Real Property.
5. The Practice in General.

V. Bills to ACCOUNT, &c.

IN the preceding chapters our attention has been confined to the *Prevention of Injuries*, and although we have examined the cases where a party may escape, or be rescued, or may retake his wife, his child, or his personal or real property, and may remove imprisonment by habeas corpus, we have not as yet fully considered the other numerous instances in which a party may obtain *Specific Relief or Specific Performance*. We will, therefore, in this chapter suppose, that an injury or breach of contract is complete, and that the party injured would prefer *specific relief* or performance in preference to mere *Compensation in damages or punishment*.

Of Specific Relief in general, and when, and how, and in what court to be obtained, whether as regards the person, or personal or real property.

It will be obvious that, in many cases a party injured would prefer to be *restored to precisely the same situation* in which he stood before the injury was committed, or to be *placed in that* which another party, for valuable consideration, has engaged he should be, and that when that is practicable, it is the best measure of justice to enforce it, and that the merely giving damages in lieu of the restoration of the person of the relative, or of the chattel, or the land, would be very inadequate, and encourage the rich and powerful by force or fraud to take from the poor his property, and then merely to pay him the value. In general the common law action of *Detinue* or *Replevin* enables the owner to recover possession of the specific chattel wrongfully detained, and a Court of Equity will, upon a bill filed, also compel the delivery of an heir-loom or specific legacy, and compel the performance of certain substantial contracts, such as a contract to convey land, &c. These are only a few instances, and it will be necessary fully to examine the general principles and rules, and some of

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REMEDIES, &c.

the leading instances in which courts will interfere and afford specific remedies. It seems expedient to arrange the subject as in other instances, viz. as relates to 1st, *The Person*, and *Personal Rights* absolute and relative. 2dly, *Personal Property* and *Contracts*. And 3dly, As regards *Real Property*: under each considering the specific remedy at *Law*, then in *Equity*, then in the *Ecclesiastical* and *Spiritual Courts*, and lastly in the *Admiralty* or *Prize Courts*. But as regards the remedy by *Mandamus* at law, or by bill for *specific performance* in equity, these being of *great practical importance*, will be fully considered.

I. Respecting
the person, ab-
solute and rela-
tive.

I. As respects the *Person* and the *absolute* rights, the *specific* remedy for false imprisonment, we have seen, is a writ of *Habeas Corpus*, or summary application for release from imprisonment. But there are some few private rights, principally of the person, the violation of which may be remedied by writ of *Mandamus*, the nature and application of which will be presently stated.

As respects the *Relative* rights of *Persons*, we have seen in what instances Courts of Law or Equity will interfere to afford specific relief, viz. restoration of the *Person* of the Relative, whether wife, child, apprentice, or servant, and which is usually by writ of *Habeas Corpus*. (a) But a guardian may obtain restoration of his ward by petition, without filing a bill. (b)

Formerly also a contract to *marry* might have been *specifically* enforced, but at length the legislature wisely considering that the greatest misery would probably ensue from a forced union, enacted that no bill in Equity, or suit in the *Spiritual Court*, shall be sustainable to compel marriage, (c) and the party complaining of a breach of such engagement can only sue at law for damages; and even then the contract is considered so personal, that the executors of a female, to whom a promise of marriage has been made, cannot sue, and the remedy dies with the person. (d) But if the contract of marriage has been legally *completed*, according to the *lex loci*, where the ceremony was performed, then the *Ecclesiastical* or *Spiritual Court* will enforce specific observance of the resulting duties, by entertaining a suit at the instance of the husband or the wife, for the *restoration of conjugal rights*; and though, in fact, there is no pos-

(a) *Ante*, 684 to 695.

(b) *Wright v. Naylor*, 5 Madd. R. 77;
1 Newl. Ch. Pr. 211.

(c) 4 Geo. 4, c. 76, s. 27; 1 Bla. Com.

433.

(d) *Chamberlain v. Williamson*, 2 Maule
& Selw. 498.

sibility of strictly compelling specific performance of duties, according to the *spirit* of the sacred vow, yet if the party continue disobedient to the sentence of the court, he or she will be in contempt, and may be perpetually imprisoned until observant, and instances of which have sometimes, though rarely, resulted from the proceeding. Suits of that nature involve all the questions that can arise, not only upon the legality of the marriage, but also upon any collateral question, whether the husband or the wife has by adultery or such gross cruelty or infamous conduct forfeited the matrimonial rights, and the ultimate decree will depend on those circumstances. The practical mode of conducting such a suit will be fully considered when we treat of the jurisdiction and practice of the Ecclesiastical Courts.

There are, as we have just suggested, some *private* rights, principally of the *Person*, the specific enforcement of which may be secured by writ of *Mandamus*, which commands the completion or restitution of the right. The power of issuing writs of *Mandamus* is one of the highest and most important branches of the jurisdiction of the Court of King's Bench, and in general exclusively belongs to that court, (e) and figuratively it has been treated as its *principal flower*, and it may be compared to a *Bill in Equity* for a *specific performance*. (f) It is used, however, by that court *principally* for *public* purposes, and to enforce performance of *public* Rights or *Duties*, and generally speaking, it is issued *only* to enforce a *public Right* or a *public Duty*; and therefore the court will not grant a *mandamus* to a trading corporation at the instance of one of its members, to compel them to produce their accounts for the purpose of declaring a dividend of the profits. (g) And Abbott, C. J. said, "This is an application for a *Mandamus* to a trading corporation, at the instance of an individual member, to compel the directors of that corporation to produce their accounts and divide their profits: it is in effect, an application on the behalf of one of several partners, to compel his co-partners to produce the account of profit and loss, and to divide their profits, if any there be. The examination of the accounts of a trading company may be effectually entered into in the Court of Chancery, but this court is a very unfit tribunal for

What Rights
of the *Person*
may be
enforced by
Writ of *Manda-*
mus in the Court
of K. B.

(e) A *mandamus* to examine witnesses in India, given by 13 Geo. 3, c. 63, s. 44, and which may be issued at the instance of a plaintiff or defendant out of any of the courts at Westminster, constitutes a statute exception.

(f) *Andoley v. Joye*, Poph. 176. The general practice relative to writs of *man-*

damus will be considered in the next volume. See who in general, 2 Selwyn, Nt. Pri. 6th ed. 1061; Comyn. Dig. *Mandamus*; and Impey on *Mandamus*.

(g) *Rex v. Bank of England*, 2 Bar. & Ald. 640; *Rex v. London Insurance Company*, 5 Bar. & Ald. 899; and see *Anon.* 2 Ld. Raym. 989.

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such a subject. A mere trading corporation differs materially from those which are entrusted with the *government* of cities and towns, and therefore have important *public* duties to perform. No instance has been cited in which the court has granted a mandamus to a corporation like the present, and I think we ought not now to establish the precedent." And Bayley J. said, "The court never grant this writ except for *public purposes*, and to compel the performance of *public* duties. This is an application at the instance of one of several partners in a trading company, to compel his co-partners to divide their profits; but that is a mere *private* purpose and presents a fit subject for enquiry on the other side of the hall. There is no instance in which the court have granted a mandamus to a trading corporation; and that being so, I think that we should not now grant it for the first time." Nor does a mandamus lie to an Insurance Company to *transfer* shares standing in the name of a bankrupt into the names of his assignees. (h) But if there be a *public duty* to enforce, then the writ may be directed to the *inhabitants of a parish*, in case there be no standing officer. (i)

However, a writ of mandamus does operate, and most powerfully and extensively, in affording specific relief, and enforcing some *Private Rights*, when they are withheld by a *Public Officer*, (j) and though principally for the *admission* or *restitution* to a *Public office*, yet it extends to other rights of the person or property.

It is another general rule, that this writ is only to be issued where the party has *no other specific remedy*; and for that reason the court refused a mandamus to a bishop to license a curate, because the latter had another specific remedy by *quare impedit*. (k) And on the same ground a mandamus to the bank to transfer stock, was refused, because the party might recover the value in an action of assumpsit. (l) And, although in the case of a *clear public* right, if it be important to prevent great and *immediate* public damage or inconvenience to many persons, that the court should *immediately* interfere, as in case of a public bridge, or other work, being in a very dangerous state, and requiring immediate repair or support, if there be no doubt respecting the obligation to repair, a mandamus may be issued, although there be another remedy by

(h) *Rex v. London Assurance Company*, 1 Dowl. & R. 510; 5 B. & Ald. 899, S.C.

(i) *Rex v. Wir*, 2 Bar. & Adolp. 197; and *Rex v. Greenwich*, S. P.

(j) *Per Buller, J. in Rex v. Bishop of Chester*, 1 Term Rep. 404; *Rex v. Marq. of Stafford*, 3 Term Rep. 652; *Rex v.*

Bank of England, Dougl. 526; and see *Rex v. Justices of Cambridgeshire*, Id. 325; *Rex v. Bristol Dock Company*, M. 52 Geo. 3, S. P.; Selwyn, Ni. Pri. 6th ed. 1072.

(k) *Rex v. Bishop of Chester*, 1 Term Rep. 396.

(l) *Rex v. Bank of England*, Dougl. 523.

indictment. (m) Yet, if the right or the obligation be doubtful, the court will refuse the writ, and leave the prosecutor to proceed by indictment. (n) And in general, to induce the court to interfere, there must be not only a *specific legal right*, but also the *absence* of any other *specific legal remedy*, in order to found an application for a mandamus. (o)

Further, it is not to be considered a writ of *Right*, (p) but it is in the discretion of the court to grant it, and as no writ of error lies, it is a jurisdiction to be exercised with great caution. (q)

Another rule is, that the court will not interfere by mandamus after considerable delay, and where the party applying for it has slept on his right, and allowed perhaps *other rights* to grow up; or a disposal of the fund out of which the claim ought originally to have been perfected. And therefore, where allotments were set out under an inclosure act to a party claiming them, and possession given in or about 1817, and there was no road to them, nor any access but through allotments made or land sold under the act to other persons, on motion, twelve years afterwards, (viz. in 1829), for a mandamus to the commissioners (who had not yet published their award) to set out an occupation road to the first mentioned allotments, the court held that the application came too late; and Bayley J. mentioned a case (r) where a motion was made in 1813 for a mandamus, directing the commissioners under a canal act to cause a jury to be summoned and compensation assessed for lands taken in 1799, and the court said the application came too late. (s)

As respects the *Rights to Offices* of a public nature, and the *Duties* of certain officers and personages, standing in certain situations, the possession of the *right* on the one hand, and the observance of the *duty* on the other, will be enforced by this writ of Mandamus, and as the instances are numerous,

The general application of Writs of Mandamus principally in enforcing the Rights and Duties of persons. (t)

(m) *Rex v. Severn and Wye Railway Company*, 2 Bar. & Ald. 646, where Abbott C. J. said, "If an indictment had been a remedy equally convenient, beneficial, and as effectual as a mandamus, I should have been of opinion that we ought not to grant a mandamus; but I think it is perfectly clear that an indictment is not such a remedy, for a corporation cannot be compelled by indictment to reinstate the road. The court may indeed, in case of conviction, impose a fine, and that fine may be levied by distress, but the corporation may submit to the payment of the fine, and refuse to reinstate the road; and at all events a considerable delay may take place. The remedy, therefore, is not so effectual as that by mandamus." And see also *Rex v. Commissioners of Dean Inclosure*,

2 Maule & S. 80, 81; Cases of Mag. 88.

(n) *Rex v. Corporation of Plymouth*, and case there cited; and see *Weale v. West Middlesex Water Works*, 1 Jac. & W. 358, 370, 373; as to the refusal of *specific performance*, post.

(o) Per Lord Ellenborough, C. J. in *Rex v. Archb. of Canterbury*, 8 East, 219.

(p) Per Ashurst J. in *Rex v. Commissioners of Excise*, 2 Term Rep. 385.

(q) Selwyn, N. P. 6th ed. 1064.

(r) *The King v. The Stainforth and Keadley Canal Company*, 1 M. & S. 32.

(s) *Rex v. Commissioners of Cockermouth Inclosure Act*, 1 Bar. & Adoph. 378, 380.

(t) See in general Com. Dig. Mandamus; 2 Rol. Ab. Restitution; Selwyn, N. P. 6 ed. 1062; Impey's Mandamus.

**CHAP. X.
MANDAMUS.**

Alphabetical
list of instances
in which a Man-
damus will or
will not be
issued.

it is expedient to enumerate, in the following alphabetical table, some of the principal instances when the Court of King's Bench will grant or refuse a mandamus.

Accounts, enforcing delivery of, &c. (See *Churchwardens and Overseers, post, 806.*)

Administration and Probate. (See *Probate, post, 806.*)

Admission and Admittance. (See *Copyhold post, 794, and Officer, post, 798.*)

Alehouses. (See *Licenses, post, 798.*)

Appeal. (See *Justices, Overseers, Rates, and Sessions, post, 804.*)

Apprentices.—The writ lies to Mayor of a Corporation to admit an apprentice to his freedom when he has a right by service, although he had broken his covenant not to marry; (u) so the writ lies to enrol indentures in proper cases, but not otherwise. (v) But when the binding or service of a notary's clerk has been insufficient, a mandamus to the scriviners' company to admit him to practise as a notary was refused. (x) And a mandamus requiring the admission of an attorney to practise in an inferior court should be to *examine*, and if fit to admit, and not absolutely to admit. (y)

Arbitration and Award.—These, when under a public act, may be enforced by mandamus, but otherwise not. (z)

Books and Documents. (See *Overseers, post, 801.*)—The writ issues to compel a removed clerk to deliver up books of a public corporate company; (a) and to compel overseers to deliver up parish books to their successors, (b) but it was refused to new churchwardens against the old, on the ground that the right might be tried by an issue at law; (c) and in the case of a vestry clerk, he might maintain trover; (d) nor will it lie to compel an attorney and steward to deliver up documents. (e) Though, at the instance of the lord of the manor, or of the judge of a court, a mandamus might issue to compel the steward or officer to deliver up the court roll, records, and proceeding, because the immediate production of them might be essential to the public. (f) (See further, *Inspection, post, 810, 811.*)

(u) *Townsend's case*, 1 Lev. 91; Sir T. Raym. 69, S. C.

(v) *Rex v. Marshall*, 3 T. R. 2.

(x) *Rex v. Scriveners' Company*, 10 B. & C. 511.

(y) *Rex v. York*, 3 B. & Adolp. 790.

(z) *Over Kellid Inclosure Act*, and *Rex v. Washbrooke*, 7 Dowl. & R. 221; Tidd, 9 ed. 844, *post*, 796, n. (y), 805.

(a) *Rex v. Wildman*, 2 Stra. 879.

(b) *Rex v. Clapham*, 1 Wils. 305, *post*.

(c) *Rex v. Street*, Mod. Cas. 98; and see *Anon.* 2 Chit. R. 255.

(d) *Anon.* 2 Chit. R. 255, *post*, 810, (a).

(e) *Coch v. Harmer*, 6 East, 404.

(f) *Rex v. Ingram*, 1 Bla. R. 30; *Hughes v. Mayne*, 3 T. R. 275; *Corpus Christi College*, 6 Taunt. 105, S. C.; *Rex v. Erle*, 2 Burr. 1197; and see *Rex v. Hulston*, 1 Stra. 621; *Marshall's Case*, 2 Bla. 912; *Ex parte Grubb*, 5 Taunt. 206; Tidd, 9th ed. 87.

Burial will be enforced by mandamus, but not burial in a particular place or manner. (g)

Case, Special.—The statement of this may be compelled by mandamus, when the sessions agreed that there should be a case, unless it should appear that there would be no utility in stating it. (h) But unless the sessions have agreed to state a case, they are not bound to grant it. (i)

Church and Church Rates.—In general, no writ lies to compel the making of a rate, because such a rate is of ecclesiastical jurisdiction. But a mandamus may issue under the 10th Anne, c. 11, sect. 21, to assemble a meeting, and to inquire and agree whether it is fit to make a rate. (k)

Churchwardens. (See *Officers, post*, 798.)—The writ lies to *swear* in a churchwarden, (l) and this, although the ministerial officer has been inhibited by the bishop. (m) And though in one case a mandamus to the churchwardens of St. Botolph, Bishopsgate, commanding them to call a vestry meeting in Easter week to *elect new churchwardens* was refused, as there was no instance of such a mandamus, and the court could not take notice who had the right to call the vestry, and consequently could not know to whom it should be directed. (n) But in a subsequent case the court granted a mandamus to the *inhabitants* of a parish liable to contribute to the church rate, to meet and assemble together, with the minister, to elect churchwardens, (o) and a churchwarden may by mandamus be compelled, upon showing special reasons, to produce his accounts to a party, in pursuance of 17 Geo. 2, c. 38. (p)

Constable.—The writ may be issued to compel the hearing an appeal against a *constable's* account, under 18 Geo. 3, c. 25, s. 5, but only when a majority of the overseers concurred in the appeal. (q)

Conviction.—A mandamus will be issued to compel justices to set out the evidence in their Conviction, as directed by 3

(g) *Post*, 806.

(h) *Rex v. Pembrokeshire*, 2 Bar. & Adolp. 391; *Rex v. Effingham*, 1d. 393, note (o); and see Burn's J., *Poor*, 786 to 789, 829.

(i) *Rex v. Darley Abbey*, 14 East, 285; Burn's J., *Poor*, 786.

(k) *Rex v. St. Margaret's, Westminster*, 4 Maule & Sel. 250, and *post*, 800, n. (h), 804, n. (x).

(l) *Post*.

(m) *Rex v. Simpson*, Selwyn, N. P. Mandamus, 1062, note 1; *Anon.* 1 Vent. 115.

(n) *Anon.* 1 Stra. 686; but see *Rex v. Wix*, 2 B. & Adolp. 196; and see next case, that new churchwardens and overseers may by mandamus be compelled to summon a meeting of inhabitants for establishing a select vestry; *Rex v. London* 2 B. & Adolp. 506.

(o) *Rex v. Wix*, 2 B. & Adolp. 197; *post*, 804.

(p) *Rex v. Clear*, 4 B. & Cres. 899; 7 D. & R. 395, S. C.; when not, *Rex v. Smallpiece*, 2 Chit. Rep. 288.

(q) *Rex v. Manchester*, 1 Dowl. & B. 454.

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Geo. 4, c. 23, s. 1, when that act applies. (r) But not to enforce a conviction doubtful in validity. (s)

Copyhold.—This writ lies to the lord and steward of a manor, to compel an admission to copyhold. Thus, if the lord of a manor refuse to admit a purchaser, or a devisee, or even an *heir* to copyhold, a mandamus may be issued to compel him, (t) though the lord's remedy to compel admittance and payment of the fine would be by proceedings for a forfeiture, *quousque* the fine paid. (u) A bill in equity also may be filed to compel a lord to hold courts and admit, and that appears to have been originally the only proceeding, but ultimately courts of law assumed jurisdiction, and now almost exclusively exercise it. (x) But no action at law can be supported against the lord for refusing to admit, (y) though probably, when the lord of a manor has perversely refused admittance after proper formal request, the court, under the recent act, would subject him to pay the costs of the application. (z)

Corporation. (See *Officers, post*, 798.)—The writ issues to compel the filling up of *vacancies* in a corporation consisting of a definite number, and which by deaths of burgesses might otherwise become extinct, and which is a proceeding expedient more frequently to be adopted; (a) so to fill up vacancies or compel serving corporate offices; (b) and this, although the party has paid a fine, the payment of which does not exempt, (c) and it lies to compel the proceeding to a new election, when the former was clearly colourable and void. (d) But the Court of King's Bench will not issue a mandamus to compel a mayor to put a resolution to repeal certain bye-laws, there being no precedent for issuing a writ in such a case. (e)

Courts.—When it is a duty to hold a court for the benefit of suitors, it may be enforced by mandamus, (f) and this even as to the place of holding; (g) and the writ may be issued

(r) *In the matter of Rix*, 4 Dowl. & R. 352; *Rex v. Marsh*, Id. 260; and see "*Justices*," and *Rex v. Warnford*, 5 Id. 489.

(s) *Rex v. Broderip*, 5 B. & Cres. 239; 7 D. & R. 861; *Rex v. Robinson*, 2 Smith, 274; *Rex v. Buckinghamshire*, 1 Bar. & Cres. 485; 2 D. & R. 689.

(t) *Rex v. Rennett*, 2 T. R. 197; *Rex v. Brewers' Company*, 3 B. & Cres. 172; 4 D. & R. 492, S. C.; *ante*, 351; and see *infra*, note (h).

(u) *Ante*, 351.

(x) 1 Mad. Ch. Pr. 253, 254; *Moor v. Huntingdon*, Nels. 12; Co. Caryl. sect. 39.

(y) *King v. Coggan*, 6 East, 431; 1 Mad. Ch. Pr. 254.

(z) 1 Wm. 4, c. 21, sect. 8.

(a) *Rex v. Norwich*, 1 Bar. & Adolp. 310; and *Rex v. Grampound*, 6 T. R. 301; *Case Town of Nottingham*, 2 Selwyn, N. P. 1072.

(b) *Rex v. Leland*, 3 M. & S. 184.

(c) *Rex v. Bowyer*, 1 B. & Cres. 585; 2 Dowl. & R. 842, S. C.

(d) *Rex v. Cambridge*, 4 Burr. 2008; *Rex v. Bedford*, 1 East, 79.

(e) *Rex v. Newcastle*, 3 B. & Adolp. 252.

(f) *Rex v. Hastings*, 5 Bar. & Ald. 692; 1 D. & R. 148; *Rex v. Havering*, 2 D. & R. 176, n; 5 B. & C. 691.

(g) *Rex v. Ilchester*, 2 D. & R. 727; *Rex v. Grantham*, 1 Wils. 716; and see *post*, 795, tit. Inferior Courts, &c.

to compel the holding of a copyhold court, to accept a surrender. (*h*)

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Costs (and see *Overseers. Rate.*)—Unless the power to award costs be clear the court will refuse a writ of mandamus to levy a rate for the costs incurred in defending actions for damages done by riotous assemblies under the 57 Geo. 3, c. 19, s. 38. (*i*)

Court Rolls. (See *Inspection, post*, 810, 811.)

Dissenters.—A mandamus lies to justices to register and certify a dissenting meeting-house, (*k*) and to admit a party to take the oaths in order to become a teacher of a dissenting congregation. (*l*)

Distress. (See *Inferior Courts, &c.*)—A mandamus lies to compel the backing of a distress warrant into another county under 35 Geo. 3, c. 101, s. 2, (*m*) but not to issue a distress warrant if the legality of the conviction be doubtful. (*n*)

Evidence.—A mandamus may be issued at the instance of the plaintiff or defendant to examine witnesses in India under 13 Geo. 3, c. 63, s. 44. (*o*) But not to compel a magistrate to produce depositions to an intended prosecutor for perjury, but the magistrate must be subpoenaed. (*p*)

Highways. (See *Surveyor, post*, 804.)

Inferior Courts and Judges thereof, and Justices of Peace, and other Ministerial Officers, to proceed according to their respective duties.—Thus this writ issues to compel justices to give judgment on an information of seizure; (*q*) to hear an application of journeymen millers to make a rate, or the hearing of any other matter which they are required by statute to hear, although upon the hearing they might decide as they think fit. (*r*) So to hear a complaint respecting non-payment of a church-rate, though they might determine as they think proper. (*s*) So if the sheriff or his deputy neglect to enter a plaint in replevin, in the county court, for damage feasant, the Court of King's Bench would compel him by mandamus, though not by a summary motion. (*t*) So where a statute directs, that justices of the peace shall make compensation to

(*h*) *Rex v. Boughey*, 1 Bar. & Cres. 565.

(*i*) *Rex v. Lynn*, 3 B. & Cres. 147; 4 D. & R. 778, S. C. See the present act 7 & 8 Geo. 4, c. 31, which now provides modes of reimbursement.

(*k*) *Rex v. Derby*, 4 Burr. 1991.

(*l*) *Peake's case*, 6 Mod. 310; 2 Salk. 572, S. C.

(*m*) *Rex v. Kynaston*, 1 East, 117.

(*n*) *Rex v. Robinson*, 2 Smith's R. 274; *ante*, 794, note (*s*).

(*o*) *Grillard v. Hague*, 1 Brod. & B. 319; 4 Moore, 313, S. C.

(*p*) *Ex parte Bedford*, 1 Chit. R. 227; but see *Rex v. Smith*, 1 Stra. 126; *Welsh v. Richards*, Barnes, 468.

(*q*) *Rex v. Tod*, 1 Stra. 530.

(*r*) *Rex v. Kent*, 14 East, 395; *Rex v. Cumberland*, 1 M. & S. 190.

(*s*) *Rex v. Wrottesley*, 1 B. & Adolp. 648.

(*t*) *Ex parte Boyle*, 2 Dowl. & Ryl. 13.

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the sheriff in lieu of abolished gaol fees, the making such compensation will be enforced by mandamus.^(u) So to commissioners of bankrupts, to issue their warrant for further examination.^(x) So to arbitrators under a canal act to appoint an umpire as therein enjoined.^(y) To a visitor to hear an appeal and give some judgment.^(z) So to compel an inferior court to give judgment,^(a) but not to grant a new trial unless the former were a nullity.^(b) To a canal company in a local act to assess the value of land taken by them, pursuant to provisions, and make recompense, provided the application be made within a reasonable time, but otherwise not.^(c) So a mandamus to justices may be issued to compel them to allow the expenses sustained by an appellant parish in keeping a poor person from the time of his removal till the order of removal was discharged,^(d) and the writ also lies to compel the warden of a college to affix the corporate seal to an answer in chancery.^(e)

Negative.—But the writ will not be granted unless the act required to be done be clearly within the act or duty to be performed,^(f) nor to perform an act which might render the justices liable to an action, the issue of which would be doubtful, though it would be otherwise if there were no probability of such liability.^(g) Nor will it lie to dismiss an appeal,^(h) nor to re-hear an appeal against an order of removal after judgment given at sessions, though it might be otherwise if no judgment had been given.⁽ⁱ⁾ Nor will it issue to compel justices to come to any particular prescribed decision.^(k) But if the sessions should erroneously decide that they have no jurisdiction when they had, and on that account dismissed the appeal, then a mandamus lies.^(k) Nor will the writ issue to compel the re-hearing of an appeal unless where the evidence on hearing one side had been *totally* rejected, for that would be in effect the same as if the appeal had not been heard at all; ^(l) nor will

(u) *Rex v. Middlesex*, 3 B. & Adolp. 100.
(x) *In re Bromley*, 3 Dowl. & R. 310, and post, 805, 806.

(y) *Rex v. Goodrich*, 3 Smith's R. 388.
(z) *Rex v. Ely*, 5 T. R. 475; *Rex v. Lincoln*, 2 Id. 338; *Rex v. Bury*, Id. 346; *Rex v. Worcester*, 4 Maule & S. 415; when not, *Rex v. Conynham*, 5 B. & Ald. 885; 1 Dowl. & R. 529.

(a) *Brook v. Ewers*, 1 Stra. 113; *Ex parte Amherst*, T. Raym, 214; *Ex parte Morgan*, 2 Chit. R. 250.

(b) *Ex parte Morgan*, 2 Chit. R. 250.

(c) *Rex v. Stanford*, 1 Maule & Sel. 32.

(d) *St. Mary's, Nottingham, v. Kirklington*, 2 Sess. Cas. 67.

(e) *Rex v. Windham*, Cowp. 377; *Rex v. Cambridge*, 3 Burr 1647.

(f) *Rex v. Hayward*, 1 M. & S. 624.

(g) *Rex v. Buckinghamshire*, 1 Bar. & Cres. 485; 2 Dowl. & R. 809, S. C.; *Rex v. Robinson*, 2 Smith, 274; *Rex v. Broderip*, 5 B. & C. 239; 7 D. & R. 861, S. C.

(h) *Rex v. Wilts*, 2 Chit. R. 257.

(i) *Rex v. Leicestershire*, 1 M. & S. 444; *Rex v. Carnarvon*, 4 B. & Ald. 86.

(k) *Rex v. Middlesex*, 4 B. & Ald. 298; *Rex v. Worcestershire*, 1 Chit. R. 649.

(l) *Rex v. Carnarvon*, 4 B. & Ald. 86, 88; *Rex v. Middlesex*, Id. 298; *Rex v. Gloucestershire*, 1 B. & Adolp. 1, 5.

it lie to review a decision on the ground that they had come to a wrong decision; (m) nor if a party have omitted to give any notice of appeal against a conviction, and on that account his appeal has been dismissed; (n) nor if a petition has been heard and considered although witnesses tendered were not examined; (o) nor to compel justices to proceed upon an order of removal which they had previously by order superseded; (p) nor to compel justices to proceed where they could not legally do so on account of a defect in their proceedings; (q) nor to regulate the practice of the quarter sessions unless it appear to be manifestly wrong or unjust; (r) nor to compel a bishop to state his reasons for refusing to admit a party as deputy register of a diocese; (s) nor to compel the mayor of a town corporate to propose a resolution for repealing certain by-laws, and which he had refused to put. (t)

Not when the Power was Discretionary.—When justices have discretionary power the Court of King's Bench will not interfere, as in granting *Alehouse Licenses*, (u) and the same rule applies to other persons; (x) nor to compel justices to allow an item in a coroner's account; (y) nor even to compel a justice or judge to come to a particular decision; (z) nor to make an order of maintenance on a particular parish; (a) nor to compel sessions to hear an appeal when out of time and where they in their discretion refused a postponement; (b) nor to compel sessions to give reasons for their judgments or make any special entries upon their records; (c) nor in general to justices to assign their reasons for their decision. (c) And though when the sessions upon delivering an appeal on a settlement case have granted a case and none has been stated, the court will under some circumstances direct a mandamus to the justices who heard the appeal to state a case, (d) they will not do so where it is clear that such a proceeding could lead to no result; as where the chairman, in consequence of his own opinion and that of the court upon the facts differing, refused to sign any

(m) *Rex v. Worcestershire*, 1 Chit. R. 649; *Rex v. Justice*, 1 Chit. R. 164.

(n) *Rex v. Oxfordshire*, 1 M. & S. 446.

(o) *Rex v. Cumberland*, 1 M. & S. 190; *Rex v. Kent*, 14 East, 395.

(p) *Rex v. Norfolk*, 1 Dowl. & R. 69.

(q) *Rex v. Lincolnshire*, 3 Bar. & Cres. 549.

(r) *Rex v. Essex*, 2 Chit. R. 385.

(s) *Rex v. Gloucester*, 2 B. & Adolp. 158; *Rex v. London*, 13 East, 419; *Rex v. Devon*, 1 Chit. R. 34; *Rex v. London*, 3 B. & Adolp. 255.

(t) *Rex v. Newcastle*, 3 B. & Adolp. 252.

(u) *Giles's case*, 2 Stra. 881.

(x) *Rex v. Chester*, 1 M. & S. 101; *Rex v. Flockvold*, 2 Chit. R. 251; *Rex v. Gloucester*, 2 B. & Adolp. 163, per Parke, J.; *post*, 800, n. (b).

(y) *Rex v. Kent*, 11 East, 229.

(z) *Rex v. Middlesex*, 4 B. & Ald. 290.

(a) *Ex parte Becke*, 3 B. & Adolp. 704.

(b) *Rex v. Devon*, 1 Chit. R. 34; *Rex v. London*, 3 B. & Adolp. 255.

(c) *South Cadbury v. Braddow*, 2 Salk. 607; *Rex v. Devon*, 1 Chit. R. 34.

(d) *Rex v. Pembrokeshire*, 2 B. & Adolp. 391; *Rex v. Eppingham*, Id. 393, in notes, where see a suggestion how the justices are to proceed in stating the case.

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statement but one which would have excluded the point of law relied upon by the party demanding the case. (e)

Inspection of Court Rolls, &c. (See *post*, 810, 811; and see *Books, ante*, 792.)

License.—No mandamus will be issued relating to the granting a license, as to re-hear an application for an alehouse license which justices had refused, although it was suggested that their refusal proceeded from a mistaken view of their jurisdiction. (f)

Manor. (See *Copyhold* (g) and *Inspection, post*, 810, 811.)

Oaths. (And see *Officers and Overseers.*)—A mandamus lies to justices to admit a person to take the oath, &c. in order to be teacher of a dissenting congregation. (h)

Officers and Situations of a Public Nature.—Whenever the office, whether temporal or ecclesiastical or otherwise, is *legal* and *public*, or *fixed and permanent* by statute, charter or usage, then this writ lies to swear in, admit or restore a party entitled to the same; but if the office or station be merely of a *private nature* or determinable *at will*, then no mandamus will be granted, (i) unless there be another remedy, as in the case of ecclesiastical persons by *quare impedit*, (k) or by *quo warranto*, when there is a recorder *de facto* though not *de jure*. (l) Nor will a mandamus be issued to swear in or admit, unless the party can show that he *in all respects* is *entitled* to practise or hold the office; (m) and a mandamus to the judges of an inferior court to admit an attorney, ought not to be directly to admit, but only to examine whether he be capable and qualified to be admitted. (n)

Corporate Officers.—A writ of mandamus lies to admit or restore one of these from the highest to the lowest, whenever legally elected or appointed, and not legally removed, (o) as a mayor, alderman, jurat of a corporation, common councilman, recorder, (p) town-clerk, (q) liveryman, burgess, bailiff, serjeant or high steward, (r) and any peace officer thereof; (s)

(e) *Rex v. Pembrokeshire*, 2 B. & Adolp. 391.

(f) *Rex v. Farringdon*, 4 Dowl. & R. 735; *Giles's case*, Stra. 881; *Rex v. Nottingham*, Say. Rep. 217; *Rex v. Storrey*, 5 Dowl. & R. 308.

(g) *Ante*, 794.

(h) *Peake's case*, 6 Mod. 310; *Rex v. Peach*, 2 Salk. 572.

(i) *Rex v. London*, 2 T. R. 182, what offices are deemed public, see Burn's J. tit. "Poor;" *Rex v. Croydon*, 5 T. R. 713; *Rex v. Bishop of London*, in the case of lecturer of St. Ann's, Westminster, 2 Stra. 1192; 1 Wils. 11, S. C.

(k) *Rex v. Chester*, 1 T. R. 596.

(l) *Rex v. Colchester*, 2 T. R. 259.

(m) *Rex v. Scriveners' Company*, 10 Bar. & Cres. 511.

(n) *Rex v. York*, 3 B. & Adolp. 770.

(o) *Rex v. Azbridge*, Cowp. 523. As to writs of mandamus relative to corporations, see Selwyn's Nt. Pri. tit. "Mandamus."

(p) *Rex v. Wells*, 4 Burr, 1999; when not, *Rex v. Colchester*, 2 T. R. 259.

(q) *Audeley v. Joye*, Poph. 176.

(r) See cases and instances, Impey's Mandamus, 42, 43.

(s) *Scoble, Audeley v. Joye*, Poph. 176.

and if either of these have the right, though he has never had possession of the office, his admission will be enforced. (r) But if the election be discretionary, no mandamus to proceed to elect would be issued; (s) nor to elect members of an undefined body; (t) nor to compel a corporate assembly for the purpose of removing non-resident members. (u) And if upon the affidavits it should be doubtful whether the office be public or private, the court will issue a mandamus in order to have the facts fully stated in the return.

In general if the office is acquirable by *purchase*, and an oath of office, as well as oaths to *government* are administered, it will be presumed to be *public*; and on that ground a mandamus was granted to restore a party to the office of *clerk or surveyor to the city works*; (x) and this writ was issued to restore the treasurer of the New River Company, for though it was but a private corporation yet it was created by the king's letter-patent. (y)

Upon affidavit that one of two candidates for an office had a majority only by means of *illegal* votes, the court will grant a mandamus to the corporation to admit and swear in the other who appeared upon the affidavits to have the greater number of *legal* votes, notwithstanding the first had been admitted and sworn into the office, there being no other specific, or at least no other such convenient mode of trying the right. (z)

Ecclesiastical Officers and Persons.—The admission and restoration of these may be enforced from the highest to the lowest, (a) unless in some cases, as where there is another appropriate remedy, as by *quare impedit*, for interfering with the right of presentation (b) or ejection when a parson has been evicted; (c) yet mandamus lies in other cases, as to try the right of officiating in a chapel by admitting a person to the curacy; (d) to compel the bishop to grant a license to a lecturer to preach, or to show good cause to the contrary; (e) to the trustees of a meeting-house to admit a dissenting teacher duly elected; (f) to restore to the ministry of an endowed

(r) *Rex v. St. John's College*, 4 Mod. 368; Sty. 299.

(s) *Rex v. Chester*, 1 M. & S. 102; *Foot v. Brown*, 1 Stra. 625.

(t) *Rex v. Fowey*, 4 Dowl. & R. 132.

(u) *Rex v. Portsmouth*, 3 B. & Cres. 152; 4 D. & R. 767, S. C.

(x) *Rex v. London*, 2 T. R. 182, n. 6.

(y) *Id.*; *Anon.* 1 Stra. 696, S. P.; *Rex v. London*, 1 Lev. 123; Sid. 169; 3 Mod. 334, S. C.; but see the last report, which shows it was rather experimental.

(z) *Rex v. Bedford Level*, 6 East, 536;

and see *Rex v. York*, 4 T. R. 699.

(a) See in general Selwyn's N. P. tit. Mandamus, 11.; Harrison's Index, Mandamus, 6.

(b) *Rex v. Chester*, 1 T. R. 396.

(c) *Ante*; but see *Clark v. Sarum*, 2 Stra. 1082.

(d) *Rex v. Bloer*, 2 Burr. 1043.

(e) *Rex v. London*, 13 East, 420; 1 T. R. 331; *Rex v. Field*, 4 T. R. 125.

(f) *Rex v. Barker*, 3 Burr. 1265; 1 Bla. R. 300, 352, S. C.

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dissenting meeting house; (g) to swear in or restore a churchwarden, (h) a parish clerk, (i) or a sexton; (k) but not to restore the minister of an endowed dissenting meeting-house when expelled by the majority of congregation, if it do not appear that he has complied with all the requisites essential to give him a *prima facie* title. (l)

Other Officers and Stations.—So a candidate as clerk to the Commissioners of the Land Tax may by mandamus compel them to proceed to elect a clerk, (m) and if elected may have a mandamus to swear him in and admit him; (n) and a mandamus will lie to the warden of a college to admit a chaplain, especially if there be no other visitorial power; (o) to restore a schoolmaster of a grammar school by the crown; (p) to restore the master of a college; (q) and even to restore an usher of a grammar school. (r) And if the visitor of a college in one of the universities should refuse to exercise his visitorial power by receiving and hearing an appeal, the Court of King's Bench will grant a mandamus to compel him. (s)

If in any case of election it be uncertain which of two candidates was duly elected, then, upon hearing the discussion of the rule nisi, the court will, instead of a mandamus to swear in or admit, issue a mandamus to proceed to a *new election*. (t) So it lies to restore a party to the office of master of a free school. (u)

When not.—But when the office is *private*, (x) or determinable *at pleasure*, (y) no writ will be issued; nor will it be to restore, if the party were confessedly rightfully removed as regarded the merits, although irregularly so without adequate notice; (z) nor where the suspension from the office was not equivalent to a removal. (a) Nor where the words “shall and may” are not obligatory but *discretionary*; (b) nor to compel the

(g) *Rex v. Jotham*, 3 T. R. 575.

(h) *Anon.* 2 Chit. R. 254; *Rex v. Harris*, 3 Burr. 1420; *ante*, 793.

(i) *Id. ibid.*; *Rex v. Warren*, Cowp. 370.

(k) *Rex v. St. James's*, Cowp. 413; *Rex v. King's Clerc*, 2 Lev. 18; *Ile's Case*, 1 Vent. 143; Selw. N. P. Mandamus, 11. n. (s).

(l) *Rex v. Canterbury*, 8 East, 215; see other cases as to clerical persons, *Impey, Mandamus*, 103 to 106.

(m) *Rex v. Commissioners of Westminster*, 1 T. R. 146.

(n) *Rex v. Thatcher*, 1 Dowl. & R. 426.

(o) *Rex v. Chester*, 2 Stra. 797; *Appleyard's Case*, 1 Mod. 82; and see *Clark v. Bishop of Sarum*, 2 Stra. 1082; but see *ante*, 799.

(p) *Rex v. Morpeths*, 1 Stra. 58.

(q) *Patrick's Case*, T. Raym. 111.

(r) *Craford's Case*, Sty. 457; *Stamp's Case*, T. Raym. 12.

(s) *Rex v. Ely*, 5 T. R. 475; *Phillips v. Bury*, 2 T. R. 346.

(t) *Rex v. Hertfordshire*, in the matter of *Jordan*, Easter Term, A. D. 1833.

(u) *Anon. Loft*, 146.

(x) *Ante*, 790; *Anon.* 2 Ld. Raym. 989, S. P.

(y) *Ante*, 798, note (i).

(z) *Rex v. Azbridge*, Cowp. 523; *Rex v. London*, 2 T. R. 177.

(a) *Rex v. Whitslake*, 7 East, 353.

(b) *Rex v. Eye*, 2 Dowl. & R. 172; *Rex v. Flockwold Inclosure*, 2 Chit. R. 251; *Rex v. Chester*, 1 M. & S. 101; or another remedy, as by *Quo Warranto*, *Rex v. Colchester*, 2 T. R. 259.

Archbishop of Canterbury to issue his fiat for the admission of a doctor of laws as advocate of the Court of Arches ; (c) nor to the benchers of one of the inns of court to admit a person as a member or student, nor to call him to the bar so as to enable him to practise as a barrister ; (d) nor to the College of Physicians to examine a party so that he may be admitted a fellow of the college ; (e) nor to admit an attorney, that being discretionary in the judge who examines him, and the only remedy is petition to the court. (f)

Orders.—These will not in general be enforced by mandamus, but the disobedience of them may be punished by indictment. (g)

Overseers of the Poor.—A mandamus lies to justices of the peace to nominate overseers, although the time mentioned in the statute 43 Eliz. c. 2, s. 1, has expired, the statute being only directory as to time ; (h) so to appoint overseers in an extra-parochial place, (i) or a separate hamlet ; (k) to appoint overseers when the present had been appointed on a Sunday ; (l) to preceding overseers to deliver over the parish books to their successor ; (m) or to the overseers to make a rate ; (n) the rule for which is absolute in the first instance, for otherwise the poor might starve. (n) So it lies to overseers and guardians to pass their accounts ; (o) to justices to swear an overseer to his accounts ; (p) or to proceed to pass overseers' accounts ; (q) or to levy the balance of the overseers' accounts ; (r) or to hear a complaint against overseers for not delivering a full account ; (s) or to hear an appeal against his account, although not previously allowed at a special sessions ; (t) or a complaint against him for not paying over the balance. (u)

(c) *Rex v. Exeter*, 2 East, 462.

(d) *Rex v. Gray's Inn*, Dougl. 353 ; *Wooller's Case*, 4 B. & C. 855 ; the only mode of relief is by appeal to all the judges. In case of *D. W. Harvey* there was such an appeal, but it was unsuccessful ; and see *Rex v. Gray's Inn*, 1 Dougl. 353.

(e) *Rex v. College of Physicians*, 7 T. R. 282.

(f) 2 Geo. 2, c. 23, s. 3 to 6 ; 23 Geo. 2, c. 26, s. 15.

(g) *Rex v. Bristol*, 6 T. R. 168 ; but see *Rex v. Shaw*, 5 T. R. 549 ; and see *Inferior Courts, Justices, &c.*, ante, 795 to 798.

(h) *Rex v. Sparrow*, 2 Stra. 1123 ; *Burn's J. Poor*, 24, 25 ; *Rex v. Norwich*, 1 Bar. & Adelp. 313 ; what must be sworn, *Rex v. Bedfordshire*, Cald. 157 ; and *Rex v. Peterborough*, Id. 238.

(i) *Rex v. Stafford*, 1 Stra. 512.

(k) *Rex v. Wiltshire*, 1 Wils. 138 ; *Rex v. Horton*, 1 Term R. 374.

(l) *Rex v. Bridgewater*, Cowp. 189 ; *Anon. Lofft*, 618.

(m) *Rex v. Clapham*, 1 Wils. 305 ; *Rex v. Bleshow*, 1 Bott, 260.

(n) *Luddleston v. Exeter*, Fol. 18 ; *Rex v. Edwards*, 1 Bla. Rep. 637 ; *Rex v. Fisher*, Sayer's R. 160.

(o) *Rex v. Warwickshire*, 2 Dowl. & Ry. 299.

(p) *Rex v. Middlesex*, 1 Wils. 125.

(q) *Rex v. Townsend*, 1 Bott, 305.

(r) *Rex v. Somersetshire*, 2 Stra. 992 ; 2 Sess. Cas. 283 ; *Rex v. Pascoe*, 2 M. & S. 343.

(s) *Rex v. Worcestershire*, 3 Dowl. & Ry. 299 ; 2 Mag. Cas. 7, S. C.

(t) *Rex v. Colchester*, 5 Bar. & Ald. 535 ; 1 Dowl. & Ry. 146, S. C.

(u) *Rex v. Pascoe*, 2 Maule & S. 343 ; *Rex v. Manchester*, 1 Dowl. & Ry. 454 ; *Rex v. Worcestershire*, 3 Dowl. & Ry. 299 ; 2 Cas. Mag. 7, S. C.

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Payment of a public debt or duty may in some cases be enforced by mandamus to the party who ought to pay; as to pay an assessment towards a *poor rate* when there is doubt whether the property apparently liable to be taken as a distress belongs to the party rated. (x) So if a ministerial legal officer be duly ordered to pay over money, it should seem that the payment might in particular cases be enforced by mandamus, as upon an order of guardians of the poor upon their treasurer to pay over, but not if the order were made only by the justices at sessions, who had no jurisdiction. (y) In general the modes of enforcing payment of a public duty is by distress; or if duly ordered to be paid, then by indictment for disobedience of the order; (z) as by an indictment of the treasurer of the county for refusing to pay a constable the expenses of apprehending and conveying to prison a deserter. (a) So a mandamus to the treasurer and directors of the St. Katherine Dock Company is the proper remedy to enforce the payment of the costs of an action against the treasurer of the company under the statute 6 Geo. 4, c. 5. (b)

Permit.—When it is the duty of an officer of the excise to grant, and he should refuse, a permit to remove wine, the court would compel the delivery of a proper permit. (c)

Poor rate.—The 43 Eliz. c. 2, is imperative on the churchwardens and overseers to make a rate, and the performance of that duty will, upon affidavit of the necessity and neglect, be enforced by *mandamus* to the churchwardens and overseers to make, and the justices to sign, a rate; (d) and such a mandamus will be granted in the *first instance* without a rule nisi, for otherwise in the mean time the poor might starve. (e) So it lies to justices to make a rate *in aid*, after inquiring whether it be necessary, though not so if the other parish be within an exclusive jurisdiction. (f) And it has been supposed that a mandamus would issue to make a rate assessing stock in trade

(x) *Rex v. Margate*, 3 Bar. & Ald. 220; 2 Chitty's Rep. 256, S. C.

(y) *Rex v. Shaw*, 5 Term Rep. 549; but see in *Impey*, Mand. 109.

(z) *Rex v. Rye*, 2 Burr. 799; *Rex v. Mython*, 4 Doug. 333; *Rex v. Moorehouse*, Id. 388; *Rex v. Harris*, 4 Term Rep. 205; *Rex v. Kingston and others*, 8 East, 41.

(a) *Rex v. Pierce*, 3 M. & S. 62; and see *Rex v. Cookson*, 16 East, 376.

(b) *Corpe v. Glyn*, 3 Bar. & Adolp. 901.

(c) *Rex v. Commissioners of Excise*, 2 T.

R. 381; *Rex v. Cookson*, 16 East, 376; *Rex v. Commissioners of Liverpool*, 2 Maule & S. 223.

(d) *Ledesdon v. Exeter*, Fol. 19; *Rex v. Woolly*, 2 Stra. 1259; and other cases, Burn's J. Poor, 44. In *Rex v. Canterbury*, 1 Bla. R. 667; 4 Barr. 2290, S. C. it was supposed that there must first have been an appeal to the sessions. But an appeal against what?

(e) *Rex v. Fisher*, Sayer's Rep. 160.

(f) *Rex v. Holbeach*, 4 Term Rep. 778.

and personal property. (g) But the practice is otherwise. (h) It lies to justices to *sign* or *allow* a rate, as that act is merely ministerial; (i) and if there be two different rates, the justices will be compelled to elect which to sign. (k) And though a mandamus will not be issued to command the overseers to *collect* the rate, (l) yet it may be issued to compel the party rated, at least when a corporation, to *pay*, as when it is doubtful whether the property apparently to be distrained upon is really the property of the corporation, and the taking of which might lead to an action. (m) So it issues after inexcusable refusal to compel a justice to summon a party, even a bishop, in arrear, and if he show no cause, to issue his distress warrant in a clear case of liability, (n) but not if the liability be doubtful, and the proceeding might subject the justice to an action. (o) And it will not issue to direct that certain persons shall be inserted in the rate; (p) nor to regulate the equality of the assessment. (q)

Probate may be enforced by mandamus. (r)

Public Works.—Where a railway had been made under the authority of a statute, under which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of the same, the company having afterwards taken up the railway, it was held that a mandamus might issue to compel the company to reinstate and lay it down; (s) but if the public right or duty be doubtful, the court would not interfere, but leave the applicant to try the question by indictment; (t) and though when commissioners of sewers are bound to repair, their liability may be enforced, it would not be so on the application of the owner of marsh lands bound to repair, and whose neglect occasioned an inundation. (u)

Rate. (See *Poor-rate. Overseers.*)—A writ of mandamus will not be issued to justices to make a rate to reimburse two

(g) *Impey*, Mand. 21, 22, cites *Rex v. Canterbury*, 1 Bott, 132; *Rex v. Whitney*, Id. 141; *Rex v. Barking*, 2 Lord Raym. 1280; *Rex v. Ambleside*, 16 East, 380.

(h) See cases in Barn's J. Poor, 63 to 68.

(i) *Rex v. Bucher*, 8 Mod. 335.

(k) *Rex v. Anon.* Comb. 479.

(l) *Rex v. Norwich Overseers*, Nolan's P. L. 28.

(m) *Rex v. Margate*, 3 B. & Ald. 220; 2 Chit. R. 250, S. C. The remedy in general for a poor rate is only by distress, ante, 664, 665.

(n) *St. Luke's v. Middleton*, 1 Wils. 173; *Rex v. Middlesex*, 2 Kenyon's R.

163; *Rex v. Benn*, 6 Term R. 198.

(o) Id. ibid.; *Harmer v. Carr*, 7 T. R. 272; *Anon.* 2 Chit. R. 267.

(p) *Rex v. Weobly*, 2 Stra. 1259.

(q) *Rex v. Barnstable*, Fol. 16; *Butler v. Cobbett*, 1 Bott, 265.

(r) *Post*, 806.

(s) *Rex v. Severn and Wye Railway Company*, 3 Bar. & Ald. 646, and ante.

(t) *Rex v. Plymouth Corporation*, ante, 794, note (n), and when no remedy in Equity, see *Weale v. West Middlesex Waterworks Company*, 1 Jac. & Walk. 358, 370, 373, 374, post.

(u) *Rex v. Commissioners of Sewers, Essex*, 1 Bar. & Crea. 477; 2 Dowl. & R. 700, S. C.

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inhabitants in defence of indictment for not repairing a bridge; (u) nor to make a church-rate, that being matter of ecclesiastical jurisdiction, (x) unless in certain cases under modern acts; (y) nor a rate to reimburse churchwardens. (z)

Register. (See *Ship*.)

Security of Peace.—This writ will be issued to justices to compel them to take security on articles of peace exhibited in the King's Bench, where the party to give them resides at a distance in the country. (a) But the court, it is said, will not interfere with the local original jurisdiction of justices in compelling them to take sureties of the peace. (b)

Sessions. (See *Inferior Courts*.)—A mandamus lies to justices at sessions to receive and determine an appeal at a subsequent sessions, (c) or to receive an appeal during the next sessions, (d) to adjourn an appeal when there has not been reasonable time to hear it at the next sessions, (e) and to enter continuances and hear appeal. (f) But it will not issue when there was sufficient time to appeal, &c., (g) nor where it was in the discretion of the magistrates, (h) nor to regulate the practice of sessions, unless manifestly wrong or unjust, (i) nor to compel the Court of Sessions to hear particular evidence. (k)

Sheriff and his deputy will be compelled to perform his duty, as to enter a plaint in replevin in the County Court for damage feasant. (l)

Ship Registry.—The granting of, will be enforced when directed by statute, but not so where there has been an irregularity in a transfer, when the commissioners of customs will not be commanded to grant a license or register. (m)

Special Case. (See *Case*, ante, 793.)

Surveyor. (See *Highways*.)—A writ of mandamus may be issued to justices to appoint a surveyor of highways, (n) or swear him in, (o) or to justices to make a rate to reimburse a surveyor. (p)

(u) *Anon.* 1 Stra. 63.

(z) *Rex v. Thetford*, 5 Term R. 364; S. P. in *Rex v. Coleridge*, 2 Bar. & Ald. 806; 5 Dowl. & Ry. 602; 1 Chit. Rep. 588, S. C.; ante, 723.

(y) *Rex v. Lambeth*, 3 B. & Adolph. 651; ante, 793, (k).

(e) *Rex v. Bradford*, 12 East, 556; ante, 798; as to decreeing the payment of money to be levied by a parish rate, see note (a) to *Ex parte Fowler*, 1 Jac. & W. 73, 74.

(a) *Ante*, 683, note (d); *Rex v. Lewis*, 2 Stra. 833; 12 Sess. Cas. 68.

(b) *Rex v. Bushfield*, 2 Sess. Cas. 67.

(c) *Rex v. Wiltshire*, 1 East, 183; see cases on this subject 2 Harrison's Index, 65; Burr's J. tit. *Appeal*, and tit. *Sessions*.

(d) *Rex v. Leicester*, 1 East, 186.

(e) *Rex v. Buckinghamshire*, 3 East, 842; *Rex v. Shropshire*, 7 East, 549.

(f) *Rex v. Wiltshire*, 10 East, 404.

(g) *Rex v. Wiltshire*, 2 Bott. 717; *Ex parte Beck*, 3 B. & Adolph. 704.

(h) *Ex parte Beck*, 3 B. & Adolph. 704.

(i) *Rex v. Essex*, 2 Chit. Rep. 385.

(k) *Rex v. Cambridgeshire*, 1 Dowl. & Ry. 325.

(l) *Ex parte Boyle*, 2 Dowl. & R. 13; ante, 795, (t).

(m) *Rex v. Custom, Abbott, Ship*. 54; *Rex v. Collector Customs, Liverpool*, 2 M. & S. 223.

(n) *Rex v. Denbighshire*, 4 East, 142.

(o) *Rex v. Pettward*, 4 Burr. 2452.

(p) *Hassel's case*, 1 Stra. 211.

Warrant. (See *Conviction. Distress.*)—A writ of mandamus lies to compel the backing a warrant into another county, the duty being ministerial and imperative. (q)

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Where a reference to *Arbitration* has proceeded under an act of parliament, the court will grant a *mandamus* to the arbitrator under it to appoint an umpire; (r) and upon a motion respecting an award of a commissioner under an inclosure act, the Court of King's Bench said, "We may punish upon this if there be any corruption, or enforce its execution by mandamus, though we are not to interpret or set aside these awards upon complaint of their obscurity." (s) But it should seem, that unless in cases of arbitrations founded on some *statute*, or where the written submission to arbitration has been made a *rule of court* under the general arbitration act, (t) the proceedings would be considered as a mere *private* transaction between the parties, in respect of which no writ of mandamus could *issue*; the Court of King's Bench will not issue that prerogative writ in aid of mere private contracts or transactions.

Other cases where the courts will grant or refuse the writ.

Arbitrations under statutes.

As regards the *Person*, there are also some *other rights* that may be specifically enforced by mandamus; as where the attorney of a party imprisoned upon a capital charge had been refused by the visiting magistrates, in the exercise of their controul over prisons, under the 4 Geo. 4, c. 64, admission to the prison, so as to enable him to prepare his defence, the Court of King's Bench, upon affidavit of the necessity and refusal, issued a mandamus, directing the magistrates to permit the attorney to have access to the prison at proper times to be fixed by them. (u) And we have seen that where a bankrupt, even after repeated examinations, had been finally committed by the commissioners for not satisfactorily answering, yet a mandamus was granted conditionally to the commissioners to issue their warrant for a further examination, on a suggestion that the bankrupt was desirous of disclosing his estate and effects; for otherwise the commitment

Absolute rights.

(q) *Rex v. Kynaston*, 1 East, 117.
(r) *Rex v. Goodrich*, 3 Smith's R. 388.
(s) *Case on the Over Kellat Inclosure Act*, Hil. 38 Geo. 3, K. B.; and see *Rex v. Inhabitants of Washbrooke*, 7 D. & R. 221; Tidd, 9 ed. 844.
(t) 9 & 10 Wm. 3, c. 15.
(u) In *Thurtell's case*, Mich. T. 1823, MS., on motion for mandamus to jus-

tices of Hertfordshire, who had regulation of Hertford gaol under 4 Geo. 4, c. 64. *Aliter*; before that act, *Rex v. Carlisle*, 1 Dowl. & Ryl. 535: but the court will not direct what particular food a prisoner should have *who refused to work*, *Rex v. Yorkshire*, 2 B. & Cres. 286; 3 Dowl. & R. 510, S. C.

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Relative duties
how specifically
enforced.

Mandamus to
compel burial.

Mandamus to
compel probate
or administra-
tion.

The preliminary
Practice in ob-
taining a writ of
Mandamus. (h)

would occasion *perpetual imprisonment*, although the party was at length anxious to submit. (x)

At *law* we have seen that *maintenance* of a child or wife, and some other relatives, may be specifically enforced under the provisions of the 43 Eliz. c. 2, s. 7, by order of a magistrate against the superior relative, when of sufficient ability; (y) and if a parent absent himself in order to avoid the fulfilment of that duty, he is liable also to punishment under the Vagrant Act. (z) But when proper maintenance and education are withheld by a parent from a child in the higher ranks of society, the usual course is to seek relief in the Court of Chancery. (a)

After death a mandamus may be obtained to compel the *burial* of a parishioner, though not to direct the precise place or mode of burial. (b)

So a mandamus lies to compel the ecclesiastical judge to grant *probate* to the executor named in a will, (c) or *letters of administration* to the husband of his wife's estate, unless the husband has done something to part with his right; (d) and a mandamus for administration to the next of kin may be granted, notwithstanding a suit depending, if his consanguinity be not denied. (e) But when the validity of a will has been contested in the Spiritual Court, and a suit is still depending there concerning it, the court will not then grant a mandamus to the judge of such court to grant a probate to any particular person. (f) Nor will the court compel the grant of administration *durante minore ætate*, for the law has not decided who is entitled to such administration, and we have seen that a mandamus only issues to enforce a *legal right*. (g)

The *full practice* relating to writs of mandamus will be considered in the next volume, but it is expedient here to give an outline, especially of the steps to be taken before the court has granted a rule nisi for issuing. The preliminary conduct of the party is here particularly important, especially as under the

() *In re Bromley*, 3 Dowl. & R. 310.

(y) *Ante*, 65; Burn's J., Poor; *Rex v. Friend*, Russ. & Ry. 22.

(z) 5 Geo. 4, c. 83, s. 1; *ante*, 621, in notes.

(a) *Wellesley v. Duke of Beaufort*, 2 Russ. R. 23; *ante*, 65.

(b) *Ante*, 50, 51; *Andrews v. Cawthorne*, Willes, 530; *Rex v. Coleridge*, 2 Bar. & Ald. 806; 1 Chit. R. 588, S. C.; *Ex parte Blackmore*, 1 Bar. & Adolph. 122.

(c) *Anon.* 1 Vent. 335; *Anon.* 1 Stra. 152; *Dunkin v. Man*, Sir T. Raym. 233;

Offey v. Best, 1 Lev. 186; *Rex v. Inhabitants of Horsley*, 8 East, 408.

(d) *Rex v. Bettesworth*, Stra. 891, 1118.

(e) *Rex v. Hay*, 4 Burr. 2295; *Rex v. Dr. Hay*, 1 Bla. R. 640.

(f) *Rex v. Hay*, 4 Burr. 2295; *Lovegrove v. Bethell*, 1 Bla. Rep. 68.

(g) *Smyth's Case*, 2 Stra. 892.

(h) See *post*, 2d vol.; and Selwyn's N. P. 6th ed. 1662; Impey's Mandamus, Com. Dig. Mandamus; and Burn's J. tit. Mandamus, as to practice in general.

recent statute the costs of the application for a mandamus are in general in the discretion of the court; and if the party applying has acted courteously and properly, he may thereby frequently avoid the payment of costs, though in other respects he fail. (i)

In the *first* place, the party claiming admission to an office, or other right, and intending afterwards to endeavour to enforce his claim by motion for a mandamus, should frame a written and explicit notice of his claim, succinctly stating the grounds and reasons, and which may be somewhat in the form of a notice of appeal against a poor rate, or other objectionable proceeding; (k) he should then in the same notice, in a *courteous* manner, request admission to the office or performance of the other act within a reasonable time, naming a proper day and place, and that if inconvenient to the party required, then that he appoint another time and place. In the same notice it may be intimated, that in case of refusal to comply with the request, the party will be under the necessity to apply to the court as the only means of obtaining the right. At the same time, if a clear and positive opinion of counsel has been obtained in favour of the claimant, it will be a proper and candid measure to accompany the notice with a copy of such case and opinion, and request the party himself to take advice. If after such a precautionary measure the party should persist in his refusal, and the court should afterwards think that he did so improperly, then, under the above discretionary power, they would probably make him pay, or not allow him costs, according to the other circumstances of the case. The 12 Geo. 3, c. 21, as to citizens, burgesses, and freemen of any city, borough, &c., *recites*, that although a writ of mandamus to admit to the franchise at their instance be obeyed, the party applying for the same is nevertheless put to great trouble, delay, and expense, and that by the existing law he cannot recover his costs when the writ has been obeyed, *enacts*, that when any such party entitled to be admitted shall apply to the mayor or other person, officer or officers, who hath authority to admit, to be admitted a citizen, burgess, or freeman, and shall give *notice specifying the nature of his claim* to such mayor, &c. that if he shall not admit such person a citizen, burgess, or freeman, *within one*

First step to be taken by claimant.

(i) 1 Wm. 4, c. 22, s. 6; see *post*, 809, as to the costs; and see *ante*, 439, notes (f) and (g), as to small circumstances frequently influencing a court in their giving or refusing costs.

(k) See several forms of notice of appeal against poor rate, Burn, J., tit. Poor, Index, tit. *Precedents*; and see the numerous forms of various notices in the notes to the antecedent pages.

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month from the time of such notice, the Court of K. B. will be applied to ; and if such mayor, &c. shall refuse or neglect to admit such person, and a writ of mandamus shall afterwards issue, then the party applying for the same, (unless the court shall see just cause to the contrary,) shall obtain and receive from such mayor, &c. all the costs, &c. (l) In cases not within this act, it might be as well to observe the same provision in any notice which it is always expedient to serve.

Second applica-
tion

At the appointed time there should be a second application in person to the proper officer, requesting admission, &c., and this should be in the presence of one or more proper persons to join in an affidavit. And at all events in case a personal interview or peremptory refusal to admit has not been obtained, it may be expedient to serve another notice, referring to the former, and the refusal or silence, and again requiring admission, and pointing out the loss or inconvenience that will result from continued refusal, and the necessity that will ensue for the expense of proceedings in the Court of King's Bench, and the power of that court over the costs.

Affidavit to
support motion
to the court.

In the event of continued refusal, then an *affidavit* or affidavits should be sworn on the part of the claimant, fully and explicitly stating the nature of the office, and showing its duties and other facts essential to establish that it is of a *public* nature. (m) And where it is a corporation by prescription, the constitution of it, as well as the party's particular right under it, must be verified by affidavit. (n) And where it is by charter, the substance as applicable should be stated, and an authenticated copy must be produced at the time of making the motion. (n) The election and other circumstances under which he claims, and still claims to be admitted, must be very distinctly and positively stated, and shown to have been according to the charter or prescription, and this not according to hearsay or mere belief. (o) The affidavit should also anticipate and answer every possible objection or argument in fact which it may be expected will be urged against the claim. A copy of the notice or notices previously served on the mayor, &c.,

(l) 12 Geo. 3, c. 21.

(m) So an affidavit to support a mandamus to a clergyman to replace a parish clerk, at least had better show that it is an office *for life*, *Anon.* 2 Chit. R. 254. So in an affidavit in support of a motion for mandamus to justices to appoint overseers, it must be sworn that the *district* is, or at least that it is reputed to be, a village or parish, *Rex v. Bedfordshire*, *Caldecot*, 157; *Anon.* Loft, 618; *Rex v.*

Bridgwater, Cowp. 139; as to a *Hamlet*, see *Rex v. Wiltshire*, 1 Willson, 138. In an affidavit for a mandamus to compel a corporation to pay a poor rate, it must appear that they had no distrainable goods, *Rex v. Margate*, 3 B. & Ald. 220; 2 Chit. R. 250, S. C.

(n) Bul. N. P. 200; Selwyn's N. P. Mandamus, 1076.

(o) Bull. N. P. 200; Selwyn, N. P. 1077.

should be annexed and verified, and the service of each, and the non-compliance with the notice, also sworn to; and when any strong resistance is expected, any disputable or material facts should be corroborated by one or more respectable and experienced individuals.

The proper affidavits having been obtained, the course in general is, upon production of such affidavits, to move for a rule nisi, (to show cause,) why a mandamus should not issue, though in some cases the rule will, as we have seen, be absolute in the first instance, and the writ will immediately be issued. When a rule nisi has been obtained, then if no sufficient cause be shown, the party will either submit, or a mandamus will issue, which will require a return either that the required act has been performed, or a formal and true return of an adequate excuse, and which is traversable; and if ultimately no sufficient cause be shown, or the return be insufficient, a *Peremptory Mandamus* will be issued.

Motion to the Court.

The writ and return, and other proceedings, will be considered together with the other part of the full practice in the next volume. With respect to costs, at common law in general, after issuing the writ, no costs were to be paid or received, the king being considered the prosecutor, (p) though upon discharging a rule nisi for a writ of mandamus, the costs of the motion were in the discretion of the court. (q) In actions for a false return to the writ, the plaintiff, if he succeeded and obtained a verdict for damages, was entitled to costs, and the defendant, if he succeeded, was entitled to his costs, under the 4 Jac. 1, c. 3; (r) and the 9 Ann. c. 20, s. 1 & 2, provided that in the case of corporate officers, if there were a false return, and afterwards a peremptory mandamus issued, the prosecutor should have his costs; (s) and the 12 Geo. 3, c. 21, we have seen provided, that in case of refusal to admit after a month's notice, the Court of King's Bench might award him costs of a writ of mandamus though obeyed. (t) And now in all cases of application for any writ of mandamus whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the court, and the court is authorized to order and direct by whom and to whom the same

Writ of Mandamus and other proceedings, and especially Costs.

(p) Tidd, 9 ed. 946.

(q) Id. 949; *Rex v. Banks*, 3 Burr. 1453; *Rex v. Chester*, 1 T. R. 396, 405.

(r) Tidd, 9 ed. 949; *Hullock's Costs*, 2 ed. 325.

(s) He is also entitled to poundage; *Rex v. Mayor of Glamorgan*, 2 Smith's R. 8.

(t) *Ante*, 807, 808.

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shall be paid. (u) This act, as before suggested, renders it expedient to be particularly cautious and courteous in the proceedings antecedent to the application.

Rights of Persons enforced in Equity.

In *Equity* we have seen that some rights of *persons* may be *specifically* enforced by *Bill*, (the extent and application of which will be presently fully noticed,) and sometimes even more summarily on *Petition* and *Affidavit*, although no cause be depending. Thus a guardian may be appointed to an infant, and maintenance allowed, upon petition merely. (x) And though the Court of Chancery has no jurisdiction to appoint a guardian to an infant unless he has property; (y) yet as a usual expedient on the part of a relative who is anxious to secure due protection to an infant, he will make a small provision for the infant, (as an annuity of 5*l.* a year,) and which will give jurisdiction to the court to refer it upon petition to the Master to approve of a guardian and consider what is fit to be allowed for maintenance, and which reference will not be dispensed with excepting when the property is personal and small; in other cases a bill must be filed. (z)

II. Specific Remedies with regard to Personal Property and Contracts.

II. As respects *moveable Personal property*, at *law*, the only *specific* legal remedies for a person entitled to the possession is to *Replevy*, or to proceed by action of *Detinue*, and at law a mandamus would be refused whenever a party sets up a claim to the *possession*, and not merely the *inspection* of a public document. Thus the court refused a mandamus to churchwardens to deliver a vestry-book to the vestry-clerk, Lord Ellenborough saying, "If the muniments belonged to him as annexed to his office, he may bring an action of detinue or trover." (a) But there are very numerous cases of the *Inspection* of documents, rather of a *public* or *general* nature, being enforced by *Mandamus*, where the party applying does not claim any right to the possession, but merely requires an inspection of the documents in the possession of the rightful owner, such as court rolls of a manor, of which he is a copyholder. (b) And in which case, upon swearing to the right and necessity for the inspection, and a previous application and refusal, the Court of

Inspection of Court Rolls, &c.

(u) 1 Wm. 4, c. 21, s. 6.
(x) *Ex parte Salter*, 3 Bro. C. C. 500; *Ex parte Myerscomb*, 1 Jac. & Walk. 151; 1 Newl. Ch. Pr. 210.
(y) *In the matter of Talbot*, cor. Lord Eldon, 6 April, 1815, 1 Newl. Ch. Pr. 210; *ante*, 64, note (s).

(z) 1 Newl. on Cont. 210, 211; *ante*, 64, 69, note (s), 70, note (k), 702 (o); *Ex parte Jones*, 1 Russ. R. 478.
(a) *Anon.* 2 Chitty's R. 255; *ante*, 792, n. (d).
(b) See the cases and practice, Tidd, 9 ed. 594, 595.

King's Bench, although there be no suit depending, will by writ of *mandamus* compel the lord and his steward to allow inspection when justice requires. (c) And although it has been held that a *freehold* tenant of a manor has no right to inspect the court rolls, unless there be some cause depending in which his right may be involved, (d) and that a freeholder ought not to be allowed to inspect the rolls in a case between himself and the lord relating to *Copyhold*, because the lord ought not to be obliged to assist the defendant to make out his case; (e) yet it seems now to be settled that it is immaterial whether or not a suit be depending; (f) and provided the applicant be a tenant of and within the manor, though not a copyholder, it should seem that in all questions as well between copyholders as between a freeholder and the lord, who is in the nature of a trustee for all his tenants owing him suit and service, and has a right to inspect the rolls relating to the concerns and property in the manor, (g) though it would be otherwise as to a stranger. (h) But a *mandamus* will not be issued even at the instance of a tenant of the manor to inspect the rolls for the purpose of supporting an indictment against the lord even for not repairing a road within the manor; (i) because in a criminal proceeding it is a rule at law, as well as in equity, not to compel a party to furnish *preliminary* evidence against himself. (k)

Replevin is not (as until recently had been generally but erroneously supposed (l)) confined to cases of wrongful *distress*, but is an immediate summary remedy in all cases when there has been a *wrongful taking, even by force* or in any manner otherwise than by process in *execution*; and it should seem that even goods *illegally detained* may be replevied. (m) And even in cases of distress for a poor-rate, it has been recently decided that the sheriff is legally bound to grant replevy. (n) This

Other remedies at law, as *Replevin* and *Detinue*, &c.

(c) *Rex v. Shelly*, 3 Term R. 141; *Rex v. Lucas*, 10 East, 235; *Rex v. Tower*, 4 Maule & Selwyn, 162, ante, 792, 798.

(d) *Rex v. Allgood*, 7 T. R. 746; *Smith v. Davis*, 1 Wils. 104.

(e) *Id. ibid.*; Tidd, 9 ed. 595, n. (b), but see *Rex v. Lucas*, 10 East, 235, and quære as to the generality of that position; and is not the Lord bound to keep faithful rolls as to all *Copyholds* within his manor, as if he were a trustee for the copyholders?

(f) *Rex v. Lucas*, 10 East, 235.

(g) *Rex v. Tower*, 4 Maule & S. 162.

(h) 12 Vin. Ab. 146; *Crew v. Sanniders*, 2 Stra. 1005.

(i) *Rex v. Lord Cadogan*, 5 Bar. & Ald. 902; 1 Dowl. & Ry. 559, S. C.; *Fleming v. St. John*, 2 Simons, 181.

(k) *Id. Ibid.*; *Fleming v. St. John*, 2 Simons, 181, S. P.; but see exception, *Green v. Weaver*, 1 Simon's R. 404; and ante, 730, n. (t).

(l) 3 Bla. Com. 146.

(m) *Ex parte Chamberlain*, 1 Schol. & Lef. 320; *Shannon v. Shannon*, *Id.* 324; *Le Mason v. Dixon*, Sir W. Jones, 173, 174; Year Books, 6 Hen. 7, 8, 9; *Bishop v. Viscountess Montague*, Cro. Eliz. 824; Cro. Jac. 50, S. C.; Com. Dig. tit. *Replevin*, A. and tit. *Action*, M. 6; Vin. Ab. tit. *Replevin*, B. pl. 2; *Wilkinson on Replevin*, 2, 3; and see 1 Chitt. Pl. 5 ed. 188; &c.; not when in nature of execution cases, Burn's J., *Distress under Warrant*.

(n) *Sabourin v. Marshall and another*, 3 Bar. & Adolp. 440; and see observations, Burn's J. 26 ed. Poor, 847, 848.

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is unquestionably the *best specific remedy at law* for the immediate return and securing of any moveable chattel; for though in an action of *detinue* ultimately the judgment and execution would be to recover and have back the thing detained, or the value, together with the damages occasioned by the detention, with costs; (o) yet in the mean time the thing may have been eloiigned or destroyed, and the wrong-doer may have absconded or become insolvent. (p) And the same objection applies to an action of trover, in which also only damages are recoverable. In one case of an action of trover for partnership books, Lord Ellenborough intimated that the bringing an action of trover was not the most convenient remedy in a case of this nature, and said that he had heard Mr. Wallace express *his surprise that the remedy by replevin was not more frequently resorted to, as by means thereof the party might obtain possession of the specific chattel* of which he had been deprived, instead of an action of trover, in which he would only recover damages. (q)

Specific delivery
of a chattel
when enforced
in Equity.

A Court of Equity will, upon bill filed, decree the *specific delivery* of certain chattels, which it is considered may be of *peculiar value* to the owner, perhaps much beyond their intrinsic value, such as *heir-looms* or title deeds; and where, in case of a *specific bequest* of a chattel, the executor has refused his assent, a bill in equity to compel assent and the delivery of the specific article may be the *only* remedy. Thus, although we have seen that it is considered beneath the dignity of a Court of Equity to enforce specific delivery of a purchased chattel, such as corn or hops, or the ordinary subjects of sale, in fulfilment of a mere personal contract, because the like articles might be readily purchased or obtained elsewhere, and the recovery of damages at law for the breach would therefore in general be adequate compensation, (r) yet it is otherwise with respect to some chattels, to which it may be supposed the owner is particularly attached, and in that respect to him are valuable beyond any pecuniary compensation. (s) Thus a specific delivery to the owner of *heir-looms*, and chattels in the nature of heir-looms, (t) as family pictures or family plate, (u) will be enforced; and where the tenure of the estate was by the delivery of a horn, the specific delivery may be enforced. (w) So

(o) *Detinue* also is a more extensive remedy than has been supposed. It lies although the goods were taken tortiously and even *by force*. See cases 1 Chit. Pl. 5 ed. 139 to 141.

(p) *Dora v. Wilkinson and another*, 2 Stark. R. 288.

(q) *Id. ibid.*

(r) *Ante*, 711, 713; and see *Glasiers v.*

Massie, Cary, 82, and *post*,

(s) *Nutbrown v. Thornton*, 10 Ves. 163; *Fellis v. Read*, 3 Ves. 70.

(t) *Macclesfield v. Davis*, 3 Ves. & B. 16; and see other cases, Chit. Eq. Dig. tit. *Chattels Personal*, and tit. *Heir-looms*; and where see what are heir-looms.

(u) *Geoffry v. Davis*, Cary, 34.

(w) *Pussy v. Pusey*, 1 Vern. 273.

the specific delivery of an ornamental and valuable altar-piece, or other curiosity, or even a tobacco box, (x) or of any specific bequest, (y) and of a valuable picture delivered for a special purpose by an executor, (z) will be decreed; for in all these cases it may be presumed, that from various and obvious considerations, unnecessary even to be here suggested, the owner may reasonably esteem such articles much beyond any pecuniary remuneration that could be afforded at law as damages for the conversion of the article.

It seems also that presents made to and accepted by a lady during courtship and in faith of marriage afterwards broken off by her without adequate cause, may by suit in equity be recovered back, unless it should appear that the party was an adventurer improperly attempting by such gifts to win the lady merely for the sake of her fortune. (a) So a bill in equity has been sustained against a bailee to compel the redelivery of jewels, instead of compelling the bailor to proceed at law; and it was held that persons entitled to a part of them were not necessarily to be made parties. (b)

Some of the members of a lodge of Freemasons were allowed to sustain a suit in equity against the executor of a deceased member to have the dresses and other insignia delivered up, and an injunction was obtained, it being considered inconvenient to justice that *all* the members should be parties to the suit. (c) So where one joint-tenant or tenant in common assumes an unjust or exclusive possession or use or management of a personal chattel, it should seem that (as one tenant in common cannot sue his co-tenant *at law* in trover for any conversion short of *destruction*, (d) or in case for any injury that does not amount to waste or destruction, (e)) the best course is to file a bill in equity, by which proceeding (as in the case of part owners of a ship) *the proper and equally beneficial use and enjoyment of the chattel* may be decreed and enforced. (f)

In cases of this nature, of the wrongful taking or detention of a chattel, it will frequently be preferable to resort to a Court of Equity to compel specific delivery, for otherwise the rich might with impunity keep from the poor his specific property,

When it is preferable to proceed in Equity.

(x) *Somerset v. Cookson*, 3 P. Wms. 398.
Tobacco-box, *Fells v. Read*, 3 Ves. 76.

(y) *Lowther v. Lowther*, 13 Ves. 95.

(z) *Id. ibid.*

(a) *Young v. Carrel*, Cary, 54; *Robinson v. Cumming*, 2 Atk. 409.

(b) *Saville v. Tancred*, 3 Swanst. 141.

(c) *Lloyd v. Loring*, 6 Ves. 773; Chit. Eq. Dig. 217; *post*, vol. 2, as to number of the parties.

(d) *Cubitt v. Porter*, *per* Littledale, J., 8 Bar. & Cres. 268; *Healt v. Hubbard*, 4 East, 117, 121; *Martyn v. Knowles*, 8 Term Rep. 145; Co. Lit. 200, a.; 2 Saund. 47, h., note (u); *ante*, 645.

(e) *Martyn v. Knowles*, 8 T. R. 145.

(f) *Id. ibid.*; and *ante*, 717, as to part owners of ships; see in general as to remedies in equity against partners, *Const v. Harris*, 1 Turn. & Rus. 469 to 529.

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and insist upon his receiving only damages to be assessed by a jury, and the verdict for which would probably not much exceed the actual value of the article. Besides, a bill in equity is, immediately and before a final decree, a more perfect remedy than an action of detinue, because not only will the ultimate decree direct that the chattel shall be delivered to the owner, but also in the mean time, and pending the suit, an injunction will be granted to prevent the defendant from parting with or injuring the chattel; and he will be imprisoned if he do not comply with the decree. (g) It is however to be observed, that at law, in an action of *detinue*, the *defendant* has not, as has been supposed, the *option* of delivering up the goods or paying the value, (h) but on the contrary, the judgment and execution in an action of detinue are absolutely for the restoration of the chattel, if the same can be found, together with damages and costs; and only in the alternative as to the value, in case the chattel should be destroyed or eloiigned.

But it has been considered that when an executor in that character seeks the recovery of a specific chattel, he must resort to law after he has obtained a discovery in equity. (i)

The advantage in Equity of securing the chattels pending the suit.

It should seem that immediately after a bill has been filed, and upon affidavit showing the specific right, and the danger of the chattel being damaged or lost, then immediately, and before final decree, an injunction or order to stay the disposal thereof will be granted, (k) for which reason, in some cases, this remedy in equity is clearly preferable to an action of detinue.

In other cases of pecuniary and other property, where there are joint-tenants, tenants in common, or partners, whether in an adventure or in a common trading concern, if there have been fraud or there be danger of loss to one or more of the co-owners by the misconduct of the others, then, upon a bill filed, the *fund* may be brought into court or otherwise secured, although there would be no remedy at law, and any dangerous abuse of mutual confidence will be restrained by injunction; (l) and a bill in equity lies to recover deposits paid by a shareholder in a joint stock company, where the project was afterwards discovered to be a bubble. (m) But we have seen that the

(g) *Walwyn v. Lee*, 9 Ves. 33; 1 Mad. Ch. Pr. 232.

(h) 1 Mad. Ch. Pr. 232.

(i) *Allen v. Smith*, Ridg. 288; Chit. Eq. Dig. tit. Chattels Personal, Executor, and Trover, *sed quere*. *Somerset v. Cookson*, 3 P. W. 398; *Saville v. Tancred*, 3 Swanst. 141.

(k) *Ximenes v. Franco*, Dick. 149; and see *Const v. Harris*, 1 Turn. & R. 496.

(l) *Blain v. Agar*, 1 Sim. 37; *Castland v. Lyster*, 1 Ridg. L. & S. 580; *Harkly v. Schrader*, 8 Ves. 317; and see several cases, Chit. Eq. Dig. Partners, xi. 746, 747, 748; and *ante*, 704, n. (b.); but *semble*, in case of a partnership, a dissolution must be prayed, *Id. ibid.* When not, and other points, see *Const v. Harris*, 1 Turn. & R. 496.

(m) *Green v. Barrett*, 1 Sim. 45.

merely swearing to the existence of a strong temptation to abuse partnership effects, is not alone sufficient to induce the court to grant an injunction, but some actual or threatened abuse must be established. (n)

We have further seen that if a party is in possession of a *void deed* or instrument, but which might thereafter be attempted to be enforced, a Court of Equity will by injunction restrain proceedings, and order the instrument to be delivered up, (o) a power which a Court of Law, unless in cases of warrants of attorney and a few other particular cases, cannot exercise. (p) So although a deed or instrument *be valid*, yet, if in equity, it ought to be *delivered up*, the court will decree accordingly, unless each party has been guilty of fraud, and neither entitled to assistance. (q) So we have also seen that a Court of Equity will decree and *enforce the delivery of a proper deed* or other instrument, in pursuance of a party's contract. (r) Under particular statutes, to prevent the expense of a formal suit, certain persons standing in the situation of *Trustees* may, upon *Petition*, and without bill, be *compelled to execute conveyances*, or the conveyance may be dispensed with; thus an infant mortgagee or trustee may, under the 7th Anne, c. 19, upon petition, and without suit, be directed by the Court of Chancery or Exchequer to convey; (s) and the same provision has been extended to *Idiots* and *Lunatics*, *Feme Coverts*, &c.; (t) and there are other enactments of the same nature. (u)

Delivering up
of void Deeds
enforced.

The Convey-
ance and Deli-
very of a proper
instrument en-
forced.

Suits for *Legacies* charged upon personal estates *were*, perhaps, originally exclusively cognizable in the *Ecclesiastical Courts*, as a branch of that testamentary jurisdiction which undoubtedly belongs to them; but at an early period as *Executors* and *Administrators* (x) have ever been considered to be *Trustees*, and as *all trusts* are particularly cognizable in *equity*, and as legatees instituting a suit in an Ecclesiastical Court have found the authority of that court inadequate to enforce a full *discovery* of assets, they were frequently, after the commencement of the suit there, driven into a Court of Equity for that purpose; therefore, to save a circuitry of suit, and in ease of the suitors, Courts of Equity assumed and exercised concurrent and more complete

Suits against
Executors and
Administrators,
for Legacies and
Distributive
Shares.

(n) *Glassington v. Thwaites*, 1 Sim. & Stu. 124; and see in general, ante, 704, 705.

(o) Ante, 709, 710; *Ex parte Earl of Uxbridge*, 6 Ves. J. 425; *Ware v. Horwood*, 14 Ves. J. 28; 1 Ves. & B. 224; *Hayward v. Dimdale*, 17 Ves. 111; Chit. Eq. Dig. tit. Delivery up of Deeds.

(p) Ante, 695, n. (d), (e).

(q) Ante, 710, n. (f), (g).

(r) Ante, 710, 711.

(s) 7 Anne, c. 19, extended to counties palatine, &c. by 4 Geo. 3, c. 16.

(t) 4 Geo. 2, c. 10; and 1 & 2 Geo. 4, c. 114; 1 Wm. 4, c. 60.

(u) See the acts and decisions, 1 Newl. Ch. Pr. 212 to 248, and cases there collected; 1 Wm. 4, c. 60.

(x) *Tiffin v. Tiffin*, 1 Vern. 2; 2 Mad. Ch. Pr. 2.

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jurisdiction in the matter, by, in the first instance, enforcing the *discovery*, and afterwards *decreeing payment* of the legacy. (y) But in the exercise of this *concurrent jurisdiction* Courts of Equity necessarily adopted the law of that forum in which the suit was originally cognizable, and therefore it is that where a suit is instituted in equity for payment of a legacy charged upon the *personal* estate, if a question arise upon the right of the legatee to demand payment, it is governed by the *civil* law; whereas, if the legacy be charged on a *real* estate, the rules of the *common* law prevail, because in the latter case the jurisdiction of the Temporal Court is original and exclusive. (x) And therefore where legacies are by will charged upon *real* property, the Ecclesiastical Court has no jurisdiction. (x) In other cases of legacies payable out of *Personal* estate in general, the legatees have the option of suing for their legacies either in the Spiritual Court or in a Court of Equity, but the latter is now almost always resorted to, because, as we have just seen, the remedy given there is more effectual and complete, and concludes all parties by the judgment of the court in the distribution of the effects. (a)

If the legatee be a *married woman*, (b) or an *infant*, (c) then the suit can properly only be in equity; and if a suit be instituted by a husband or parent in the Spiritual Court for a legacy, payable to a married woman, (b) or an infant, (c) the Court of Chancery, upon bill filed, will grant an injunction, because the Spiritual Court cannot, like a Court of Equity, compel the husband to make an adequate provision or settlement before the husband will be permitted to receive the legacy, and it is a special jurisdiction of a Court of Equity to take care of the interests of infants. And, on account of the deficiency of the jurisdiction of the Ecclesiastical Court, either to compel an account, or pending the suit, to secure the assets, suits for *legacies* are seldom brought in the Ecclesiastical Court; nor is it an answer to a suit in equity on this subject, that a suit has already been commenced and is pending in the Ecclesiastical Court. (d)

So the Ecclesiastical Court cannot in any case compel an *Executor* to make *Distribution* of the residue amongst the

(y) *Keilly v. Monck*, 3 Ridgw. P. C. 243; *Kendall v. Kendall*, 4 Russ. Rep. 370; *Hurst v. Beach*, 5 Mad. R. 360; Chit. Eq. Dig. 597; ante, 112, note (b); 2 Mad. Ch. Pr. 1.

(x) *Barker v. May*, 9 Bar. & Cres. 489; ante, 112, note (c).

(a) *Redes. Tr. Pl.* 110; 2 Mad. Ch.

Pr. 3.

(b) *Tanfield v. Davenport*, Tot. 114, and other cases; 1 Mad. Ch. Pr. 129.

(c) *Rotherham v. Fanshaw*, 3 Atk. 689; *Harrell v. Waldron*, 1 Vern. 26; 2 Ch. C. 56; Chit. Eq. Dig. 597, 598, 667; 1 Mad. Ch. Pr. 129.

(d) 2 Mad. Ch. Pr. 3, 4.

next of kin, because the claim upon him is in the character of a *Trustee* for the next of kin, and that court cannot enforce the execution of a trust, (e) or as it hath been said, any thing in the nature of a trust. (f) It is otherwise, however, as regards *Administrators*, because the 22 & 23 Car. 2, c. 10, s. 3, *expressly* authorizes the *ecclesiastical* judge to decree distribution in case of intestacy. But notwithstanding that enactment, it has been decided that an account and due distribution may be decreed in *equity* of an intestate's personal estate against an administrator, notwithstanding an account has been before taken and a distribution decreed in the Spiritual Court. (g) And when the personal estate is considerable, or when there is the least apprehension of insolvency or misconduct on the part of an administrator, it is certainly advisable, shortly after the death, to file a bill in equity, to prevent waste or loss. (h) In the case of an administrator who has become insolvent, it seems necessary, in order to subject his *sureties* to liability to be sued upon the *administration bond* on behalf of the next of kin for their distributive shares, to be essential, in order to bring the case within the terms of the condition, to institute a suit and *obtain a decree* in the Ecclesiastical Court for distribution, without which no action on such bond can be sustained. (i)

So there is a specific remedy to compel the production and giving up of a *will or probate* which has been taken or improperly detained by an attorney or other person, under pretence of a lien or some other claim, and in respect of which a summary proceeding is sustainable. (k)

Delivery of a will or probate enforced summarily in spiritual courts.

The Ecclesiastical Courts have exclusive jurisdiction, and the Court of Chancery has no jurisdiction to decide upon the *validity* of a will of *Personalty*, even in the case of alleged *fraud*. (l) On the other hand, the validity of a devise or will of

Jurisdiction as to validity of Will of Personal or Real Estate.

(e) *Farrington v. Knightley*, 1 P. Wms. 559; 2 Mad. Ch. Pr. 3.

(f) *Franco v. Alvares*, 3 Atk. 346.

(g) *Bissell v. Cortelo*, 2 Vern. 47; Mad. Ch. Pr. 580; *Howard v. Howard*, 1 Vern. 134; Chit. Eq. Dig. tit. Distribution and Jurisdiction, 597.

(h) *Ante*, 716, and note (h).

(i) *Archbishop of Canterbury v. Tappen*, 8 B. & C. 150; 2 Man. & R. 186, S. C.; *ante*, 552; *Archbishop of Canterbury v. Robertson*, *ante*, 716, note (h); and that no action at law lies for a distributive share, *Jones v. Tanner*, 7 B. & C. 542; unless it has been by the executors converted into a loan or debt, *George v. Harman*, 1 Moore & P. 209.

(k) *Ante*, 513; and see 1 Williams on

Executors, 186.

(l) *Jones v. Frost*, 1 Jac. & R. 466; *Jones v. Jones*, 3 Meriv. 161; *Pemberton v. Pemberton*, 13 Ves. 297; *Bennet v. Vade*, 2 Atk. 324; 9 Mod. 312, S. C.; nor can a will of *personalty* be set aside in *equity*, even on ground of *fraud*, but only in the Spiritual Court, *Ex parte Fearon*, 5 Ves. 647; *Kerrick v. Bransby*, 7 Bro. P. C. 437; *Warwick v. Gerrard*, 2 Vern. 8; *Nelden v. Oldfield*, Id. 76; 1 Madd. Ch. Pr. 258. The want of jurisdiction in a Court of Equity to set aside a will on the ground of *fraud* has frequently been regretted, but is admitted, *Ex parte Fearon*, 5 Ves. 647; 1 Mad. Ch. P. 258; see some cases *contra*, but not considered to be law, Chit. Eq. Dig. 597.

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Real property can only be determined in an action at law, or upon an issue *devisavit vel non.* (m)

Suits in Prize Court for restitution of Captured Ship or Goods, &c.

We have seen that *hostile captures*, or *seizure* in the nature thereof, made in or in relation to war, are not cognizable in any municipal court, and that a *Prize Court* is therefore specially appointed and authorized by commission from the king, directed to the judge of the Admiralty Court, and before whom all suits for *restoration* of the captured property must be instituted; (n) and this rule obtains so strongly, that no action can be sustained in the temporal or other courts even for false imprisonment, when connected with the detention of goods or ship under colour of a capture. (o) And though there might be equitable grounds upon which a Court of Equity might interfere to restrain a captor from proceeding to condemnation, yet an injunction to stay proceedings in the Admiralty Court (or rather Prize Court), in a suit for the condemnation of a ship, on the ground that a note had been unduly obtained from the captain acknowledging the right of capture, was refused, because the Court of Admiralty had sufficient authority to investigate the circumstances. (p) Where the property claimed is of less value than 100*l.*, then, for the purpose of avoiding expenses disproportionate to the claim, the Prize Court will permit the propriety of the capture or seizure to be litigated and decided without the expense of a formal suit; but as a fixed rule is essential, if the property be at all, as only a few pounds, above the value of 100*l.*, then a formal suit is essential. (q) But although the Prize Court has exclusive jurisdiction over *direct* questions of prize or capture, yet if any *trust* or partnership arise, a Court of Equity then has so far jurisdiction as to direct between whom the property recovered in the Prize Court shall be divided. (r)

III. *Real Property.*

III. As respects *Real Property*, we have seen when recourse may be had to the right of *re-entry* and of taking possession without any legal assistance. (s) We have also, in the outline

(m) 1 Mad. Ch. Pr. 258.

(n) *Ante*, 2, note (b); *Le Cour v. Eden*, Dougl. 594; *Elphinstone v. Bedreechund*, Knapp's R. 316 to 361; *Hill v. Reader*, 2 Sim. & Stu. 437, 451; 2 Russ. R. 608, S. C. See the full proceedings in a Prize Court, 3 Chit. Commercial Law, 608 to 618; and *ante*, 2, note (b).

(o) *Faith v. Pearson*, Holt's C. N. P.

113; 3 Bla. Com. 69, 70, note 11.

(p) *Anon.* 3 Ask. 350; 1 Madd. Ch. Pr. 130.

(q) *The Mercurius*, 5 Rob. 127, 128.

(r) *Hill v. Reardon*, 2 Russ. R. 608; and see *Pearson v. Belcher*, 4 Vet. 637; *ante*, 780, note (f); *Chaloner v. Sanson*, 1 Bro. P. C. 149.

(s) *Ante*, 646.

of private rights, injuries, and remedies, seen the *specific* remedies afforded by the statutes against *forcible entries and detainers*, enabling *justices of the peace* immediately to restore possession,^(t) but that they are exceedingly reluctant to act, and can rarely be persuaded to do so; and, perhaps, as there are other remedies, as by indictment or by action of ejectment, and in the mean time an injunction to prevent waste might be obtained, the Court of King's Bench would not enforce the duty in a case where the practice has become obsolete.^(u) But we will in the next volume consider the course of proceeding, as unquestionably it would be highly advantageous in many cases, especially during the long vacation, to revive the practice.^(x)

Besides the statutes enabling magistrates on a summary proceeding to restore possession, the statute 8 Hen. 6, c. 9, enables a freeholder, who has been forcibly expelled, to recover back, under the judgment upon an indictment, the estate with treble costs, unless the offender has been in possession for more than three years; and the same remedy was afterwards extended to copyholders and tenants for years by 21 Jac. 1, c. 15.^(y) And in case of paupers and others who have intruded into buildings or land appropriated to the poor, summary proceedings to recover possession have been introduced by statute;^(z) and we have seen the summary specific remedy by the intervention of two justices in case of tenants owing half a year's rent, and having deserted the premises.^(a)

There was also an ancient common law writ, *de domo reparanda*, still in force, though not in use, by which one tenant in common might compel his co-tenant to concur in the expense of repairing the joint property, and which might be revived in

(t) *Ante*, 375, 376.

(u) In *note, ante*, page 376, it has been supposed that a *mandamus* would issue; but that position may be questionable, as the court rarely interferes when besides *mandamus* there would be any other remedy (*ante*, 791; *Rex v. Cambridgeshire*, 1 Dowl. & R. 325); and in case of a forcible entry, there are several other remedies, as an indictment, upon which there would be judgment and process for restitution, *ante*, 377, 378; or an action of ejectment at common law, and in the mean time a Court of Equity would prevent waste, *ante*, 723. In general, however, the Court of King's Bench will award a *mandamus* to compel justices to take security on articles of peace from K. B. *Rex v. Lewis*, 2 Stra. 835; 2 Sess. Ca. 68, pl. 72, S. C.; and to justices to sum-

mon parties assessed to the poor rates, and grant warrants of distress, *Rex v. Benn*, 6 T. R. 198; *Harper v. Carr*, 7 T. R. 722; *Anon.* 2 Chit. R. 257; and to justices to back the warrant of distress, *Rex v. Kynaston*, 1 East, 117. But the court will not issue the writ if it be doubtful whether the justices can legally do the act to be required of them, and certainly would not when the doing the act would probably subject the justices to an action, *Rex v. Buckinghamshire*, 1 Bar. & Cres. 485; 2 Dowl. & Ry. 809, S. C.; *Rex v. Robinson*, 2 Smith's R. 271.

(x) *Post*, Part 3; and Burn's J. Forcible Entries.

(y) *Ante*, 377, 378.

(z) 59 Geo. 3, c. 12, s. 17, 24, 25; *ante*, 378.

(a) *Ante*, 376.

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practice with utility. (b) And if there be two tenants in common of a house or mill, and it fall into decay, and the one is willing to repair and the other not, he that is willing may have a writ *de reparatione facienda*. (c) But this writ has fallen into disuse, and the remedy, when there is any between tenants in common and joint tenants, is usually in equity for contribution.

Of the same nature was the ancient common law writ *de curia claudenda*, still also in force, though not resorted to, by which an owner of an estate of inheritance of land (d) might compel the owner in fee of adjoining land specifically to repair the intermediate fences according to his prescriptive obligation. But that remedy has given way to the action on the case for not repairing, although by that proceeding only damages can be recovered, though a repetition of successive actions will generally have the ultimate effect of inducing the party to repair, to avoid accumulated expense. (e) But this writ could only be sustained by and against the owner in fee, and not by a termor or a commoner. (f)

Of the Jurisdiction of Courts of Equity to compel specific Performance of Contracts, and other acts in general. (g)

The Jurisdiction in *Equity* by *Bill* to enforce specific performance of contracts, and the delivery of accounts and of other rights, may in some degree be assimilated to the jurisdiction at *law* of the Court of King's Bench to compel specific performance of certain acts by writs of *Mandamus*, but with this general distinction, that the latter remedy is usually confined to the enforcement of *public* rights or duties; whereas the remedy in *Equity* principally relates to the enforcement of *private* rights or duties. Like the writ of *mandamus*, a party is not entitled to a bill for specific performance as of *right*, but it is always discretionary in the court, though that discretion, by a long course of decisions and practice, has in a great measure become fixed; (h) and it is now as much of course in *Equity* to

(b) See form of writ, Fitz. Nat. Brev.; *Cubitt v. Porter*, 8 Bar. & Cres. 269, per Littledale, J.; and see 1 Thomas, Co. Lit. 216, note 17; Id. 787.

(c) *Cubitt v. Porter*, 8 Bar. & Cres. 269.

(d) It lies only for a tenant in fee, for it is a writ of *Right*, Mich. 9 Ann. K. B., *Starr v. Rookesby*, 1 Salk. 126; Fitz. N. B. 128, B.

(e) As to the writ *de curia claudenda* in general, see Fitz. N. B.; Vin. Ab. tit. Fences; Bro. Ab. tit. Curia Claudenda.

(f) *Starr v. Rookesby*, 1 Salk. 336; Fitz. N. B. 128, B. C.

(g) As to the enforcement of specific performance of contracts, and other acts in general, see Newland on Contracts per tot.; and see history of this jurisdiction by Lord Erskine in *Halsey v. Great*, 13 Ves. J. 36; 1 Madd. Ch. Pr. 369 to 444; and see Index, 2d vol. tit. Specific Performance; Sugd. V. & P. as to Sales; 3 Woodes. Vin. Lect. 420 to 476; Chitty's Eq. Dig. tit. Agreement, XL. 42 to 63.

(h) *Clowes v. Higginson*, 1 Ves. & B. 524; *Mortlock v. Buller*, 10 Ves. 294; 2 Dow, 510; *Moore v. Blake*, 1 Ball & B. 69.

enforce specific performance of certain contracts made by a competent person, and in its nature and circumstances unobjectionable, as the recovery of *damages* at law. (i) The jurisdiction referred to is not an arbitrary capricious discretion, but must be regulated by grounds and reasons that will make it judicial. (k) This is a high prerogative jurisdiction, so peculiarly appropriated to Courts of Equity that although the King in Privy Council exercises judicial magistracy over the plantations, yet it was holden, that that judicature could not compel specific performance of an agreement for settling the boundaries of two provinces in America, and the suitors were remanded to the equitable jurisdiction. (l) We have already suggested that that Remedy which places a party in, or restores him to the *precise situation* in which he is entitled to stand, and especially when it also affords him compensation for intermediate damage as well as costs, must obviously be preferable to any remedy which merely affords pecuniary compensation, and that therefore upon principle, the former remedy should be extended rather than narrowed, (m) but still it will be found essential that it should be limited by some established rules. (n)

From the cases collected in the able work upon *Contracts* within the jurisdiction of Courts of Equity, by Mr. Newland, it appears that the jurisdiction of Courts of Equity in compelling specific performance of a contract was assumed, and not original, and even so late as in Easter Term, 14 James 1, upon a motion to prohibit a suit of that nature in the Court of Marches of Wales, to compel the granting a lease, pursuant to a bargain, the Court of King's Bench said, without a doubt a Court of Equity ought not to do so, for then to what purpose is the action on the case and covenant, and Lord Coke said that this would *subvert the intention of the covenantor*, for he intended it to be at his election either to lose the damages or to make the lease, and they would compel him to make the lease, contrary to his will; and so it is if a man bind himself in an obligation to enfeoff another; he may not be compelled to

(i) *Hall v. Warren*, 9 Ves. 608. It is not an arbitrary discretion. *Goring v. Nash*, 3 Atk. 186; *Jones v. Stratham*, Id. 389.

(k) Per Lord Eldon, 7 Ves. 35; *Ryall v. Rolfe*, 1 Atk. 183; *Rex v. Wilkes*, 4 Burr. 2539.

(l) *Penn v. Lord Baltimore*, 1 Ves. Sen. 447.

(m) But *semble*, that in practice the remedy has not, at least as regards personality, been extended, for formerly there were instances of contracts for the transfer of stock having been specifically enforced, but of late the party has been left to proceed at law; *Nutbrown v. Thornton*, 10 Ves. 161; *Mason v. Armitage*, 13 Ves. 37.

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make feoffment, and a prohibition was granted. (a) But it will be observed, that this was most fallacious reasoning, for undoubtedly the professed intention of the covenantor in each case, was to grant the lease, or to enfeoff, and not to reserve the option of paying damages in lieu of performing the act, and Courts of Equity have properly considered that the doctrine and remedy at law is much less than complete justice, because a party who has entered into the covenant or agreement, is in conscience bound, not only to make compensation for the breach, when he could not perform it, but also actually to perform when it is in his power, and it is on this ground that a Court of Equity interposes, (b) and this high jurisdiction is incontrovertibly settled, and one of the most fruitful sources of business in these courts; and they enforce this assistance principally in those cases where courts of law are incapable of giving to the party the remedy which he seeks, and to which in conscience he is entitled. (p) Thus, in a contract for the purchase of a particular real estate, as the object of the buyer is to obtain that specific estate, the recompence in damages, which courts of law would afford him in an action against the seller for a breach of his contract, would not be an adequate remedy; and so with respect to an agreement for a lease for a term of years, the recovery of damages for afterwards refusing to grant, would be an inadequate remedy, and therefore equity will decree the specific performance of such agreements, and compel the granting and the acceptance of the conveyance or lease. (q) But, as we have before intimated, when speaking of *injunctions*, as respects contracts relating to mere *personal property*, it is considered that the same principles do not in general extend, because, if a party contract to deliver a certain quantity of corn or hops, or to transfer stock, and refuse to do either, the purchaser may readily purchase the like articles elsewhere, and the recovery at law of damages for the breach of the contract, sufficient to cover any temporary damage or advance of price, is considered an adequate compensation; and it has also been considered, that as relates to articles of merchandize, which vary according to different times and circumstances, if a Court of Equity should admit a bill, a specific performance might perhaps be attended with ruin to the

(a) Newland on Contracts, 88, 89, cites *Genings v. Bromage*, 1 Rol. Rep. 354, 368; *Hudson v. Middleton*, 2 Rol. Rep. 433; *Mollineux's case*, Latch. Rep. 172.

(b) See *Alley v. Deschamps*, 13 Ves.

228; 1 Redesd. Tr. Pl. 108; and *O'Herlihy v. Hedges*, 1 Sch. & Lef. 129; 1 Mad. Ch. Pr. 360, 361.

(p) Id. *ibid.*; Newl. on Contr. 88, 89.

(q) 1 Mad. Ch. Pr. 361.

defendant, when in an action he might not have to pay more than one shilling damages, therefore, equity in general leaves such contracts to law, where also the remedy is so much more expeditious. (r) To this rule, however, there are exceptions, (s) and where a contract relating to personalty has been in part performed, and the purchaser has parted with his money, and then the vendor attempts to deprive him of the moveable chattels, or otherwise of the benefit of the contract, to a ruinous extent, then we have seen that a Court of Equity will in effect decree a specific and complete performance, by injunction against the wrongful act of the vendor; (t) and we have seen many instances where a Court of Equity will compel the delivery of a proper security or document in pursuance of a contract.

On the other hand, a Court of Equity will not, as it is said, entertain proceedings *infra dignitatem*, or rather will not, in mercy to claimants, interfere when the proper object in dispute is so small that the probable amount of even extra costs would render it inexpedient in prudence to proceed, and in which the costs would be ruinous perhaps as well to the complainant as to the defendant. (u) Thus equity will not entertain a suit where the value is under fifty shillings per annum, (x) nor any suit relating to a matter of very small value, especially if it be founded on a verbal contract, (too frequently and independently of the statute against frauds subject to doubts (y)); and we have seen that even in a case of injunction, the Chancellor expressed his doubt whether he had not degraded the dignity of the court by interfering by injunction to prevent the vendor of a coach concern from running an opposition coach, though contrary to his absolute covenant. (z) But to these cases there is an exception with regard to a suit on the behalf of the Roor of the parish, though for under forty shillings. (a) And there is an exception to the rule, not to interfere in enforcing contracts relating to personalty, in the case of a preliminary contract to

Not in a suit *infra dignitatem* where the sum is too small to be worth a suit in equity.

(r) Newland on Contracts, 89, 90; and cases, post, 853, 854, but the last reason seems questionable, see post, 853, 854.

(s) Ante, 712; and post, 853, 854.

(t) Ante, 711 to 715.

(u) As courts are instituted for the benefit of suitors, and not with a view to dignify the judges, and as they are always most dignified when anxiously administering justice according to law, in small as well as great causes, the more becoming expression and reason for refusing interference at law, is in mercy to the party himself; that is the avowed ground on

which new trials, when the sum recovered is under £20, are refused, unless when the trial relates to a permanent or general right, when its importance is not confined to the single cause. See an instance *Turner v. Lewes*, 1 Chit. Rep. 265.

(x) *Townley v. Omev*, Carey, 74; *Owens v. Smith*, 2 Com. 715.

(y) *Hanby v. Northaye*, Carey, 76; and see other instances, Chit. Eq. Dig. Jurisdiction, ix.

(z) Ante, 713; *Smith v. Froment*, 2 Swanst. 532.

(a) *Parrot v. Pawlet*, Carey, 103.

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enter into a more formal contract, so as to give the complaining party a more perfect remedy at law; (b) and where a party seeks to be relieved from a penalty of a bond or other contract forfeited by his want of punctual performance of a personal contract, equity will not relieve, except upon the terms of his performing the act *cy près*, or paying the actual damage sustained. (c)

Cannot at same time proceed at law for damages and in equity for specific performance.

We have seen, that, notwithstanding the pendency of an action at law to recover damages, a party may apply for and obtain an *Injunction*. (d) But the rule is otherwise with respect to bills for specific performance, for although a vendor and vendee respectively have the option of proceeding at law or in equity, (e) he cannot do both, and after a decree for a specific performance against a defendant, the plaintiff cannot proceed by action at law on the contract for damages, and such action would be restrained by injunction. (f) But if a purchaser, upon a bill filed for specific performance, pay the purchase money without putting in his answer, and afterwards discover a fraud in the sale, he is not precluded from bringing an action for damages if he come recently after discovering the deception. (g)

Necessity for reference to cases relating to *Injunctions*.

Before we consider the extensive jurisdiction of Courts of Equity in decreeing specific performance of contracts, it is necessary to observe that many of the rules and decisions which we have considered respecting *Injunctions* against breaches of contract, will equally apply to *Bills for specific performance*, and must be kept in view, (h) injunctions being granted to prevent active breaches of contract, whilst decrees of specific performance are to compel a contracting party to perform some act pursuant to his contract.

Arrangement of the Rules and Practice relating to Bills for Specific Performance.

For *Practical purposes* it may be expedient, first, to consider the *General Rules*, when or not a Court of Equity will decree *Specific Performance* of contracts; secondly, to examine separately and distinctly the instances of *particular Contracts* relating to the *Person*, *Personal property* and *Real property*; and thirdly, the *Practical Proceedings and Decree*, and these under the following heads:

(b) Newland on Contr. 92, cites *Buxton v. Lister*, 3 Atk. 382; *Pember v. Mathers*, 1 Bro. C. C. 52; and *Taylor v. Neville*, cited 5 Atk. 384.

(c) Newl. on Contr. 307 to 310; 3 Bla. Com. 326, b.; 1 Ch. Cas. 24; *Cage v. Russell*, 2 Vent. 352; *The Earl of Strafford v. Lady Wentworth*, 9 Mod. 22;

Hill v. Barclay, 18 Ves. 63.

(d) Ante, 701, (c).

(e) Sug. V. & P. 205.

(f) *Reynolds v. Nelson*, 6 Mad. R. 290; Sug. V. & P. 220.

(g) *Jedwine v. Slade*, 3 Esp. R. 257; Sug. V. & P. 220.

(h) Ante, 695 to 730.

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As regards contracts in general, a Court of Equity will not decree specific performance unless the obligation to perform the contract was, at the time it was made, *mutual and reciprocally binding*. (i) Thus, if a necessary party to the contract, at the time of making it, was an *infant* or a *married* woman, so as not then to be absolutely bound, the court would not decree specific performance on a bill filed, although at his or her instance; (k) therefore, where it was discovered and urged that the plaintiff, in a bill for specific performance, was an *infant* at the time of the contract and also when the bill was filed, such bill was dismissed with costs, to be paid by the next friend; (l) and the Master of the Rolls said, that no case of a bill filed by an infant, for the specific performance of a contract made with him, has been found in the books, and that it was an admitted general principle of Courts of Equity only to en-

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First, Each party must have been competent to contract and mutually bound.

Infancy, when an objection.

(i) Newl. Contr. 91, 152, 153; 1 Mad. Works, 1 Jac. & W. 358, 370, 373; post, Ch. Pr. 423, 424. 827, 828.

(k) Flight v. Bolland, 4 Russ. R. 298; (l) Id. ibid.; but see 1 Mad. Ch. Pr. Harnett v. Yielding, 2 Scho. & Lef. 549; 423, note (m). and see Weale v. West Middlesex Water

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force specific performance when the remedy is *avowed*. (m) He then adverted to the exception to that rule under the statute against frauds, and which establishes, that although a party filing a bill for specific performance had not himself signed the contract, yet he might sustain the bill against the party who had, (an exception, the propriety of which had been questioned by Lord Redesdale, on the ground of want of mutuality, but was supported, because the statute against frauds only requires the agreement to be signed by the party to be charged, and also because the plaintiff, by the act of filing the bill, had adopted the contract and made the remedy mutual,) (n) but that those reasons did not apply to the case of an infant. But perhaps if an infant purchaser, after he has attained twenty-one, and whilst the contract is open, and before the vendor has expressed any dissent, should affirm the contract, or even file his bill, (which might of itself be deemed such affirmance,) then his bill might be sustained. (o) In the first case, at all events, the remedy on behalf of the infant is only *at law*, where it has been held that infancy is merely a personal protection, that can be taken advantage of only by the infant himself. (p)

Marriage, when
an objection.

As to *Married women* it is clear, that if a husband should contract for the sale of his wife's real estate, a Court of Equity will not decree him to procure her to join in a conveyance; (q) and it should seem, on the other hand, that unless the vendor-husband has, whilst the contract is open, and before filing his bill for specific performance, procured his wife to concur and execute the conveyance, and levy a fine when necessary, he could not sustain his bill against the purchaser. (r) But when an estate has been settled upon a married woman for her separate use, or when the legal estate is in trustees, specific performance might probably be enforced. (s).

Lunacy.

At law *Lunacy* is not in general any defence to an action on a contract; (t) but it would be otherwise in equity, especially if circumstances of fraud were practised by the claimant. (u)

Weakness of In-
tellects, when
an objection.

And though Courts of Equity will not, as has been figuratively expressed, measure the size of people's understandings or

(m) *Flight v. Bolland*, 4 Russell, 301; Co. Lit. 2, b.

(n) *Per* Master of Rolls in *Flight v. Bolland*, 4 Russ. R. 301; *Martin v. Mitchell*, 2 Jac. & Walk. 427; *ante*, 115, 116, and notes.

(o) 9 Vin. Ab. 393, pl. 1; and see observations in *Flight v. Bolland*, 4 Russ. R. 300.

(p) *Warwick v. Bruce*, 2 Maule & S. 205; 6 Taunt. 118, S. C.

(q) Decided in *Martin v. Mitchell*, 2 Jac. & W. 425; admitted in *Flight v. Bolland*, 4 Russ. 299; and see Sugd. V. & P. 8 ed. 187 to 189; Newl. Contr. 103.

(r) *Semble*, *id.* and page 301.

(s) Sugd. V. & P. 8 ed. 187 to 191.

(t) *Baxter v. Earl Portsmouth*, 5 Bar. & Cres. 170; 2 Car. & P. 178, S. C.; but see *Sentance v. Poole*, 3 Car. & P. 1.

(u) Newl. Contr. 363; and *post*, 827, (d).

capacities, there being no such a thing as an equitable incapacity when there is a legal capacity, (x) yet *great weakness* of understanding, although not amounting to insanity, is always considered, when connected with circumstances of fraud or surprise, as forming a strong feature in the case; (y) and in these cases Courts of Equity will not only refuse specific performance, but also will, under circumstances, decree the contract to be delivered up to be cancelled. (z) As where a weak man, easily imposed upon, and seventy-two years old, conveyed an estate worth £40 a year to two persons in fee, in consideration of an annuity of £20 a year. (a) But great age and imbecility will not induce a Court of Equity to cancel even a voluntary deed, if it were well explained to the party, and he understood its terms. (b)

If a contract be obtained from a man in a complete state of *Intoxication*, although that circumstance alone would not invalidate, yet slight evidence of circumvention or fraud would induce equity to set the same aside, or at least to refuse specific performance; (c) as if the party to an agreement were drawn in to drink, by the management of the person in whose favour it was signed. (d)

But besides the necessity for each party being reciprocally bound in respect of competency, it is also a rule that the contract itself must have been so framed as to be *reciprocally* and *mutually* binding. It was partly on this ground that the case of *Wealer v. The West Middlesex Water Works Company* was decided. (e) That company was established by a statute for supplying the inhabitants of several districts with water at such terms as they should mutually agree upon; and a subsequent act provided, that the company should only demand *reasonable sums*, and it was determined that neither a bill for a specific performance of a supply of water, nor an injunction for interrupting an inhabitant's supply of water could be sustained, because there had been no *mutually binding contract* between

There must have been a contract binding each party to future performance.

(x) 1 Mad. Ch. Pr. 280; Newl. Contr. 362; *Blackford v. Christian*, Knapp's R. 77; *Diamid v. Diamid*, 3 Wils. & Shaw, 37, S. P.; 3 Bligh, N. S., 374, S. C.; *Milnes v. Cowley*, 8 Price, 620.

(y) *Griffin v. Devenille*, 3 P. W. 130; and other cases Newl. Contr. 363; 1 Mad. Ch. Pr. 280, 283; *Ball v. Munnins*, 3 Bligh, N. S. 1; *Blakeney v. Bagot*, Id. 257, 253; *Diamid v. Diamid*, Id. 374; 3 Wils. & Sh. 37.

(z) Id. *ibid.*; and ante, 709, 710.

(a) *Clarkson v. Harvey*, 2 P. Wms. 203; Newl. Contr. 365; 1 Mad. Ch. Pr. 283; *Martin v. Mitchell*, 2 Jac. & W. 413; and see *Blackford v. Christian*,

Knapp's Rep. 73; *Diamid v. Diamid*, 3 Wils. & S. 37, S. P.; 3 Bligh, N. S. 374, S. C.

(b) *Pratt v. Barker*, 1 Simon's R. 1.

(c) *Craigh v. Holme*, 18 Ves. 14; *Say v. Barwick*, 1 Ves. & B. 95; *Johnson v. Medlicott*, 3 P. W. 130, note (a); *Northam v. Latouchs*, 4 Car. & P. 140; *Pitt v. Smith*, 3 Campb. 33; *Fenton v. Holloway*, 1 Stark. R. 126; *Gregory v. Fraser*, 3 Campb. 454; Newl. Contr. 365.

(d) *Johnson v. Medlicott*, 3 P. W. 130, note (v); *Cory v. Cory*, 1 Ves. 19; *Cook v. Clayworth*, 18 Ves. 12.

(e) *Wealer v. West Middlesex Water Works*, 1 Jac. & W. 358, 370, 371, 373.

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*Secondly, The
Contract itself,
and requisites.*

*Uncertainty in
terms.*

the company and the inhabitant for a supply of water at a fixed price, and consequently neither the company was bound to supply, nor the inhabitant bound to take or pay for any water.

With respect to the *Contract itself*, the rule is, that a party who seeks specific performance by decree of a Court of Equity must establish that there has been a certain contract, clear in all its material terms, (f) and valid as well at common law (g) as under the provisions of the statute against frauds, (h) or that the defendant is precluded from objecting, on account of informality, by the circumstance of a material part performance of some part of the contract. (i)

In contracts for the payment of a sum of money, whether as the price of real property or otherwise, a specific fixed price is in general of the essence of the contract. (k) And if it appear even by parol evidence that one term of the actual agreement was omitted, specific performance will be refused; (l) and neither at law nor in equity will any material stipulation not expressed be supplied; (m) nor has a Court of Equity power to alter the contracts of parties from an eventual change not contemplated at the time; (n) and where a material ingredient in the terms of a contract has been omitted, equity considers it as only resting in *treaty*, and will not decree a specific execution. (o) So in contracts of sale, if there be uncertainty as to the description or quantity of the lands proposed to be conveyed, the court will not decree specific performance; (p) unless, perhaps, in some cases, where the party who refuses to perform, himself drew the agreement, and occasioned the objected uncertainty. (p) And although in equity, where a written agreement expressly refers to a plan as an existing document forming a term in a contract, parol evidence is admissible for the purpose of identifying the plan, yet, unless the evidence of identity be clear and satisfac-

(f) As to the necessity for certainty in general as regards suits for Specific Performance, see *Whaley v. Bagnall*, 6 Bro. P. C. 48; *Moseley v. Virgin*, 3 Ves. 184; 1 Fonbl. Eq. 170; 1 Madd. Ch. Pr. 426.

(g) See the requisites of contracts in general, ante, 112 to 126; as respects contracts of sale or demise of real property, ante, 292 to 305.

(h) 29 Car. 2, c. 3, s. 1 & 4; ante, 292, 293.

(i) See post, 832, as to part performance.

(k) See in general Newl. on Contr. 151; and admitted in *Agar v. Macklaw*, 2 Sim. & Stu. 422; *Emery v. Wase*, 5 Ves. 846; 8 Ves. 505; *Holcraft v. Hickman*, 2 Sim. & Stu. 134; *Lyndsey v. Lynch*, 2 Scho.

& Lef. 7. The same point was decided at law, in *K. B., A. D. 1821*. See also *Wealer v. West Middlesex Water Works*, ante, 827, note (c); and 3 Chitty's Comm. L. 103, n. 2.

(l) *Garran v. Grimly*, 2 Swanst. 244; *Bayley v. Tyrrell*, 2 Ball & B. 363; *Hosier v. Read*, 9 Mod. 86. When otherwise, *Omerod v. Hardman*, 5 Ves. 750; *Whaley v. Bagnel*, 6 Bro. P. C. 45.

(m) *Ormond v. Anderson*, 2 Ball & B. 369; 1 Mad. Ch. Pr. 426, 427.

(n) *Bayley v. Tyrrell* 2 Ball & B. 363.

(o) *Bromley v. Jefferies*, 2 Vern. 415; Newl. Contr. 151; but see id. 152, other cases contrd.

(p) *Clermont v. Tasburgh*, 1 Jac. & W. 115.

tory, specific performance of such an agreement will be refused. (q) We have in the preceding part considered the certainty required in a contract, and when or not it is valid and may be enforced; (r) and contracts relating to leases and sales of real property in particular have been stated. (s) When the contract attempted to be enforced would otherwise be invalid under the statute against frauds, it is advisable, though not absolutely essential, in the bill to charge that it was in writing and duly signed, or to charge fraud or other circumstance, such as part performance, necessary in equity to entitle the party to the interposition of the court. (t)

There has been some contradiction in the decisions upon the question whether the court will enforce an agreement to sell real property "for a price or sum of money to be fixed upon by two or more named persons appointed by the agreement, or by two persons indifferently to be chosen as surveyors or appraisers, one to be chosen by the vendor and the other by the purchaser," in cases where no valuation has been made, and one of the parties has declined to appoint a valuer on his part. (u) In one of the latest cases upon the subject, where the vendor had so declined, specific performance was refused, (x) and the Vice-Chancellor said, "I consider it to be quite settled that this court will not entertain a bill for the specific performance of an agreement to refer to arbitration, nor will in such case substitute the master for the arbitrators, which would be to bind the parties contrary to their agreement;" and he considered the decisions upon agreement to refer to arbitration as analogous. (y) So where two surveyors, who it had been agreed should fix the price of an estate, stated in their valuation the sum to be paid and the quantity of land, and that if it proved to be less, either 84*l.* or 42*l.* should be deducted, according to the parts of the estate in which the deficiency occurred, but did not state either the quantity supposed to be contained in each part, or that so much per acre should be deducted, it was held that such valuation was uncertain, and that a specific performance, after a reference to the master, could not be enforced in favour of the purchaser. (z) It had been previously held, that

(q) *Hodges v. Horsfall*, 1 Russ. & M. 116.

(r) *Ante*, 112 to 130.

(s) *Ante*, 292 to 301.

(t) *Ante*, 117, notes (r) & (s).

(u) *Ante*, 294, note (e).

(x) *Agar v. Macleaw*, 2 Sim. & Stu. 418, A. D. 1825, observed upon Sugd. V. & P. 8th ed. 254.

(y) *Agar v. Macleaw*, 2 Sim. and Stu. 423; and see *Milner v. Gery*, 14 Ves. 400; and see post, 851, as to the decisions upon agreements to refer.

(z) *Hopcraft v. Hickman*, 2 Sim. & Stu. 130; and see *Emery v. Wase*, 5 Ves. 846; *Blount v. Bestland*, Id. 517; *Hall v. Warren*, 9 Ves. 605; *Parker v. Whitby*, 1 Turn. & Russ. 366.

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where there is a contract to sell at a valuation to be made by *A. B. and C.*, the court would compel the vendor to permit the valuation. (z)

But if a *valuation has been actually and fairly made* by an arbitrator or valuer for a fair price before any dissent of either party, then equity will enforce the contract; (a) and it has even been held that the appointed valuers may take the opinion of any third person as *evidence*, though they could not delegate their *decision* to a third person. (b) Upon the whole, the rule seems to be, that if an agreement be made to sell at a fair valuation *generally*, without naming particular valuers or mode, the court will execute it, although the value has not been fixed or ascertained, because no particular means of ascertaining the value are pointed out, there is nothing to preclude the court from adopting any means proper to be used for that purpose. (c) But that where parties have agreed upon a *specific mode* of valuation, as by *two* persons, one chosen *by each*, then, unless the price has been fixed in the way pointed out, the court cannot enforce the performance of the agreement, for that would be not to execute their agreement, but to make a new one for them; and therefore where the agreement was to sell at a valuation by arbitrators to be appointed, or their umpire, and arbitrators were appointed, and differed as to value, and could not agree upon an umpire, the court refused to interfere, because a price fixed by the master of the court could not be a valuation made pursuant to the agreement of the parties. (d)

There are cases of contracts of sales of a mixed nature, or of real and personal property, where the price of the former has been fixed, and a general valuation of the latter only to take place, and which has been specifically enforced; as where the lease or interest and good-will in a public house has been sold at a fixed price, and the stock is to be valued fairly, where the court have decreed specific performance. (e)

(z) *Morse v. Merest*, 6 Mad. & G. 26.

(a) *Emery v. Wase*, 5 Ves. J. 346; 8 Ves. 505, S.C.; *Hall v. Warren*, 9 Ves. 605; *Blundell v. Brettarch*, 17 Ves. 241; and see *Dakin v. Cope*, 2 Russ. 170; 1 Mad. Ch. Pt. 426; Sugd. V. & P. 252. But if the prices were clearly inadequate, the court would not decree specific performance, *Parken v. Whitby*, 1 Turn. & Russ. 366.

(b) *Hopcraft v. Hickman*, 2 Sim. & Stu. 130.

(c) *Milner v. Gery*, 14 Ves. 407.

(d) *Milner v. Gery*, 14 Ves. 400;

Gregory v. Mighall, 18 Ves. 528; *Gowlay v. Somerset*, 19 Ves. 429; and see *Cook v. Jackson*, 6 Ves. 34; *Wills v. Davis*, 3 Merit. 507; *Pritchard v. Ovey*, 1 Jac. & W. 396; *Agar v. Macklem*, 2 Sim. & Stu. 416; Sugd. V. & P. 252, 253; Newl. Contr. 151; ante, 294, n. (c). The same point was decided at law in *K. B. A. D. 1821*; see 3 Chitty's Com. L. 103, note 2, accord; but see *Morse v. Merest*, 6 Mad. & Geld. 26; Sugd. V. & P. 254, contra.

(e) *Dakin v. Cope*, 2 Russ. B. 170; *Costaller v. Till*, 1 Russ. 376.

But although a contract of *sale* must in general be certain in itself, or the court will not decree performance, yet where a contract *for a lease* is incomplete merely in form, or in some particular which the court can in the exercise of its ordinary jurisdiction supply, it will then take upon itself to render it conformable with the apparent intention of the parties, to be collected from cases under similar circumstances to which it may be presumed the parties themselves probably referred, notwithstanding the loose manner in which the terms of their contract may have been expressed; (f) as for instance, where the agreement was for a lease, "with such usual and proper conditions and agreements as shall be judged reasonable and proper by John Gale, surveyor," the court referred it to the *master* to settle the terms, and not to Gale. (g) So where in an agreement for a lease, the rent, and the commencement and duration of the lease are uncertain, or made dependent upon the approbation of a third person, the court will refer it to the master, or direct proper issues to ascertain these several facts before any specific performance of the contract will be decreed, (h) especially if the tenant has occupied under the agreement. (i) And in general, specific execution of an agreement for a lease will be decreed with proper covenants, or according to the general practice as to such leases, and not contradicting the incidents of the lessee's estate; one of which is the right to have it without restraint, except what is imposed by law, as assignment, unless an express contract has been made to the contrary. (k)

But equity will not decree specific performance if the object of the agreement were in any respect inconsistent with the rules of public policy, although not absolutely declared void by any enactment. (l)

Courts of Equity cannot, on behalf of a vendor, decree the performance of one part of an agreement, leaving the other part unperformed. (m) But a purchaser may sometimes have a specific performance in part, waiving the rest, and the defendant cannot object; (n) but there are exceptions to this rule. (o)

We have seen the necessity for contracts to grant leases, or to sell any interest in land, to be *in writing*, and *signed* by the parties to be charged. (p) But in many cases where a contract has

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When it may be referred to a Master to settle the terms of a lease.

Illegal consideration or tendency vitiates.

Thirdly, The Specific Performance must be entire.

Fourthly, What acts of part performance are material and

(f) *Allen v. Harding*, 2 Eq. Ca. Ab. 17; 1 Foul. Eq. 173.

(g) *Gourlay v. Somerset*, 19 Ves. 129; *Milner v. Gery*, 14 Ves. 400.

(h) *Plunket v. Lord Kingsland*, 1 Bro. P. C. 322.

(i) *Gregory v. Mighell*, 18 Ves. 333.

(k) *Church v. Brown*, 15 Ves. 264.

(l) *Newl. Contr.* 157; 1 *Mad. Ch. Pr.* 409.

(m) *Wood v. Rowe*, 2 *Bligh*, 595.

(n) *Mestaer v. Gillespie*, 11 *Ves.* 640.

(o) *Sugd. V. & P.* 278 to 283.

(p) *Ante*, 292, 293.

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sufficient to
take a verbal
contract out of
the statute
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been imperfect in these respects, yet a *substantial part performance, effected as such*, will in equity entitle either party (whether he be the intended lessor or lessee, or vendor or purchaser), by bill in equity, to compel the specific performance of the whole. (q) The enumeration of all the rules and decisions upon this subject would be beyond our present object. It seems that although an agreement for a lease has been uncertain in some part of its terms, as that the *rent* shall be fixed by arbitration, or a third person, which has not been done, yet if the tenant has substantially occupied under the agreement, and in part performed it, the court will refer it to the master to fix the rent, rather than suffer it to be rescinded in toto. (r)

Fifthly, Circumstances inducing the courts to refuse specific performance.

There are some *circumstances* which may or not take away the right to a specific performance or induce the Court to refuse it, and these we will consider under the following heads:

1. Fraud, 833.

1. Misrepresentation, 833.

2. Concealments, 837.

2. Ignorance, 838.

3. Inadequacy of Price, 838.

4. Consequences of Vendor being unable in part to complete the entire Contract, 839.

1. Cannot demise or convey entirety of Interest in the whole Estate, 839.

2. Cannot demise or convey so large an Estate, 840.

3. Cannot convey an Estate of the like quality, 841.

4. Cannot convey of like Dimensions, 841.

5. Cannot make a perfect Title according to Conditions, 842.

6. Cases of Compensation, 842.

5. Subsequent Circumstances inducing Court to refuse Specific Performances, 844.

1. Felony of intended Lessee, 844.

2. Insolvency, 844.

3. Breaches of Covenant, 845.

4. Change in other Circumstances, as Destruction by Fire, Deaths, &c. 845.

5. Consequences of Laches or Delay as to Time, 847 to 849.

(q) See in general Sugd. V. & P. 107, 108, 110, 117, 118, 123; 1 Madd. Ch. Pr. 376, 380, &c.; Chitty's Eq. Dig. 58 to 60; *Gunter v. Halsey*, Amb. 586; *Kine v. Balfe*, 2 Ball & B. 343; *Morphett v.*

Jones, 1 Swanst. 172; *Clinder v. Cook*, 1 Scho. & L. 41; *Pilling v. Armitage*, 12 Ves. 78; *France v. Duncan*, 14 Ves. 386.

(r) *Gregory v. Nighell*, 18 Ves. 353.

As it is always *discretionary* to grant a specific performance, or to leave the parties to law, if it be established that any *fraud* is imputable to the vendor, or if there has been any *mistake* or *surprise* that operates in conscience against his demand to have the contract performed, it is an answer to his application. (s)

Fraudulent representations, or even *wilful concealment* or *suppression* of any *material fact* in the knowledge of a vendor or purchaser, although only to a small extent, would in general induce a Court of Equity to refuse specific performance at his instance, (t) though it might be enforced against him. (u) It is a well established maxim applicable to this branch of the law and to policies of insurance that *fraud, whether suggestio or allegatio falsi, or suppressio veri*, will avoid the contract. (x) Many of the cases upon this subject are ably collected by Mr. Maddox. (y) *Material misrepresentations* of bye-gone or supposed existing facts in obtaining any agreement will have this effect. (x) Thus a *verbal* misrepresentation by the auctioneer at the time of the sale as to the quantity of land would be a good defence to a bill for specific performance, (a) and even false representations by a vendor that he *intended* to make improvements upon land *adjoining* that offered to be sold, will have the same effect. (b)

With respect to *misrepresentations when innocent*, then, in some cases, in order to deter a Court of Equity from granting specific relief, it must have been *material*, and to such an extent as substantially to vary the spirit of the contract, for if not so *material* nor *wilful*, the court would compel the purchaser to complete the contract, accepting only a *compensation* for the deficiency in quantity or value in the estate. But if a *wilfully fraudulent* misrepresentation be established even as to a *small part* of a contract, the party guilty of it is entirely precluded from asking for a decree of specific performance, even of a part of the contract, or even upon his waiving the part affected by the misrepresentation; for the effect of *fraudulent* misrepresentation is not to alter or modify the agreement

(s) Per Master of the Rolls in *Beaumont v. Dukes*, Jacob's R. 424.

(t) *Calman v. Horner*, 18 Ves. 10; *Clermont v. Tasburgh*, 1 Jacob & W. 112, A. D. 1819; *Beaumont v. Dukes*, Jacob, 422, A. D. 1822; *Shirley v. Stratton*, 1 Bro. C. C. 440; Newl. Contr. 156, 213, 214. What is or not fraud to induce a court to refuse assistance, Newl. Contr. 213 to 227.

(u) Newl. Contr. 156, 157; *Mestaer v.*

Gillespie, 11 Ves. 640.

(x) See the principle and numerous instances, Sug. V. & P. 8th edit. 158, 194, 288; Park on Insurance; Marshall, id.; Hughes, id.

(y) Madd. Ch. Pr. 404, 405.

(z) *Supra*, note (t).

(a) *Wauch v. Winchester*, 1 Ves. & B. 375; *Flood v. Finley*, 2 Ball & B. 15.

(b) *Beaumont v. Dukes*, Jacob's Rep. 422.

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pro tanto, but to destroy it *entirely*, and to operate as a personal bar in equity to the party who has practised it; (c) and therefore where a bill was filed for the specific performance of an agreement to exchange estates, and it was established that such agreement was signed by the defendant upon the faith of the plaintiff's verbal false representation that his tenant and the defendant's had assented to such exchange without qualification, when in truth they had only assented to give up their occupations on the terms of being paid the value of their respective interests, the Court of Chancery refused specific performance, although the plaintiff offered to pay the tenants the amount of their claims. (c)

So where an agreement for a lease of Covent Garden theatre was obtained by a proposed lessor by his materially misrepresenting facts to the proposed lessees, it was held that they were justified in refusing the lease, *although they had possession for more than two years*, and the Vice-Chancellor having decreed otherwise, the Chancellor reversed that decree and the House of Lords affirmed the reversal. (d) But if the

(c) *Per* the Master of the Rolls in *Clermont v. Tasburgh*, 1 Jac. & Walk. 112 to 122; and *Cadman v. Horner*, 18 Ves. 10, where see the rule and principle ably elucidated.

(d) *Harris v. Kemble*, 2 Dow. & Clark's Rep. 463 to 479; overruling same case in 1 Simons, 111. In this case, by agreement under seal, of 11 March, 1822, between Harris and the defendants, the latter agreed to accept a lease from Harrison, a trustee for the plaintiff, and then of Covent Garden theatre, for a term of years, and plaintiff gave up possession of the theatre to the defendants, and they exclusively managed the same for several months. At the time of such agreement it was represented by the plaintiff that Sir E. Antrobus was lessee of a box in the theatre for a term at an annual rent of 210*l.* whereas it afterwards appeared that Sir E. Antrobus had purchased such interest in the box for 2000*l.* paid to the plaintiff and his father, which fact was not communicated to, but concealed from the defendants. There was also another fact nearly of the same nature concealed. The defendants proceeded in the management of the theatre for nearly two years, and then having discovered these facts, they refused to execute a lease but at a reduced rent, and thereupon the plaintiff in A. D. 1824, filed his bill in Chancery for a specific performance or the acceptance of a lease in modified terms. The defendants resisted this on the ground of fraud. The Vice-Chancellor, Sir John Leach, 11 April, 1827, decreed a specific performance. On an appeal to the Chancellor

Lyndhurst, he, on 26 May, 1829, reversed such decree on the ground of the fraud, and, *inter alia*, gave judgment as follows: "Now I believe it is a universal principle in this court, where a party calls for a specific performance of a contract, he must, as to every part of the contract, be free from every imputation of fraud or mistake. It is not sufficient to say that security may be given or security may be obtained upon the property; it is a personal bar to the proceedings of this court; it is a personal bar and may be a bar in a court of law; it is a personal bar to the party making application for a specific performance. I think I am justified in saying, according to the established practice of this court, if nothing had been done under this agreement, if the parties had not taken possession under it, if Mr. Harris had not given up the management, but that the agreement alone had been executed; under these circumstances it appears to me impossible to suppose that this court could have listened to an application for the purpose of enforcing a specific performance of this agreement, either generally or subject to modification. The question, therefore, comes to this, whether in consequence of the conduct of the parties, in consequence of their taking possession as they have done, and in consequence of their having dealt with the property in the way they have done, whether that state of things is such as to lead the court to enforce this agreement by a decree of a specific performance. Mr. Harris gave up the management of the whole concerns of the theatre to these gentlemen, as

thing concealed or omitted to be stated was *too trifling* to affect the ground of the contract or work any injustice or affect the interests of the party, the Court would, notwithstanding such concealment or omission, decree specific performance of the agreement. (e) Where the agreement is of doubtful and suspicious character with respect to the fairness of the terms or mode of obtaining it, the Court will not decree specific performance; and though a length of time has elapsed, that, under circumstances, will not imply acquiescence. (f)

Supposing the party deceived has, before he has discovered the fraud, taken possession and had a partial benefit from the contract, still, unless there has been perfect *bonâ fides* on the part of the other party, he cannot, on account of such partial benefit, compel specific performance, (g) but must seek his remedy, if any, for the temporary use of the property or other benefit, by another and different proceeding. (h) It must be kept in view that these cases of *fraud* are quite distinguishable from that class of cases in which the contract having been *in all respects fair* on each side, yet it cannot be literally performed in all its parts, and when the Court will modify it, attending to the substance of it, and carry it into execution free from the collateral circumstances that form the difficulty. There are cases of this kind where, from lapse of time, it has become unconscientious to insist upon the agreement *modo et forma*, or where there happens to be a small deficiency in the

agreement was entered into containing certain stipulations. It is stated that they have altered the theatre contrary to the directions contained in the contract, and have thereby materially injured the theatre. They have also, it is said, by the manner in which they have conducted the theatre, affected its interests most materially. It is obvious, however, that all this is matter of account and compensation, and does not render it necessary to enforce this agreement by decreeing a specific performance. It appears to me, therefore, considering that at the time when the bill was filed two years only had elapsed and eight years more remained; taking into consideration what I have observed with respect to the conduct of the parties during the negotiation; and considering their relative situations, that this court ought not, under all the circumstances, to interfere for the purpose of compelling a specific performance; and I do not think that there is any thing arising out of the conduct of the parties taking possession and acting towards the property in the manner they did during the time they were in possession; taking

all the circumstances into consideration, I do not think there is sufficient arising out of the conduct of the parties to the agreement of March, 1822, to justify the court in decreeing a specific performance.

I am of opinion that this agreement of 1822 ought not to be specifically performed, and cannot be specifically performed in general; it is admitted it cannot without modification, but I am of opinion that it ought not to be specifically performed without any modification, but that the parties ought to be left to their remedy either in this court or to adopt such proceedings at law as they may be advised. MS. and also from the shorthand-writer's note of the judgment.

(e) *Pellows v. Lord Gwyder and Page*, 1 Symonds, 65, confirmed in 1 Russ. & Mylne, 89, cited above.

(f) *Blakeney v. Baggett*, 1 Dow. R. New S. 405.

(g) See observations in *Clairmont v. Tabbuth*, 1 Jac. & W. 120; and see Lord Lyndhurst's judgment in *Harris v. Kemble*, *supra*, n. (d).

(h) See Lord Lyndhurst's suggestions, *supra*, n. (d).

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What is a material misrepresentation.

Puffing.

What misrepresentation not material. (p)

number of acres; the contract in such a case becomes inoperative at law and cannot be strictly performed, yet the Court of Equity will decree it, dispensing with the articles that are not essential to the substance; but this is only where there has been a *perfect bonâ fides*, and there is no case where it has been done at the instance of a plaintiff who has practised any *misrepresentation*. (i)

Even a misrepresentation by a vendor of the *value*, or the yearly value, of an estate, has been holden sufficient to induce the court to refuse specific performance; (k) and in general, misrepresentation, though in a slight degree, is an objection to enforcing specific performance, though it might not be sufficient to induce the court to rescind the contract. (l) With respect to misrepresentation of value the secret employment of *puffers*, not known to be *bonâ fide* bidders, will vitiate a sale; and where the particulars of sale by auction stated that such sale would be *without reserve*, and yet puffers were employed, specific performance was refused; (m) and indeed the contract of purchase would in that case be as void at law as in equity. (n) But the statute imposing the auction duty allows a private bidding by one person though not by several. (o)

But where a piece of land imperfectly watered in part was described in the particular as *uncommonly rich water meadow*, it was held that this was not such a misrepresentation as would avoid a sale, because the representation was to be taken as nothing more than the loose opinion of the auctioneer or vendor as to the obvious quality of the land, upon which the vendee ought not to have placed, and could not be considered to have placed, any reliance, and therefore was decreed to complete his purchase. (q) So where A., on contracting with B., falsely represented himself to be the agent of C., and thereby obtained better terms, the court would nevertheless enforce the contract against B., as it did not appear that A. knew that such would be the effect of the misrepresentation. (r)

(i) *Per* the Master of the Rolls, *Clermont v. Tasburgh*, 1 Jac. & W. 120; and see *Hill v. Buckley*, 17 Ves. 349.

(k) *Walls v. Stubbs*, 1 Mad. 80; *Breton v. Cowp*, 1 Bro. P. C. 211.

(l) *Cadman v. Homer*, 18 Ves. 10; *Rockfort v. Creswick*, 1 Bro. P. C. 171.

(m) *Meadows v. Tanner*, 5 Mad. 34; Sug. V. & P. 8th edit. 24, 26, 195.

(n) *Wheeler v. Collier*, 1 Mood. & M. 123.

(o) Sugd. V. & P. 21, 24, 195; *Wheeler*

v. Collier, 1 Mood. & M. 123. It is very absurd that a bidder at an auction should be influenced by the biddings of others, but whilst the weakness of mankind in that respect continues, it seems proper to prevent the indiscriminate employment of sham purchasers.

(p) See at law, *Early v. Garrett*, 9 Bar. & Cres. 928.

(q) *Per* Vice-Chancellor, *Scott v. Homer*, 1 Sim. Rep. 13, and see *post*, 841.

(r) *Fellows v. Lord Gryder*, 1 Sim. 63.

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cealments.

With respect to *Concealments*, if a material fact within the knowledge of the vendor or purchaser, and which, if communicated, would have probably changed or altered the terms on the part of one of the parties, be concealed, that fact will avoid the contract and preclude the party guilty from sustaining a suit for specific performance.^(s) Thus where the fact of a notice to repair having been served by the landlord, was concealed from the purchaser of a lease, although he knew that the premises were out of repair, and under which notice the landlord re-entered and evicted the purchaser, this was held a fraudulent concealment, and the purchaser was allowed to avoid the contract and recover back his deposit money, on the ground that in *such transactions* good faith is most essential, and that it was the duty of the vendor or his agent to have communicated the fact.^(t) So where a *purchaser* knew that the vendors, the assignees of a bankrupt, were ignorant of a circumstance considerably increasing the value, but concealed that fact from them, no specific performance would be decreed, and even a Court of Equity would decree the contract to be cancelled.^(u) So where a lessee for lives applied for and obtained an agreement from the lessor for a renewal, but concealed the fact of the last life being *in extremis*, specific performance was refused.^(v) And though in general a purchaser is not bound to give the vendor information respecting the value of the property, as for instance, he is not bound to tell him there is a mine under the surface,^(x) yet a very little is sufficient to affect the application of that principle; and if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate.^(y) In these cases, especially of contracts of sales improvidently entered into by a *trustee* or *assignee*, though a Court of Equity may not go so far as to cancel the agreement, yet specific performance will be refused, but the party who unjustly seeks it will be left to his remedy at law, in which, perhaps, he will only recover nominal damages against the ignorant vendor.^(z) Another reason why Courts of Equity refuse specific performance in the case of sales by trustees or assignees, is, that thereby loss to the estate and the *cestui que trust* is

(s) *Ante*, 833; *Ellard v. Landaff*, 1 Ball & B. 241; *Readred v. Griffith*, 1 Bro. P. C. 314.

(t) *Stevens v. Adamson*, 2 Stark. 422; Sug. V. & P. 286; see *Shirley v. Strattan*, 1 Bro. C. C. 410; Sug. V. & P. 195.

(u) *Turner v. Harvey*, Jacob, 169; *Stilwell v. Wilkins*, Id. 282, S. P.

(v) *Ellard v. Landaff*, 1 Ball & B.

241; see also *Readred v. Griffith*, 1 Bro. P. C. 314.

(x) Per Lord Thurlow in *Fox v. Mackreth*, 2 Bro. C. C. 420.

(y) Per Lord Chancellor in *Turner v. Harvey*, Jacob, 178.

(z) *Turner v. Harvey*, Jacob, 178; *Bridger v. Rice*, 1 Jac. & W. 74.

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avoided, and the damages must be paid by the trustees or assignees out of their own pocket, when they have been guilty of negligence. (z)

Good faith is so essential in all transactions of sale of real estates, that if a material fact be concealed relating to the title after the contract, and before the completion, the vendor may, pending proceedings upon a bill filed to complete the purchase, upon motion, be discharged from his purchase, although he had taken possession, and although the concealed claim had been released. (a)

Part performance by party deceived after notice of the fraud when excludes objection.

If an agreement be in part performed by a party after knowledge of the supposed fraud, surprise or mistake, then equity will not set aside the agreement, but will compel specific performance of so much that can be executed, as it will be considered that he has waived the objection. (b)

2. Ignorance of one party. (c)

2. So the party against whom a contract is required to be enforced must not only have had legal competency and capacity to contract, but also must have duly exercised his faculties, for otherwise a specific performance will be refused, and the party praying it left to his remedy at law by action for damages; as if the contract were *improvidently entered into by an illiterate ignorant person*, in the absence of his solicitor, to sell his reversionary interest by private contract for a sum under the real value. (d) In such a case a Court of Equity says, "make the best of your case with a jury." (e) So deeds improvidently entered into by persons uninformed of their rights will be sometimes set aside though obtained without any actual fraud or imposition. (f) And especially trustees and assignees will not be compelled to perform an agreement entered into under mistake to sell for an inadequate consideration. (g)

3. Inadequacy of Price. (h)

3. In general, mere *inadequacy* of price is not sufficient to induce the court to refuse specific performance, but there may

(z) *Ante*, 837, n. (z).

(a) *Dalby v. Pullen*, 3 Simon, 29; 1 Russ. & M. 296; *Harris v. Kemble*, 834, n. (d).

(b) *E. Anglesey v. Annesley*, 1 Bro. P. C. 289.

(c) See *ante*, 299, as to weakness of intellect.

(d) *Martin v. Mitchell*, 2 Jac. & Walk. 413; see the judgment, 421 to 423; *Stihwell v. Wilkins*, Jacob, 282; *Hamilton v. Grant*, 3 Dow, 33; 1 Bligh, N. S. 594; and see Newl. Contr. 358, 432 to 434.

(e) *Hamet v. Yielding*, 2 Scho. & Lef. 549; Sugd. V. & P. 282.

(f) *Evans v. Llewellyn*, 2 Bro. C. C. 150; 1 Cox, 333; and per Lord Chancellor in *Turner v. Harvey*, Jacob, 172; *Stihwell v. Wilkins*, Jacob, 282; *Mason v. Armitage*, 13 Ves. 25.

(g) *Bridger v. Rice*, 1 Jac. & W. 74; and see *Turner v. Harvey*, Jacob, 178, 826.

(h) See *ante*, 826, as to weakness of intellect; and see in general 1 Mad. Ch. Pr. 119, 267, 281, 425.

and have been cases of such inadequacy when so great as to form a ground even for cancelling a contract. (i) But in general, bargains, though *hard* and improvident, will be enforced in the absence of fraud. (k).

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4. The *inability* of a vendor to make a *perfect title* to the *entire thing* as agreed to be sold, may be principally of five descriptions.

4. Consequences of vendor being unable in part to convey strictly according to contract.

First. He may not be able to convey the *entire interest* in the estate sold.

Secondly. He may not be able to convey so *large an estate* in the property as proposed.

Thirdly. The objection may be to the *quality* of the estate as described.

Fourthly. He may not be able to make out a title to *so much in quantity*.

Fifthly. The *title itself* may be imperfect.

In the first, second, and fifth cases it should seem that specific performance will not in general be decreed. In the third and fourth cases it may or not with an abatement in price, but depending on other circumstances, as whether the deficient quantity was so material as to have influenced the intention of the purchaser in buying:

First, Thus when a vendor sells the *entire interest*, and he can only make out a title to an undivided share therein, as tenant in common or otherwise, he cannot compel the purchaser to complete the purchase, unless he can also procure a conveyance by the other tenants in common; for it may be very material to a purchaser to have the entire and exclusive interest; (l) and this although the inability to convey the entirety was wholly attributable to the death of one tenant in common between the contract and the time of completion; (m) and the purchaser's right to a conveyance of the entire estate, and right of exclusive possession, is so strictly preserved, that he is not compellable to accept a conveyance, if it should appear that the estate is subject merely to a reserved liberty of sporting by a third person. (n) And it seems immaterial how small may be the interest which the vendor is unable to convey, as if he could only convey nine-sixteenths when the contract was for the entirety, (o) or even six-sevenths of the whole. (p) But the *pur-*

(i) *Stilwell v. Wilkins*, Jacob, 282; and see *Western v. Russell*, 3 Ves. & B. 187; *Coles v. Trecothick*, 9 Ves. 248; *Keen v. Stukeley*, in Scacc, Gilb. Eq. R. 155; *Legal v. Miller*, 2 Ves. 299; *Shelburne v. Inchiquin*, 1 Bro. C. C. 343; *Gorman v. Salisbury*, 1 Vern. 240; see in general Newl. Contr. 65, 357, 358.

(k) *Willes v. Jernegan*, 2 Atk. 251; 1 Madd. Ch. Pr. 281.

(l) *Roffey v. Shallcross*, 4 Mad. R. 227;

Dalby v. Pullen, 3 Simons, 29; 1 Russ. & Myl. 296; Sugd. V. & P. 274.

(m) *Id.* *ibid.* But the purchaser might enforce a conveyance of the share, *Attorney-General v. Gower*, 1 Ves. 218; Sugd. V. & P. 278.

(n) *Burnell v. Brown*, 1 Jac. & W. 168; Sug. V. & P. 277.

(o) *Wheatly v. Slade*, 4 Simons, 126.

(p) *Dalby v. Pullen*, 3 Simons, R. 29; 1 Russ. & M. 296, S. C.

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taining the mansion-house. (i) But when *distinct* purchases are made, although at the same time and auction, of several lots, not materially complicated with each other, and at different prices, then the purchaser will be compelled to accept a conveyance of those unconnected lots, to which sufficient title has been established. (k) As regards *quantity of land* in general, a small deficiency will be no ground for vacating the contract, unless where there has been fraud, and at most the purchaser will be entitled to compensation or abatement for the deficiency, when the contract was to pay at so much per acre, or the precise quantity was by mistake misdescribed. (l)

Fifthly, The inability of a vendor to *make a title* is a principal and leading objection; and if one of the terms of an agreement of sale be that the contract should be void, if the *purchaser's counsel* should be of opinion that a *marketable title could not be made* by a certain time, then, however unwise such a stipulation may have been, yet if the counsel have given an opinion against the title, a bill against the purchaser for specific performance would be dismissed, although other counsel might correctly advise that the title was sufficient. (m) In other cases, where there has been no express stipulation relative to the title, a purchaser is not obliged to accept a title doubtful in fact or law, as if the construction of a will be too *doubtful* to be settled without litigation and decision. (n) At law the only question is whether or not a *good* title has been made, and the question is not whether it be doubtful. (o)

Cases of Com-
pensation.

We have seen that *fraud* in a very small respect will preclude a party from compelling the party deceived to perform the contract; (p) but that *mistakes*, if they do not affect the essence of the bargain, will not, at least in a Court of Equity, have that effect, (q) and upon making compensation for the difference in value, the rest of the contract may be specifically en-

(i) *Pools v. Shergold*, 2 Bro. C. C. 118, cited and approved in *Lewin v. Guest*, 1 Russ. 330; 1 Cox, 273; *Drewe v. Hanson*, 6 Ves. 676; Sug. V. & P. 268 to 274.

(k) *Lewin v. Guest*, 1 Russ. 325; *Pools v. Shergold*, 2 Bro. C. C. 118; 1 Cox, 273; 6 Ves. 676; Sug. V. & P. 268 to 274.

(l) See cases Sug. V. & P. 294 to 303; and see ante, 841, n. (h), *Wheatley v. Slade*, 4 Simons, 127, observing upon *Hill v. Buckley*, 17 Ves. 394.

(m) *Williams v. Edwards*, 2 Simons, 78.

(n) *Sharp v. Adcock*, 4 Russ. 374. What is or not considered a doubtful title,

and the rule at law, *Gall v. Edaile*, 8 Bing. 326, 327; and what acknowledgment of title is conclusive against a purchaser, *Bowman v. Gutch*, 7 Bing. 379.

(o) *Bowman v. Gutch*, 7 Bing. 379.

(p) *Ante*, 833, 834.

(q) At law the variance would in general be fatal, though otherwise in equity; *Stapleton v. Scott*, 13 Ves. 426; *Halsey v. Grant*, 13 Ves. 77. In equity a *small variance is not fatal*, as in case of a sale of lease of 99 years, and it turns out to be only 98 or 97 years, *Id. ibid.*; so even at law, when the variance is *very trifling*; *Belworth v. Hamell*, 4 Campb. 140; *ante*, 840, note (y).

forced; for *per* Lord Chancellor Eldon; "the principle upon which Courts of Equity act is by all the authorities brought to the true standard, that though the party had not a title at law, because he had not *strictly* complied with the terms so as to entitle him to an *action*, (as to time for instance,) yet if the time, though introduced, as some time must be fixed where something is to be done on one side, as a consideration for something to be done on the other, is not the essence of the contract; a material object, to which they looked in the first conception of it, even though the lapse of time has not arisen from accident, a Court of Equity will compel the execution of the contract upon this ground, that the one party is ready to perform, and that the other party may have a performance in *substance* if he will permit it." (s) So specific performance of an agreement for sale of an estate will be decreed, upon the terms of making compensation, notwithstanding a variance from the description, though a minute examination might have discovered the defect, as in the state of an house or other property; but not when the variance was in describing the premises as lying within a ring fence, that being considered a most important consideration. (t) And in enforcing contracts, upon the principle of compensation for variance in description, the court has *confessedly* gone so far as even, in some cases, to defeat one real object of the purchaser. (u) The court, in such cases, treat the contract of purchase as a mere investment of money, and that the purchaser ought to be content if he have in some land and in compensation an equivalent. Thus subsequently discovered outgoings, not before disclosed, if of a limited nature and not affecting the *tenure*, will merely entitle the purchaser to compensation, and will not enable him wholly to rescind the bargain. (x) Thus where a purchaser, wanting to be a freeholder of Essex, purchased an house in the Isle of Dogs, which he supposed to be in Essex, but which was in fact in Kent, he was compelled to complete his bargain. (y) But in another case, where the agreement was entered into for the purchase of a house *for a coffee-house*, and it was discovered that a chimney could not be made convenient for a coffee-house, Lord Talbot dismissed the vendor's bill for specific

(s) In *Hearne v. Tenant*, 13 Ves. 287.(t) *Dyer v. Hargreave*, 10 Ves. 505; *Halsey v. Grant*, 13 Ves. 73; *Hornblow v. Shirley*, *Id.* 81; *Stapleton v. Scott*, *Id.* 426.(u) *Drewe v. Hanson*, 6 Ves. 675.(x) *Howland v. Norris*, 1 Cox, 59; *ante*, 840, 841, notes, (s), (a).(y) *Shirley v. Davies*, cited 6 Ves. J. 678.

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Subsequent cir-
cumstances, to
induce refusal
of Specific
Performance.
Felony of in-
tended lessee.

Insolvency.

performance, merely because it would compel the purchaser to take a house for a purpose he did not want. (y)

There are *other circumstances* that may have arisen since the contract was made, which may induce a Court of Equity to refuse a decree of specific performance.

Thus if it be discovered that an intended lessee has committed a *felony*, the court would not compel the intended lessor to execute a lease to him. (x)

As respects *Solvency*, it will be obvious that in a contract of *Sale*, if the purchaser, or his assignees or representatives, tender the purchase money at the appointed time, the general insolvency of such purchaser is wholly immaterial. (a) But in an agreement for a *Lease*, the covenants and stipulations to be observed by the intended lessee being matter of *future performance* during the *whole* currency of the lease, his failure before a lease has been granted raises a substantial and reasonable continuing objection to the completion of the contract; (b) and therefore his *insolvency* is a decided objection and bar to a bill for specific performance; (c) and the bankruptcy of a lessee constitutes ground for refusing the renewal of a lease. (d) But as there may be exceptions to these cases, as where the assignees of the intended lessee offer adequate security, (e) it seems improper to *demur* to a bill on the ground that the objection is absolutely a bar. (f) Where there has been a stipulation in the agreement that the lease should contain an absolute covenant in restraint of assignment, then it is clear that assignees cannot enforce a lease. (g) And where a tenant, a trader, who has agreed to sell a lease, has committed an act of bankruptcy, although no commission has been issued, he cannot compel specific performance. (h) And although notwithstanding an intended lessee has become insolvent, an injunction may be obtained against an action of ejectment on the demise of the lessor, and

(y) 1 Ves. Sen. 307; *Halsey v. Grant*, 13 Ves. J. 78.

(x) See *dictum* in *Willingham v. Joyce*, 3 Ves. J. 186; 1 Madd. Ch. Pr. 421.

(a) *Goodman v. Lightbody*, Dan. 153; *Orlebar v. Fletcher*, 1 P. W. 737; *Bowles v. Rogers*, 6 Ves. 95; *Whitworth v. Davis*, 1 Ves. & B. 545; Sug. V. & P. 162.

(b) 1 Mad. Ch. Pr. 421, 422; Newl. Contr. 256; and *per* Lord Redesdale, *O'Hertity v. Hedges*, 1 Scho. & Lef. 123; but see *De Minckwitz v. Udny*, 16 Ves. 466, *contra*.

(c) *Buckland v. Hall*, 8 Ves. 92; *Brook v. Hewitt*, 3 Ves. 253; Newl. Contr.

256.

(d) *Drake v. Exeter*, 1 Ch. C. 71; *Willingham v. Joyce*, 3 Ves. 168; *Flood v. Finlay*, 2 Ball & B. 9; and see other cases, 1 Mad. Ch. Pr. 422.

(e) *Id.* *ibid.*; *Drake v. Mayor of Exeter*, 1 Ch. C. 71; but there is no case of assignees being entitled to a specific performance; *Flood v. Finlay*, 2 Ball & B. 9.

(f) Newl. Contr. 260, *supra*, note; and see *Boardman v. Moydun*, 6 Ves. 467.

(g) *Wetherall v. Geering*, 12 Ves. 504.

(h) *Lowe v. Lush*, 14 Ves. 547; *Franklin v. Brownlow*, *Id.* 550; *Cann v. Cann*, 1 Sim. & Stu. 284.

continued *pending* a suit against the landlord for a specific performance; (i) yet, if ultimately the insolvency and other circumstances show the party to be an unfit tenant, such an injunction will be dissolved. (k)

Breaches of
Covenant.

The court will not refuse a decree of specific performance of a contract to grant a building lease, on account of the plaintiff, the intended lessee, having erected a brewhouse on land injurious to the lessor's property, (l) or having contracted to underlet contrary to the agreement for the lease. (m) But it would be otherwise if the breaches were wilful and obstinate, or by the terms of the agreement would have exhibited grounds of forfeiture; (n) and in the case of a common agreement for a lease, if before the lease has been executed the intended lessee should commit gross waste, or treat the land in an untenant-like manner, or commit gross breaches of the intended covenant, no specific performance would be decreed. (o) So if the agreement stipulated against assignment, and nevertheless the occupier has assigned, he could not compel the execution of a lease. (p) So where a landlord had recovered in ejectment in respect of the breach of an husbandry covenant contained in an agreement for a lease, the court refused the execution of the intended lease. (q)

When there has been a *change in any material circumstances*, or alteration of the property referred to in the previous agreement, so that it could not be enjoyed according to the stipulations, the court will, in some cases, refuse to decree specific performance of any part of the stipulations. Thus, where the agreement was for the renewal of a lease of certain premises, part of which was afterwards (but previous to the commencement of the intended renewed term) taken by the committee for building Blackfriars' bridge, in which case there would be an insuperable difficulty in applying the execution of the covenants to be contained in the lease to property so entirely altered. (r) In case of an agreement of *purchase* we have seen, (s) that from the time of signing the agreement the buildings and property are at the risk of the purchaser, who in-

Change of other
circumstances;
as destruction
by fire, deaths,
&c.

(i) *De Minckwitz v. Udney*, 16 Ves. 467; *Boardman v. Moystyn*, 6 Ves. 467.

(k) *Buckland v. Hull*, 8 Ves. 92.

(l) *Gorton v. Smart*, 1 Sim. & S. 66.

(m) *Williams v. Cheney*, 3 Ves. 59; 1 Mad. Ch. Pr. 421.

(n) *Id.* *ibid.*; *Craven v. Fickell*, 1 Ves. J. 60; *Jones v. Jones*, 19 Ves. 188; 1 Mad. Ch. Pr. 421.

(o) Per Lord Eldon, *Hill v. Barclay*, 18 Ves. 63; *Gourlay v. Somerset*, 1 Ves. & B. 68; 19 Ves. 429, S. C.

(p) *Wetherall v. Geering*, 12 Ves. 504.

(q) *Lovat v. Lord Ranelagh*, 5 Ves. & B. 24.

(r) *London v. Mitford*, 10 Ves. 58; *White v. Mott*, 1 P. W. 61.

(s) *Ante*, 296, n. (q).

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stantly becomes the *equitable owner*, and entitled to all benefits and must bear all loss; (t) and he should therefore immediately insure against loss by fire, and provide against all other risks, for the vendor may compel him to complete the purchase and pay the entire purchase money, notwithstanding the entire destruction of the buildings by fire; (u) though if the *title-deeds* should afterwards be destroyed, even after they had been examined with the abstract, that circumstance *may* constitute a sufficient objection for the purchaser, and the Court of Chancery might not only dismiss the vendor's bill against him for specific performance, with costs, but also order a return of the deposit. (v) So if a church lease for two lives be sold, and after the preliminary agreement, and before conveyance, one of the lives should drop, the purchaser must bear the loss or extra fine. (x) So where the vendor agreed to convey a house, in consideration of an annuity during his life, and he died before conveyance or payment, a conveyance by the heir was decreed. (y)

But with respect to *tenants* and *agreements* for a lease, a different rule prevails; and although a lease have been executed, and afterwards the premises be consumed by fire, unless it be provided otherwise, the tenant continues liable to pay rent and perform the covenants, and could not obtain relief in equity; (z) nor could he even compel the landlord to expend the money insured in rebuilding; (a) yet if the tenancy be only in *feri*, then if the premises be materially injured by fire, or otherwise deteriorated, without fault of the intended lessee, a Court of Equity will not compel him to accept a lease, or execute a counterpart, for a tenant, previous to an *actual* lease, is not considered to be a purchaser, or to have an equitable estate for the intended term. (b) It has been held, that if the intended lessor be in arrear to the ground landlord for rent upon a prior lease, that is an adequate excuse for refusing to complete an agreement under which a party was about to take possession. (c)

(t) *White v. Nutt*, 1 P. W. 61.

(u) *Paine v. Meller*, 6 Ves. 349; *Bryant v. Bush*, 4 Russ. Rep. 1; 1 Fonbl. Eq. 374; Sug. V. & P. 254, 255; *Study v. Saunders*, 5 Bar. & Cres. 628; and see further cases, *Cass v. Rudall*, 4 Vern. 280; *White v. Nutt*, 1 P. W. 61; *Stent v. Bayliss*, 4 P. W. 220; *Pope v. Roots*, 7 Bro. P. C. 184; *Mortimer v. Capper*, 1 Bro. C. C. 156.

(v) *Bryant v. Bush*, 4 Russ. R. 1.

(x) *White v. Nutt*, 1 P. W. 61.

(y) *Jackson v. Lever*, 3 Bro. C. C. 605;

semble, overruling *Pope v. Roots*, 1 Bro. P. C. 376; 7 Id. 184, S. C.

(z) *Holtzapffel v. Baker*, 18 Ves. 115.

(a) *Leeds v. Cheetham*, 1 Sim. 146.

(b) *Semble, Phillipson v. Leigh*, 1 Esp. Rep. 398; see also *Edwards v. Etherington, Ry. & Moody*, 268; 7 Dowl. & Ry. 117, S. C.; *Collins v. Barrow*, 2 Mood. & M. 112; *Salisbury v. Marshall*, 4 Car. & Pa. 65; *Baker v. Holtzapffel*, 4 Taunt. 45; see 18 Ves. 115, S. C.

(c) *Partridge v. Sowerby*, 3 Bos. & P. 179.

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PERFORMANCE.Laches as to
Time when an
objection. (d)

In general, *gross delay*, in applying for a specific performance, would induce the court to refuse its interference. (e) But when time was not of the essence of the contract, delay in applying for performance will not necessarily constitute an objection to a specific performance; (f) and even fourteen months' silence on the part of a purchaser is not an absolute bar, especially if he has not applied to the auctioneer to get back deposit. (g) As respects the delivery of a perfect abstract, delay will not excuse the purchaser from specific performance unless time were of the essence of the contract, but such delay may affect the amount of costs allowed upon decree of specific performance. (h)

Specific execution of agreements will sometimes be decreed though the time for the entire performance has elapsed, especially in cases of acquiescence in the delay, and where delay in performance was not incurred by any default in the party seeking relief; (i) as if on the sale of an estate it be strongly stipulated that the price shall be paid by a certain day, which elapses without payment, still the contract may be enforced, for the general rule is in equity not to consider the time as of the essence of agreement. (k) But this doctrine we have seen is not to be extended; (l) and in a late case it was laid down, that time is material where the subject of the contract is of such a nature as to be exposed to a daily variation in its value, as public stock, (m) or the trade of a public house. (n) So where the subject of the contract being a life annuity, time in the completion of the bargain may be of the essence of the contract; (o) though if the delay be occasioned by the other party, then he cannot take advantage of it; (p) and a contract for the sale of an estate for life for an annuity will be executed, although the vendor died before the end of the first half year. (q) So if in an agreement by a tenant at will of a public house for the

(d) *Ante*, 786, n. (q); see in general 1 Mad. Ch. Pr. 416 to 421; Newl. Contr. 227 to 256; Chit. Eq. Dig. Agreement, XII. page 62; and *Id.* Laches, 603.

(e) *Moore v. Blake*, 1 Ball & B. 69; *Crofton v. Ormsby*, 2 Sch. & Lef. 604.

(f) *Hearne v. Tenant*, 13 Ves. 287.

(g) *Marquis of Hertford v. Boore*, 5 Ves. 719; *Pincks v. Curteis*, 4 Bro. C. C. 329; but not after fifteen years' delay, *Gill v. Fleming*, 1 Ridgw. P. C. 420; *Wingfield v. Whaley*, 1 Bro. C. C. 200.

(h) *Wilson v. Clapham*, 1 Jac. & W. 36; *Newall v. Smith*, *Id.* 263.

(i) *Penn v. Lord Baltimore*, 1 Ves. 450; 3 Woodes. 465.

(k) 3 Woodes. 465; and see *Hearne v.*

Tenant, 13 Ves. 287.

(l) *Ante*, 120, 121; *Reynolds v. Nelson*, 6 Madd. R. 18.

(m) *Doloret v. Rothschild*, 1 Sim. & Stu. 598, 599.

(n) *Coslake v. Tull*, 1 Russ. R. 376.

(o) *Withey v. Cottle*, 1 Turn. 78; but see *Coles v. Trecothick*, 9 Ves. 248; 1 Smith, 233, S. C.

(p) *Pritchard v. Ousey*, 1 Jac. & W. 396.

(q) *Jackson v. Lever*, 3 Bro. C. C. 605; *Coles v. Trecothick*, 9 Ves. 248; 1 Smith, 233, S. C.; *Kenney v. Wenham*, 6 Madd. 355; Sugd. V. & P. 8th ed. 262.

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sale of possession, trade, and good-will of the house at a fixed sum, and of the stock and furniture at a valuation, one of the terms be that possession should be given and taken, and the money paid on a named day, then time is of the essence of the contract, and a purchaser who was not in a condition to fulfil his part of the contract on that day cannot compel a specific performance, though he was on the following day to have proceeded to complete the purchase. (r) Where a lessor had long delayed to make out his title to grant a lease and give possession, specific performance of an agreement to take a lease for the purpose of *trade* was refused. (s) But we have seen that the omission of a party, who has long *possession* under an agreement to clothe himself with the legal title, will not in general constitute any objection to his enforcing the conveyance of the latter within any reasonable time during the term, (t) though if the party were not in possession, neither he nor the other party could obtain a decree of specific performance after great lapse of time. (u) So agreements are frequently considered to have been *abandoned* when neither party has taken any step for a considerable time; (x) as where a party contracted with another to work a colliery, but neglected to do so for several years, and his son then attempted to proceed and to enforce the agreement, but was refused. (y) So where a lease contained a covenant upon request to renew within three months before the expiration of the term, and the lessee neglected to apply for a renewal till within a month of the expiration of the term, and in the mean time the lessor had agreed to demise to a third party, the court held that the lessee was too late in his application. (z) And where a lease for three lives contained a covenant to renew upon the death of one life, and the lessee neglected to require a renewal until after two of the lives had dropped, although he offered to pay the fines for both the lives, specific performance was refused. (a) But where a tenant has been suffered to hold under an agreement for a lease, equity will not, after the expiration of the term, compel the tenant to execute the counterpart of a lease, merely to give the lessor a better remedy by action of covenant, especially if the

(r) *Costlake v. Till*, 1 Russ. 376.

(s) *Parker v. Frith*, 1 Sim. & Sta. 199.

(t) *Ante*, 786; *Crofton v. Ormsby*, 2 Sch. & Lef. 604; *Lord Kensington v. Phillips*, *Nesbitt v. Meyer*, 1 Swanst. 223.

(u) *Selon v. Slade*, 7 Ves. 265; *Atley v. Deschamps*, 13 Ves. 228.

(x) *Guest v. Homfrey*, 5 Ves. 818; *Lloyd v. Collet*, 4 Bro. C. C. 469.

(y) *Crofton v. Ormsby*, 2 Sch. & Lef. 604.

(z) Cited in *London v. Miford*, 14 Ves. 58; 1 Fonbl. Eq. 432.

(a) *Bayley v. Leominster*, 1 Ves. J. 476; 3 Bro. C. C. 529, S. C.; and see 1 Fonbl. Eq. 433; and see *Herlity v. Hedger*, 1 Sch. & L. 123; but see *Lord Kensington v. Phillips*, 5 Dow, 61.

breach would probably only entitle him to nominal damages. (b)

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In cases where the term would shortly expire, the court will on application advance the hearing of the bill for specific performance when the justice of the case requires. (c) The general rule is, that when time is not of the substance of a contract, specific performance will be decreed, though the period for its completion has elapsed. (d) This might on first view seem useless, but in many cases it would be otherwise; as suppose an agreement between a landlord and an intended lessee, *and his surety for the latter*, to execute a lease and counterpart, the execution might be material, even after the expiration of the proposed term, in order to give the lessor specific remedies at law by action of covenant; (e) and specific performance will be enforced where the lapse of time has been trifling, or the result of fraud. (f) But where a lessor, who applied for specific performance of an agreement for a lease of iron and coal mines, neglected to do so for forty-two years, it was held that the circumstance of his estate being encumbered with mortgages, and the difficulty of obtaining their essential concurrence, was no adequate excuse for the delay; (g) and delay for two years, and until after the intended lessee had given notice of his intention to abandon the contract on account of the lessor's neglect to make stipulated alterations and improvements, was held inexcusable. (h) And even an infant cannot excuse delay in applying for a lease for twenty years, when there was a stipulation to lay out a certain sum within the first three years of the term. (i)

II. Having thus considered the *general rules* when or not a Court of Equity will decree a specific performance of contracts, it may be of practical utility to state the principal instances when or not *particular* contracts will be enforced as they relate to, 1st, The Person,—2dly, Personal Property,—and, 3dly, Real Property. We have necessarily, in stating the *general* rules, had occasion to examine many of these, and to which reference must be had. (k)

II. PARTICULAR
CONTRACTS
WHEN SPECIFICALLY
ENFORCED. (j)

(b) *Nesbitt v. Meyer*, 1 Swanst. 225.

(c) *Hoyle v. Livesey*, 1 Meriv. 381.

(d) *Jessop v. King*, 2 Ball & B. 94.

(e) But see *Bridger v. Nesbit*, 1 Swanst. 225, 226.

(f) *Savage v. Brocksopp*, 18 Ves. 335; see cases of fraud and other excuse, *Blackwell v. Nash*, 1 Stra. 535; *Hotham v. East India Company*, 1 T. R. 638; 1

Fonbl. Eq. 391.

(g) *Pinker v. Frith*, cited in *Wright v. Howard*, 1 Sim. & Stu. 199.

(h) *Heaphy v. Hill*, 2 Sim. & Sta. 29.

(i) *Griffin v. Griffin*, 1 Sch. & L. 352.

(j) See division of subject, ante, 825.

(k) Ante, 825 to 849.

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1. Relating to the *Person*, or of a *mixed* nature, as in case of marriage articles, partnerships, &c.

Partnerships.

1. We have seen that suits to compel the specific performance of a contract to marry have been expressly prohibited; (l) but specific performance of marriage articles, and all contracts of that nature, although relating only to the payment of money, will be specifically enforced in Courts of Equity, where the most adequate justice in those cases can be best secured. (m) So, though in general *suits* for *formally annulling* a marriage are exclusively cognizable in the Spiritual Courts, yet there are cases in which equity will decree and enforce the payment of alimony to a wife, though she have had a sentence for it in a Spiritual Court. (n) The adultery of the wife is no bar to a bill for specific performance of articles previous to the marriage. (o)

A clear and distinct contract to enter into a *Partnership* in a trade or other concern for a certain term of years, will be specifically enforced, though in truth it is a mere chattel interest. (p) But if by the terms of the agreement the partnership, if it were actually commenced, would have no fixed duration or benefit, as if it be stipulated or understood that either party might put an end to it upon giving notice, there the court would not absurdly interfere to decree a partnership that might immediately afterwards be legally determined, (q) and the party would be left to his remedy at law to recover damages, if any, for the nonperformance of the agreement. (r) On the other hand, when, in consequence of the fraud or misconduct of one of several partners, the joint trade cannot be any longer carried on without hazard, the court will enforce dissolution by injunction and decree. (s) So the specific performance of an agreement made at the *dissolution* of a partnership that a particular book used in the trade should be considered the exclusive property of one of the partners, and that a copy of it should be delivered to the other, will be decreed, for in such case, as at law such partner was legally entitled to the book,

(l) *Ante*, 56, 57; 4 Geo. 4, c. 76, s. 27.

(m) *Haymer v. Haymer*, 2 Ventr. 343; *Jenkins v. Keymis*, 1 Lev. 150, 237, S. C.; *Green v. Pigot*, 1 Bro. Ch. Cas. 103; *Mortimer v. Capper*, Id. 158; Chit. Eq. Dig. head Settlement, VII. VIII., and tit. Covenant; 3 Woodes, V. L. 474.

(n) *Angier v. Angier*, Pr. Ch. 496; Gilb. Eq. Rep. 152, S. C.

(o) *Buchanan v. Buchanan*, 1 Ball & B. 203; 1 Mad. Ch. Pr. 421.

(p) *Per* Lord Hardwicke in *Beaton v. Liston*, 3 Atk. 385; *Anon.* 2 Ves. S. 629; *Peacock v. Peacock*, 16 Ves. 49; Newl.

Contr. 92; and particularly 1 Mad. Ch. Pr. 411, note (x), observing upon the case of *Hercy v. Birch*.

(q) *Hercy v. Birch*, 9 Ves. 357; and see observations in *Agar v. Macklew*, 2 Sim. & Stu. 422.

(r) *Morson v. Saunders*, 1 Brod. & Bing. 318; *Street v. Brown*, 1 Marsh. Rep. 610; *Gale v. Lackie*, 2 Stark. Rep. 108. If nothing expressed, the implied contract is for an equal division of profits, *Peacock v. Peacock*, 16 Ves. J. 49.

(s) *Loscombe v. Russell*, 1 Clarke & Fin. 8; *ante*, 705, 706; and see cases in Chitty on Bills, 8 ed. 61, n. (f).

the specific delivery thereof could not have been enforced by replevin or action of detinue; (t) for the principle upon which a Court of Equity interferes to enforce contracts is, that the *particular act prayed* cannot be enforced in a Court of Law, which has no means of compelling the defendant to permit the copy to be completed, or to permit, in the interim, the inspection of the book by the plaintiff. And although in general a bill for an account against a partner should pray a dissolution, (u) yet the Court of Chancery will entertain a bill to compel specific and *continued* performance by partners, and compel them to *continue* to act according to the provisions of instruments into which they have entered, when it is essential for the interests of the parties concerned that such partnership should continue; and where the court will so interfere it will take care, by injunction and otherwise, to secure that the decree shall not be defeated by any thing done in the mean time. (x)

With respect to contracts connected with *mental labours* and pursuits, a Court of Equity will not decree specific performance of an agreement to compose and write reports of cases determined in a court of justice, to be printed and published by a particular individual for a stipulated remuneration; (y) though that court will by injunction restrain an author from publishing contrary to his express covenant any other work in prejudice of that the copyright of which he had sold to the covenantee. (z)

Equity will not decree specific performance of the most express agreement to *refer to arbitration* (a) or to abide by the decision of a *third person*, (b) unless before revocation a perfect award or decision has been made; (c) and indeed upon one occasion, where a party had covenanted to refer, it was held that no action can be sustained for refusing to nominate an arbitrator, (d) and as either party might, after the appointment, and even upon the eve of making the award, revoke or countermand the authority of the arbitrator (subject to an express rule

Not an agreement to refer.

(t) *Lingen v. Simpson*, 1 Sim. & Stu. 600.

(u) *Loscombe v. Russell*, 1 Clark & Fin. 8.

(x) *Const v. Harris*, 1 Turn. & Russ. 496, 529, where the extent of jurisdiction in equity as to partners was fully discussed.

(y) *Clarks v. Priece*, 2 Wils. Ch. R. 157.

(z) *Barfield v. Nicholson*, 2 Sim. & Stu. 1; but see 2 Wils. Ch. R. 157.

(a) *Agar v. Macklew*, 2 Sim. & Stu. 418; *Booth v. Jackson*, 6 Ves. 815,

818; *Milnes v. Carey*, 14 Ves. 270; *Street v. Rigby*, id.; *Gourlay v. Somerset*, 19 Ves. 431, 1 Wils. Ch. Pr. 31; *Wellington v. Mackintosh*, 3 Atk. 569; *Tattersal v. Groote*, 2 Bos. & P. 135; Sug. V. & P. 8 ed. 253, 254; 1 Mad. Ch. Pr. 404; Redesd. Tr. Pl. 214.

(b) *Blundell v. Bretlarch*, 17 Ves. 241; and see as to valuations, ante, 828 to 831; 1 Mad. Ch. Pr. 426.

(c) *Ante*, 830.

(d) *Tattersal v. Groote*, 2 Bos. & Pul. 135; but see *Mitchell v. Harris*, 2 Ves. J. 129.

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of court to the contrary), it is obvious that it would be as futile to decree a reference and appointment of arbitrators as it would be to decree a partnership determinable at pleasure. (d) However, an agreement to make the submission to reference a rule of court, under the statute 9 & 10 W. 3, c. 15, may be made an order of a Court of Equity, and the Court of Chancery will in that case compel, by proceeding *in personam*, (viz. by attachment,) the specific performance of the award made in pursuance of such a submission, provided the authority of the arbitrator were not revoked before the award was made; (e) or even if it were revoked, yet if the submission and order expressly prohibited such revocation. (e) And a bill lies to compel specific performance of an award when the act to be performed is collateral to the payment of money, or where the party has received the money, in consideration whereof he was awarded to convey. (f) In one case a specific performance of an agreement to grant *a lease* was decreed, rejecting a stipulation that a third person should decide upon the terms, the agency of such third party not being of the essence of the contract. (g) But where one of the terms of a contract of *purchase* was, that the purchaser's counsel should approve of the title, and he did not, a bill for specific performance against him was dismissed with costs. (h) The practice is stated to be, that if one party perform his part of an award, the Court of Chancery may compel the other party to perform his, though the award was not made originally by the direction of that court, (i) and that it is clear that a bill will lie for the specific performance of an award; (k) and this, although the award be unreasonable, because the arbitrator was a judge of the party's own choosing, and the award is considered as ascertaining the terms of a previous agreement. But although if the award direct any thing to be done respecting *lands*, the court will decree a specific performance, it will not execute an award for the mere payment of money. (l)

Secondly, Contracts relating to Personal Property.

It has been supposed, though incorrectly, to be a general rule, that *contracts* relating to the *sale* of *Personal Property* will not be specifically *enforced*, and that the party, whether vendor or

(d) *Ante*, 850, (g).

(e) *Hall v. Hurdy*, 3 P. W. 187; *Speltigue v. Carpenter*, Id. 362; 2 Vern. 444; Com. Dig. Chancery, 2 K. 2; *Nichols v. Chalie*, 14 Ves. 265.

(f) *Hall v. Hurdy*, 3 P. W. 187, 190, 1 Mad. Ch. Pr. 426.

(g) *Gourlay v. Somerset*, 19 Ves. 129, *ante*, 831, note (g).

(h) *Williams v. Edwards*, 2 Simons, 78, and see *ante*, 829.

(i) *Bishop v. Bishop*, 1 Chan. Rep. 142; *Marquis of Ormond v. Kynnersley*, 3 Sim. & Stu. 15.

(k) *Wood v. Griffiths*, 1 Swanst. 45; 1 Wils. Ch. C. 44, S. C.

(l) 1 Madd. Ch. Pr. 401, and *quere* as to the generality of the latter exception.

purchaser, will be left to his remedy at law for the recovery of damages; (m) but that doctrine (the application of which will presently be fully considered,) is by no means so general, and there is no general rule distinguishing contracts relating to *personalty* from those respecting *realty*; and it now seems to be established that where the breach of any contract would occasion irreparable mischief, such breach, if affirmative, may be prevented by injunction, and if negative, by bill and decree of specific performance; (n) and it should further seem, that although where the damages which a party might be able to recover at law must necessarily, from the nature of the case, be commensurate to the injury sustained, a Court of Equity will not interfere; (o) yet specific execution of agreements will be decreed where damages would not answer the intention of the party making the contract, and a specific performance is therefore essential to justice. (p) The true rule has recently been stated and explained by the Vice-Chancellor in *Adderley v. Dixon*, (q) in which specific performance, by payment of a stipulated price, was decreed in a bill filed by the vendor of debts proved under a commission of bankruptcy, and the Vice-Chancellor observed, " Courts of Equity decree the specific performance of contracts, not upon any distinction between Realty and Personalty, but because damages at law may not in the particular case afford a complete remedy. Thus a Court of Equity decrees performance of a contract for land, not because of the *real* nature of the land, but because damages at law, which must be calculated upon the general money-value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a Court of Equity will not generally decree performance of a contract for the sale of *Stock or Goods*, not because of their personal nature, but because damages at law, calculated upon the market-price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as with the damages he may purchase the same quantity of the like stock or goods. In *Taylor v. Neville*, (r) specific performance was decreed of a contract for sale of 800 tons of iron, to be delivered and paid for in a certain number of years, and by instalments; and the

The general principle and rule when specific performance of a contract relating to personalty will be enforced.

(m) See cases ante, 711, 712; Newl. Cont. 90, 91.

(n) *Semble, Weale v. West Middlesex Waterworks Company*, 1 Jac. & W. 370.

(o) *Harnett v. Yielding*, 2 Sch. & Lef. 533.

(p) *Davis v. Howe*, Id. 341.

(q) *Adderley v. Dixon*, 1 Sim. & Stu. 607; and see *Wishy v. Cottle*, Id. 174; 1 Turn. & Russ. 78, S. C.; *Wright v. Bell*, 5 Price, 325; Dan. 95, S. C.

(r) *Taylor v. Neville*, cited in *Buxton v. Lister*, 3 Atk. 383.

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reason given by Lord Hardwicke was, that such sort of contracts differ from those that are immediately to be executed. And they do differ in this respect, that the profit upon the contract being to depend upon future events, cannot be correctly estimated in damages where the calculation must proceed upon conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it at a conjectural price. In *Ball v. Coggs*,^(s) specific performance was decreed in the House of Lords of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred weight of brass wire manufactured by the defendant during the life of the plaintiff. The same principle is to be applied to this case. Damages might be no complete remedy, being to be calculated merely by conjecture, and to compel the plaintiff in such a case to take damages would be to compel him to sell the annual provision during his life for which he had contracted at a conjectural price. In *Buxton v. Lister*, Lord Hardwicke puts the case of a ship carpenter purchasing timber, which was peculiarly convenient to him by reason of its vicinity; and also the case of an owner of land covered with timber, contracting to sell his timber in order to clear his land; and assumes that as in both those cases damages would not, by reason of the special circumstances, be a complete remedy, equity would decree specific performance. The Vice Chancellor then said, "The present case being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that, upon the principle established by the cases of *Ball v. Coggs*, and *Taylor v. Neville*, a Court of Equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends, and to compel this purchaser to take such damages would be to compel him to sell these dividends at a conjectural price. It is true that the present bill is not filed by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to be paid for them. It has however been settled by repeated decisions, that the remedy in equity *must be mutual*; and that where a bill will lie for the purchaser, it will also lie for the vendor."^(t) So it has been laid down as a general rule that specific execution of agreements will be decreed when 'damages would not answer the intention

(s) *Ball v. Coggs*, 1 Bro. P. C. 140.

(t) *Per Vice-Chancellor in Adderley v. Dixon*, 1 Sim. & Stu. 607.

in making the contract, and a specific performance is therefore essential to justice; and that on the other hand equity will not decree specific performance of a covenant, where from circumstances it has become unconscientious strictly to enforce the specific performance, but on the terms of the plaintiff's submitting to a conscientious modification, especially where the conduct of both parties for a great length of time has caused the covenant to be so acted upon as to make it unconscionable to refuse a specific performance. (t) So in the case of partners, before noticed, where the taking a copy of a partnership book was decreed, we may remember the principle there stated by the Vice-Chancellor, upon which a Court of Equity interferes to enforce contracts, viz. that the particular relief prayed cannot be had in a court of law. (u)

We have seen that a Court of Equity will secure and decree the delivery of *particular* kind of chattels, as *heir-looms, family pictures, title deeds, specific bequests* or other property, in which a claimant may have a particular interest; (x) for in an action of trover damages only could be obtained, and not the deeds themselves; and though detinue would restore the deeds themselves, yet a bill in equity, with an immediate injunction pending the suit securing them, and an ultimate decree for their specific delivery, would obviously be a more perfect remedy. (y) And Chancery will decree a specific chattel to be delivered up without measuring the value, when from its nature there can be no compensation by damages. (z) But in an application to the court to stay the disposal of personalty, a specific right to the property must be shown, as well as the danger of loss. (a)

So the specific performance of a covenant to *indemnify* may be decreed, though it sounds only in damages, upon the principle on which bills *quia timet* are entertained; (b) but this is not to be extended to a contract to pay an annuity not secured otherwise than by personal contract, so as to compel the party, who has engaged to pay, to give any collateral security for prospective payments, and to recover which, the party entitled must therefore proceed only at law. (c)

Contracts
strictly of in-
demnity.

(t) *Davis v. Hone*, 2 Scho. & Lef. 341; *Wilby v. Gottle*, 1 Sim. & Stu. 174; 1 Turn. & Russ. 78, S. C.

(u) *Lingen v. Simpson*, 1 Sim. & Stu. 603, ante, 850, 851.

(x) *Ante*, 812, 813, and *Macclesfield v. Davis*, 3 Ves. & B. 16.

(y) *Jackson v. Butler*, 2 Atk. 306; 1

Mad. Ch. Pr. 228.

(z) *Fellis v. Read*, 3 Ves. 70.

(a) *Zimines v. Franco*, Dick. 149.

(b) *Ranclough v. Hayes*, 1 Vern. 189; *Pember v. Mathers*, 1 Bro. C. C. 52.

(c) *Brough v. Oddey*, 1 Russ. & M. 55, 58.

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Contract for
purchase of
goods.

In general a mere contract for the sale and delivery of any kind of goods, the usual and daily subjects of purchases and sales, and which might be readily and as conveniently obtained elsewhere, will not be specifically enforced, because the recovery at law of damages for not accepting or not delivering would in general be adequate compensation; (d) but there are exceptions to that rule, as when the non-delivery would be productive of serious loss, or where the purchaser has paid the price, and is justly entitled to the specific delivery. (e) Thus we have seen that a contract for the purchase of a large quantity of timber standing or lying in a particular place; (f) so an agreement for the purchase of an annuity payable out of the dividends of stock; (g) though not to enforce payment of the arrears of an annuity, the remedy being properly at law, (h) or for the purchase of debts. (i) So where property in a cargo had been transferred by a bill of sale signed by the vendor and vendee, but by a new agreement, signed by them before they parted, it was stipulated, that it should be sold and accounted for by the factor for the vendor, this being reduced to agreement, it was held that the remedy was in equity. (k) So where the vendor of a share of a ship had executed a bill of sale and signed receipt for the purchase money, without its being in fact paid, a Court of Equity will give relief as well as discovery and decree specific payment. (l)

Stock in the
funds.

With respect to a purchase of stock in the funds, the decisions have been contradictory, and one of the cases turned upon the question whether stock was goods and chattels within the statute of frauds. (m) In one of the last cases it was considered to be perfectly settled that equity will not enforce the specific performance of an agreement for a transfer of stock. (n) But it has been recently decided that a bill may be sustained for the specific performance of a contract for the sale of the stock of a foreign government (the Neapolitan stock), the bill praying the specific delivery of certificates relating to such

(d) *Ante*, 711, 712; *Dorson v. Westbrook*, 5 Vin. Ab. 510, pl. 22 & 558; and see observations on that case in *Doloret v. Rothschild*, 1 Sim. & Stu. 598.

(e) *Ante*, 712, notes, (t) & (x), and 853, 854.

(f) *Ante*, 712, n. (t); and see *Clavering v. Clavering*, Mos. 224; Chit. Eq. Dig. 62.

(g) *Withy v. Cattle*, 1 Sim. & Stu. 174; *Jackson v. Lever*, 3 Bro. C. C. 605; *Kenney v. Wexham*, 6 Madd. R. 253.

(h) *Brough v. Oldley*, 1 Russ. & M. 58.

(i) *Adderly v. Dixon*, 1 Sim. & Stu.

608; but see *ante*, 853, 854; *Wright v. Bell*, 5 Price, R. 325.

(k) *Weymouth v. Boyer*, 1 Ves. 416.

(l) *Ryle v. Haggie*, 1 Jac. & W. 234, 240.

(m) *Colt v. Neterville*, 2 P. W. 304; where the judges were equally divided on that point, *Id.* 308.

(n) *Nutbrown v. Thornton*, 10 Ves. 161; *Cud v. Butter*, 1 P. W. 370; *Gardener v. Pullen*, 2 Ves. 394; *Moss v. Armitage*, 13 Ves. 37; *Newl. Contr.* 90, 91; but see *Colt v. Neterville*, 2 P. W. 304, 306.

stock, and which give the *legal title* thereto, and the Vice-Chancellor was of opinion that inasmuch as that bill prayed a *delivery of the certificates*, which would constitute the plaintiff the proprietor of a certain quantity of stock, the bill in equity would hold, because a court of law could not give the property, but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party; and the Vice-Chancellor declared that he also considered that the plaintiff, not being the original holder of scrip, but merely the bearer, might not be able to maintain any action at law upon the contract, and that if he had any title it must be in equity. (o) It will be observed that the principle of this decision, and of the decisions respecting injunctions, (p) will probably justly lead to an extension of the remedy, by enforcing the specific performance of many personal contracts, where the chattel itself might, by proceedings in equity, be secured and delivered to a purchaser, in cases where the vendor may have received part of the purchase money and probably be insolvent. (p)

Contracts for the purchase and assignment of a *chose in action* and delivery of the security may be enforced specifically in equity. (q) So on the behalf of a vendor, specific performance of a contract for the sale of *debts* proved under a commission of bankruptcy, but the amount of the dividends upon which had not been declared, was enforced, viz. by a decree of payment of the agreed price. (r) And an agreement to divide equally whatever should come to either of two or more parties by the will of a third party will be specifically enforced, (s) and even a contract to *bequeath by will*, when founded on consideration, will be *substantially* enforced. (t)

Sales of debts
or choses in
action.

A contract to *grant an annuity* may be specifically decreed, (u) as in favour of a female, whom the covenantor had

(o) *Doloret v. Rothschild*, 1 Sim. & Stu. 590, A. D. 1824; and see *Colt v. Naterville*, 2 P. W. 304. And suppose a vendor of an estate has sold and conveyed the same for £20,000, to be paid by a transfer of stock standing in purchaser's name at a future day, and before that day the purchaser has resold the estate and pocketed the money, and has become insolvent, and about to quit the kingdom, ought not a Court of Equity on bill filed, immediately by injunction to secure the stock, and afterwards decree a specific transfer, &c.?

(p) *Ante*, 711 to 714; *Pousett v. Humphrey*, Id. 712, n. (r); *Smith v. Fromont*, 2 Swanst. 332, 713; *ante*, 853, 854.

(q) *Newl. Cont.* 100, but not for the reason there assigned, that there is no

remedy at law, because it is clear there is; *Wright v. Bell*, Dan. 95; 5 Price's R. 325, S. C.

(r) *Adderley v. Dixon*, 1 Sim. & Stu. 667; *ante*, 853, 854.

(s) *Beckley v. Newland*, 2 P. W. 181; *Wethered v. Wethered*, 2 Simons, 183; *Harwood v. Tooke*, Ib. 192.

(t) *Goilmers v. Bathson*, 1 Vern. 48; *Dufour v. Ferara*, cited 3 Ves. 412, 416; *Walpole v. Lord Orford*, 3 Ves. 402.

(u) *Weild v. Smith*, 14 Ves. 491; *Ball v. Coggs*, 1 Bro. P. C. 146, cited in *Adderley v. Dixon*, 1 Sim. & Stu. 610; *Colas v. Trecothick*, 9 Ves. 248; *Wilby v. Cottle*, 1 Sim. & Stu. 174; *Kenney v. Wexham*, 6 Madd. R. 253; but see *ante*, 855, n. (c).

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Personal con-
tracts to pay
money.

previously seduced. (x) But if the annuity has been already granted, a bill cannot be filed to compel a better prospective security unless agreed to be given, but the party beneficially entitled will be left to the legal remedy for the arrears as they become due. (y)

No suit in equity is, in general, sustainable (excepting in cases of *trusts*) to compel the *specific payment of a sum certain*, or a penalty secured by specialty or other contract, but the remedy is in general only at law. (z) But we have just seen that specific performance by payment may be enforced on a contract to purchase debts. (a) And where a party beneficially interested had entered into a written contract, in the name of a *third* person, although without his knowledge, to sell certain articles to the defendant, and who afterwards refused to pay, and the third person would not allow his name to be used as a plaintiff at law, a bill was sustained against the third person and the defendant, to compel the latter to pay the price. (b) So where a son promised to pay his father's legacies if he would forbear to alter his will, such promise would be enforced in equity. (c)

Good-will of a
trade, &c.

Specific performance will be decreed of an agreement to sell the *good-will* of a trade, when accompanied with the exclusive use of a secret therein; (d) and a contract for the sale of the *lease* of a public-house and the good-will of the trade, licenses, household furniture and stock in trade at a valuation, and which had been made, was also decreed. (e) But it has been consi-

(x) *Annandale v. Harris*, 2 P. W. 432; 1 Bro. P. C. 250.

(y) *Brough v. Oddy*, 1 Russ. & M. 35, 58; ante, 855, (c).

(z) *Hollis v. Carr*, 3 Swan. Rep. 644.

(a) *Adderley v. Dixon*, 1 Sim. & Stu. 607; ante, 853, 854; *Wright v. Bell*, 5 Price, 325; Dan. 95, S. C.

(b) *Fellowes v. Lord Gwyder*, 1 Sim. R. 63; and see *Ryle v. Haggie*, 1 Jac. & W. 234, as to decrees for payment.

(c) *Chamberlain v. Chamberlain*, 2 Freem. 34.

(d) *Bryson v. Whitehead*, 1 Sim. & Stu. 74; and see *Williams v. Williams*, 2 Swans. 253; see other cases, Chit. Eq. Dig. tit. Good-will, 479; and id. Trade, 1284.

(e) *Dakin v. Cope*, 2 Russ. R. 170. By an agreement entered into with executors for the purchase of a leasehold public-house and the good-will and licenses connected with it, the household furniture, stock in trade and other effects upon the premises, were to be taken by the purchaser at a valuation, and possession was to be delivered up to him on the 29th of

September, 1821. The valuation was made, but on the 29th of September, the purchaser alleging that there was a defect in the title to the leasehold, refused to perform his contract, the executors filed a bill for specific performance, but in the mean time remained in possession of the house and carried on the business; and it was held, that though the executors were entitled to a decree for specific performance, and though the purchaser had done wrong in refusing to perform the contract, he could not be made answerable for the trade which had been carried on in the premises since September, 1821; that he could not be compelled to take that portion of the stock in trade on the premises at the time of the decree which was not there at the date of the agreement, but had been substituted for such parts of the old stock as had been consumed in the usual course of the business; that the purchaser ought to be charged with rent, taxes and other out-goings paid by the executors since September, 1821, and with interest on the sums so paid by them; that the purchaser was not entitled to any

dered that a sale of a good-will *merely* without some *real property* could not be enforced in equity; (*f*) and it seems to have been doubted whether when good-will forms the *principal* part of a contract, performance would be decreed, but there was no decision upon that point, the bill having been dismissed on the ground that the purchaser was not ready to pay on the precise day, which in that case was material. (*g*) And contracts of this nature will not, it is said, be enforced without great caution and consideration; (*h*) and a contract to assign the fees of a gaoler together with the profits of a tap-house will not be specifically enforced; (*i*) nor an agreement to purchase the business of an attorney. (*k*)

We have seen that where a party has *agreed*, though verbally, to give a valid security, and by mistake an insufficient security has been executed, invalid at common law, or varying from the intended terms, or invalid in respect of the insufficiency of the stamp, a Court of Equity will compel the execution and delivery of a proper security, according to the original intention of the parties. (*m*) Thus where *A.* agreed to be bound in a bond as surety for *B.*, and signed and sealed the same accordingly; but by the neglect of the clerk *A.*'s name was not inserted, and afterwards the obligee showed the condition and *A.*'s name and seal, and demanded payment of *A.*, and threatened to sue him unless he would give fresh security, which *A.* agreed to do, but afterwards finding the mistake, refused, not being bound by law, a Court of Equity compelled him to give such security. (*n*) So where a scrivener negligently omitted to examine the title of a vendor, and in consequence his client, the purchaser, took a bad title, and thereupon the scrivener agreed to make him satisfaction another way, but afterwards refused, upon bill filed specific performance was decreed. (*o*) And where a vendor retains the title-deeds, and has covenanted for further assurance

Compelling the
executing and
delivery of
securities. (*l*)

occupation rent or other allowance for the use of the house and furniture by the executors during the period that elapsed after the 29th of September, 1821.

(*f*) *Baxter v. Connolly*, 1 Jac. & W. 380; and see *Shackler v. Baker*, 14 Ves. 468; *Crutwell v. Lye*, 17 Ves. 335; *Metwold v. Walbank*, 2 Ves. 238.

(*g*) *Costake v. Till*, 1 Russ. R. 376.

(*h*) *Supra*, note (*f*); *Mitchel v. Reynolds*, 1 P. W. 184; *Harrison v. Gardner*, 2 Mad. R. 198; *Davis v. Mason*, 5 T. R. 118. A contract for the transfer of the good-will of the business of an attorney is good at law, *Bunn v. Guy*, 4 East, 190; *Wylburd v. Stanton*, 4 Esp. R. 179.

(*i*) *Metwold v. Walbank*, 2 Ves. 238; 1 Bro. P. C. 234.

(*k*) *Bozon v. Farlow*, 1 Meriv. 459; 1 Mad. Ch. Pr. 404.

(*l*) *Ante*, 710, 711, improperly there inserted, but which should have been here introduced.

(*m*) *Ante*, 710, 711, where by mistake the rules and decisions were printed, instead of having been more properly introduced in this part.

(*n*) *Crosby v. Middleton*, Prec. Chan. 309; and see *Rawstone v. Parr*, 3 Russ. 424, 539, S. C.

(*o*) *King v. Withers*, Prec. Cha. 19.

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Equity will enforce a contract where the remedy at law would be doubtful.

only, the purchaser may, under that covenant, file a bill to compel him to enter into a covenant for production of the deeds. (p)

Whenever the *legal* right of a purchaser to maintain an *action* for damages in respect of the breach of contract may be doubtful, it seems that sometimes a Court of Equity will on that account, without other reasons, decree specific performance; (q) as where the defendant had agreed to deliver certificates which constituted the legal title to stock; (q) and where by a memorandum the parties agreed to sell and purchase several large parcels of timber standing in a particular place, and the price of which was 3050*l.*, to be paid by instalments extending over six years, and the purchaser to be allowed eight years for disposing of the timber, and it was thereby further stipulated that formal articles and *covenants* should be forthwith drawn, Lord Hardwicke, thinking the remedy at law questionable, decreed specific performance. (r) So where partners have entered into a preliminary agreement stipulating for more formal articles, the execution of the latter will be decreed. (s)

Thirdly. Specific performance of contracts relating to *Realty*.

With respect to *Real Estates*, although in general all questions relating to them must be decided in the country where they are situate, yet a Court of Equity in England will enforce contracts and trusts relating to them, if the party required to perform the act be within the jurisdiction. (t) And we have seen that in equity, even an agreement for settling the boundaries of British plantations may be enforced, (u) and a question concerning the title to the Isle of Man may be collaterally determined in the Court of Chancery. (v)

Covenants or contracts to *repair, build or rebuild* a house or other erection, as they related to *realty*, were *formerly* specifically enforced. (x) But the more recent decisions appear to settle, that a suit for specific performance of any such covenant cannot now be sustained, and that the remedy is properly at law to recover damages, which the plaintiff may then expend in completing or repairing the stipulated buildings, and bills to compel specific performance of such covenants have been dis-

(p) *Fain v. Agres*, 2 Sim. & Stu. 533.

(q) *Deloret v. Rothschild*, 1 Sim. & Stu. 598.

(r) *Burton v. Lester*, 3 Atk. 382; *Pember v. Mathers*, 1 Bro. C. C. 52; *Taylor v. Neville*, cited 3 Atk. 384; per Lord Hardwicke, *Burton v. Lister*, 3 Atk. 385; *Newl. Contr.* 92.

(s) *Ante*, 850.

(t) *Elliot v. Lord Minto*, 6 Mod. 16; *Foster v. Vassall*, 3 Atk. 589; *Gardner v. Fell*, 1 Jac. & W. 27.

(u) *Penn v. Lord Baltimore*, 1 Ves. Sen. 447, *ante*, 821.

(v) *Earl Derby v. Duke of Athol*, 1 Ves. Sen. 202.

(x) See *Year Books*, 8 Edw. 4, 46; 1 Mod. Ch. Pr. 361; but see *Id.* 403, 404.

missed with costs. (y) Nor, as we have seen, will specific performance of the *ordinary* covenants in a *lease* be enforced in equity, (z) and the court refused to decree specific performance of a covenant to make good a gravel pit, (a) though we have seen that when the breach of such a covenant would amount to waste, and be ruinous to the estate, such as pulling down buildings, or digging or ploughing up ancient meadows, contrary to express or implied covenants, such breaches by commission may be restrained by injunction. (b) Equity, however, will execute a covenant in a building lease, that the lessee's erections shall correspond with adjoining houses, pursuant to express covenant. (c) Perhaps it was partly on the ground of waste that a covenant by a lessee of alum works, to *leave* a stock of a certain amount upon the premises, that a decree *quia timet* was in one case made, and which was afterwards affirmed in the House of Lords. (d)

An agreement to invest money in land, (e) and an agreement to settle boundaries, will be specifically enforced, because damages in an action would not in either case effect the object of the grantee. (f)

Contracts for *demising* or *selling* estates are the most frequent subjects of bills for specific performance, and we have noticed, in considering the general rules, most of the cases when or when not performance will be decreed. (g) Where an ancestor, seised in fee, has, by a contract not under seal, (and consequently not at law binding his heir, nor subjecting him to any action at law,) agreed to demise or sell his estate, a bill against the heir to compel specific performance is the best, and unless the ancestor left personal assets, is the only remedy. (h) The sale of an estate under a decree is an exception, for the purchaser then cannot file a bill for specific performance, but must proceed under the decree. (i)

Contracts for a
Lease or Sale of
Real property.

In a case of *sale* (except in the instances where the acceptance of compensation will be enforced) the vendor cannot sue

(y) *Ante*, 714, n. (l); Newl. on Contr. 98 to 95; 3 Woodes. 464, note 2; 1 Mad. Ch. Pr. 404; *Lucas v. Comerford*, 3 Bro. C. C. 167; *Mosely v. Virgin*, 3 Ves. 184; *Pembroke v. Thorpe*, 3 Swanst. Rep. 437, where the cases on this subject are collected; and see observations in *Hodges v. Horsfall*, 1 Russ. & Myl. 124, 125; *Flint v. Brandon*, 8 Ves. 159.

(z) *Rayner v. Stone*, 2 Eden's Rep. 128; 1 Mad. Ch. Pr. 404.

(a) *Flint v. Brandon*, 8 Ves. 159.

(b) *Id. ibid.*; *ante*, 714, n. (h); and

ante, 726, 727.

(c) *Franklyn v. Tuton*, 5 Mad. 469; and see Chit. Eq. Dig. Covenant to build.

(d) *Buckinghamshire v. Ward*, cited 3 Atk. 384; *Nutbrown v. Thornton*, 10 Ves. 164; Newl. Cont. 93; *sed quere*, see *Flint v. Brandon*, 8 Ves. 159.

(e) Newl. Cont. 74, 109.

(f) *Penn v. Lord Baltimore*, 1 Ves. 444.

(g) *Ante*, 820 to 849.

(h) 1 Mad. Ch. Pr. 362.

(i) *Annesley v. Ashurst*, 3 P. W. 282; 1 Mad. Ch. Pr. 404.

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tain a suit for specific performance, unless he be prepared to establish a complete title to the whole of the property agreed to be sold. Therefore where a vendor could only make out a title to convey six-sevenths of the estate sold, a specific performance was refused. (j) But having considered the numerous cases in which Courts of Equity will refuse specific performance, whether on account of the incompetency of the contracting parties, or of the insufficiency of the contract itself, or in respect of fraudulent misrepresentation or concealment, or other numerous circumstances, it would be an unnecessary repetition here to consider the various grounds when or not a contract for a lease or a sale will be enforced. (k)

How in practice specific performance is in effect decreed by granting an injunction.

We have also before suggested the necessity for referring to the practice relative to injunctions, when inquiring whether a specific performance of an act can be enforced. (l) Thus, though a Court of Equity will not order directly the repair of the banks of a canal, and that the defendant do stop the gaps thereof, yet an injunction will be granted restraining the defendant from impeding the plaintiff in his right of navigation, by continuing to keep the bank, &c. out of repair, &c. and by which means the full effect of the refused order was given; (m) and we have stated an instance of an injunction from permitting parts of buildings, erected contrary to an agreement, from remaining, which it is obvious was in effect equal to a direct decree that the defendant should remove the buildings. (n) So where the lessees of a colliery had agreed to grant the lessees of an adjoining colliery the use of a way, an injunction was granted to restrain the removal of materials essential to the enjoyment of such way. (o)

III. The PRACTICE and Proceedings relating to Bills for Specific Performance and Decree, &c.

We shall in the next volume fully consider the practice in filing and proceeding upon bills in equity; but it may be expedient in this part to suggest a few precautionary measures most particularly affecting bills for specific performance.

And, *first*, we will suppose that it is certain that the contract is of a nature to be enforced in equity, and that the complainant, whether vendor or purchaser, has done every thing incumbent on him to perform, and that the other party has either neglected or refused to perform his part. Still, before filing

(j) *Ante*, 297, 839; and *Wheatley v. Spade*, 4 Simon's Rep. 126.

(k) *Ante*, 824 to 852.

(l) *Ante*, 714.

(m) *Lane v. Newdigate*, 10 Ves. 192.

(n) *Ante*, 714, note (i); *Rankin v. Huskisson*, 1 Clark & F. 13.

(o) *Newmarch v. Brandling*, 3 Swans. 99.

any bill, the party complaining should, through his solicitor, cause a courteous letter or notice to be served on the other party, stating the act or omission complained of, and intimating the necessity for legal measures, unless redress be afforded before a named day. We have seen how far the adoption of this preliminary measure may affect the costs, and sometimes even the substance of the remedy. (p) The party still neglecting or refusing to perform his contract, a second application may still be advisable before the actual filing of the bill, the same as in case of a mandamus. (q)

In filing a bill for a specific performance, it seems advisable, where the contract ought, under the statute against frauds, to have been in writing, and signed, to charge in the bill that those requisites had been complied with; but if the bill charge that the contract was in writing, signature will be presumed, and the omission to state the same will be no ground of demurrer; (s) and where fraud or part performance is to be relied upon, each should be particularly stated in the bill; and there may be cases in which it may be judicious to anticipate and refute the supposed defence.

It has been much discussed whether and when a defendant should avail himself of the statute against frauds by way of demurrer, or by answer; and the latter seems preferable, if not absolutely necessary. (t) If the defect and objection appear clear upon the face of the bill, then a demurrer will be proper; but if some extrinsic fact be essential to complete the objection, then the answer must raise it. (u) We have seen that in equity a stipulation or an agreement to pay a fixed sum as damages affords no answer to a bill for specific performance. (v)

In suits for the specific performance of an agreement, if the contract is admitted, and the only question is on the title of the seller, the court will, before the hearing upon motion, direct *a reference to a master to inquire into the title*, (x) although formerly this was not done till the regular hearing of the cause;

(p) *Ante*, 438, 439; and *id.* note (g), 561; and *Clermont v. Tasburgh*, 1 Jac. & W. 116. But see *post*, 868, as to costs of bills for specific performance, and 2 Mad. Ch. Pr. 560, 561, and *id.* 208.

(q) *Ante*, 808.

(r) See the forms of bills for specific performance at instance of vendor or purchaser, 2 Newl. Prac. 29, 31.

(s) *Rist v. Hobson*, 1 Sim. & Stu. 543; *ante*, 117, notes (r) and (s).

(t) *Rist v. Hobson*, 1 Sim. & Stu. 543; but see *Whitchurch v. Bevis*, 2 Bro. C. C.

559; *Redding v. Wilkes*, 3 Bro. C. C. 400.

(u) *Fleming v. St. John*, 2 Sim. & Stu. 181.

(v) *Howard v. Hopkins*, 2 Atk. 371; 1 Mad. Ch. Pr. 44; *ante*, 737. What a penalty, or what stipulated damages, *Davies v. Penton*, 6 Bar. & Cres. 216.

(x) *Moss v. Matthews*, 3 Ves. 279; *Wright v. Bond*, 11 Ves. 39; *Gomperts v. —*, 12 Ves. 17; 1 Newl. Ch. Pr. 204, from which these short observations are principally taken.

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and the case of *Moss v. Matthews* was the first instance in which the court deviated from the ancient practice. This reference has been directed before answer. (y) But reference will not be directed before the hearing where the purchaser resists the performance of the agreement on *other* grounds, as upon the laches of the vendor, (z) or on account of misrepresentation; (a) or where the vendor claims an abatement out of the purchase money; (b) or where the subject of the contract being a life annuity, the defendant also insisted that time was of the essence of the contract. (c) But the *other* matter upon which the defendant resists the performance must be substantial. (d) It seems that this order of reference to the master is, according to strict practice, simply for him to *inquire* whether a good title can be made; and that the inquiry as to *time*, when a good title can be made, if the vendor has such a title, is not directed until it is ascertained by the master's report whether there is a good title or not. (e) But although in strictness it is not regular to make it part of the order to inquire *when* a good title was shown, because if the master be of opinion that no good title was ever shown, that part of the order is nugatory; yet as the condition of those few words in the order of reference will, in case the master finds that a good title can be made, save the delay and expense of a further order and a further report, it is clearly for the interests of both parties that these words should be introduced. (f) If the master reports against the title of the vendor, and he is the plaintiff, it is not necessary to set down the cause in order that the bill may be dismissed with costs, but the court will make such an order upon motion. (g) But when on a reference to the master he reports that a good title to the purchase cannot be made, the vendee may file a bill against the vendor to have the contract delivered up; but it seems that *compensation* will not be granted for the loss sustained by the failure of the contract, though the bill pray, in the alternative, a specific performance, *or* an issue, *or* an inquiry before the master, with a view to damages, (h) that being more properly the subject of an action. (i)

(y) *Balmanno v. Lumley*, 1 Ves. & B. 224; *sed vide* 1 Meriv. 372.

(z) *Blyth v. Edmeston*, 1 Ves. & B. 1.

(a) *Paton v. Rogers*, 1 Ves. & B. 351.

(b) — *v. Skelton*, 1 Ves. & B. 516.

(c) *Wither v. Cottle*, 1 Turn. 78.

(d) *See Botham v. Wood*, 1 Jac. & W. 421; *Wither v. Cottle*, 1 Turn. 78; *Gordon v. Ball*, 1 Sim. & Stu. 178.

(e) *Gibson v. Clarke*, 2 Ves. & B. 105.

(f) *Anon.* 3 Mad. 495; *Hyls v. Wroughton*, Id. 280.

(g) *Walters v. Pyman*, 19 Ves. 331; *Whitcomb v. Foley*, 6 Mad. 3.

(h) *Todd v. Gee*, 17 Ves. 273, which seems to overrule *Greenaway v. Adam*, 12 Ves. 395.

(i) *Gwillin v. Stone*, 14 Ves. 128; 1 Mad. Ch. Pr. 440.

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Although in general a decree in equity is *in personam*, and is enforced in the first instance only by *attachment* for the contempt, yet if the party continue obstinate, and remain in custody for such contempt, the court will effectually exercise the power to grant an order requiring the party to deliver up the possession of the land to the person in whose favour the decree was made, and afterwards a writ of execution of that order must be served upon the defendant, and until that has been done no further order can be made. (j) If there be necessity, a *writ of assistance* will be issued directed to the sheriff, commanding him to be aiding and assisting in putting the party in possession. (k) In other cases, also, a Court of Equity will enforce execution by writ of assistance, as to put sequestrators in possession, and under which they may break locks. (l) We have seen the cases when or not payment of the purchase money will be decreed, subject to compensation, or when the inability to convey the whole will excuse the purchaser from completing the contract in part. (m)

Decree in suit
for Specific
Performance,
and how en-
forced.

Pending a bill for specific performance of a contract of sale or purchase of a real estate, if the purchaser has not been let into possession, the vendor is bound to take care and prevent the deterioration of the estate (except as against fire), (n) especially if the purchaser have been improperly kept out of possession, and the purchaser will upon petition, and after the amount of injury to the estate has been ascertained by the master or a jury, be allowed to deduct the same from the purchase money, and with interest, if the money has been paid into court. (o) We have seen the rights and liability of a purchaser of leasehold property (the lease and good-will of a public house), where he has improperly refused to take possession at the appointed time. (p)

Allowance for
Deteriorations,
&c.

With respect to *interest* upon the *purchase money* of an estate, the general rule seems to be that it must be paid by a purchaser from the time the contract ought to have been completed, (r) unless the purchase money has lain dead, and the purchaser gave the vendor notice of the fact, and the delay be

Interest. (q)

(j) Newl. Contr. 305; *Green v. Green*, 2 Simon's Rep. 430; see the practice as to enforcing a decree to deliver possession of an estate, 2 Mad. Ch. Pr. 469.

(k) 1 Ves. 454; 2 Harrison's Ch. Pr. 109, 5th ed.; Newl. Contr. 315, 316; see fully *Dove v. Dove*, 2 Dick. 617; and *Green v. Green*, 2 Sim. Rep. 394, 430.

(l) 1 Mad. Ch. Pr. 207, 208.

(m) *Ante*, 839 to 844; and see *Eadaile v. Stephenson*, 1 Sim. & Stu. 122.

(n) *Ante*, 845, 846.

(o) *Ferguson v. Tudman*, 1 Simons, 350.

(p) *Ante*, 858, note (e).

(q) See in general Sugd. V. & P. Index, Interest; 2 Madd. Ch. Pr. Index, Interest.

(r) See *Lowther v. Andover*, 1 Bro. C. C. 396; 6 Ves. J. 143, 352; *Eadaile v. Stephenson*, 1 Sim. & Stu. 123.

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occasioned by the vendor. (s) Where the conditions of sale provide that interest shall be paid from a certain day, if the purchase be not then completed, the purchaser cannot then relieve himself from payment of interest by alleging that the delay in completing the contract was caused by the vendor; although it is otherwise where there is no such express stipulation; (t) but where the purchaser, upon entering into possession, paid the amount of his purchase money to his banker, and gave notice that he was ready to invest it in such manner as the vendor should require, and no answer was returned to that notice, and the purchaser, during the investigation of the title, kept in the hands of his banker a balance equal to the amount of the purchase money, except for four days, when it was a little less; the court held the purchaser not to be liable for interest on the difference between his average balance during the period in question, and during the three preceding years. (u) But a purchaser who has not been in possession is bound to pay interest on the purchase money, and take the rents and profits only from the time when a good title was first shown, and not from the time fixed by the agreement for the completion of the purchase. (x) And where a contract of purchase contained a stipulation, that if by reason of any unforeseen or unavoidable obstacles the conveyance could not be perfected for execution before the day fixed for the completion of the purchase, the purchaser should from that day pay interest at 5*l.* per cent. on his purchase money; and be entitled to the rents and profits of the premises, and the vendor did not show a good title till long after the specified day, he was held not to be entitled to interest except from the time when a good title was first shown. (y) So where a purchaser takes possession, and agrees to pay interest, he may rescind the agreement if it appear that a long time must elapse before a title can be made, unless he acquiesce in the delay. (z) Nor is a purchaser bound to pay interest after the conveyance is delivered to the vendor's attorney for execution. (a) Interest on timber runs only from the valuation, because surveyors always value timber according to its present state; and the augmented value in the timber by growth is an equivalent for the interest from the time of the

(s) *Howland v. Morris*, 1 Cox, 59;
Calcraft v. Roebuck, 1 Ves. J. 221;
Powell v. Martyr, 8 Ves. 166.

(t) *Esdaile v. Stephenson*, 1 Sim. & Stu. 122.

(u) *Winter v. Blades*, 2 Sim. & Stu. 393.

(x) *Jones v. Mudd*, 4 Russ. Rep. 118.

(y) *Monk v. Huskinson*, 4 Russ. Rep. 121, in note.

(z) *Fludyer v. Cocker*, 12 Ves. J. 25; Sugd. V. & P. 505, 506.

(a) *Id. ibid.*; Sugd. V. & P. 507.

contract to the making the valuation. (b) And where a leasehold estate is sold, and possession is not delivered to the purchaser, if any delay occurs, as it would not be just to make the purchaser pay the whole purchase money after part of the term has elapsed, without his having derived any benefit from the estate, the court will compel the vendor to pay a rent in respect of his occupation of the estate, and the purchaser to pay interest on the purchase money during the delay. (c) And it has been held that interest must be paid in respect of a sum deposited in the hands of a purchaser to pay off incumbrances. (d) And it should seem that an agreement to pay interest on the purchase money, although signed by the vendor only, will be binding on the purchaser, if the contract of sale have been in part performed. (e)

A purchaser never pays interest on the deposit; (f) and though he may under circumstances recover interest on a deposit paid either to a principal or to an auctioneer, (g) yet he cannot recover interest against the latter unless under peculiar circumstances; (g) and where an auctioneer employed to sell an estate received a deposit from the purchaser, he was considered to be a mere stakeholder, liable to be called upon to pay the money at any time; and that therefore, although he placed the money in the funds and made interest of it, yet he was not liable to pay such interest to the vendor when the purchase was completed, though the vendor, without the concurrence of the vendee, gave notice to invest in government securities. (h) When interest has been recovered against an auctioneer, he may recover it from the vendor if he be not himself in fault. (i) And it has been laid down as a general rule, that where the original contract is void, the purchaser can only recover his deposit in an action for money had and received, and will not be allowed interest. (k)

Interest must be paid by a vendor where he cannot make a title, if the purchase money has lain dead, and he has had notice of that fact. (l)

Where interest is recovered at Law, it is always at the rate Rate of interest.

(b) *Waldron v. Forester*, Exchequer, June 30, 1807; Sugd. V. & P. 507, 508.

(c) *Dyer v. Hargrave*, 10 Ves. J. 505; Sugd. V. & P. 509.

(d) Sugd. V. & P. 511.

(e) *Owen v. Davies*, 1 Ves. 82.

(f) Sugd. V. & P. 511.

(g) *Id. ibid.* 513, 222.

(h) *Harrington v. Hoggart*, 1 B. & Adolp. 577; and see other cases, Sugd. V. & P. 512.

(i) *Spurrier v. Elderton*, 5 Esp. Ca. 1.

(k) *Walker v. Constable*, 1 Bos. & Pull. 306; *Tuppenden v. Randall*, 2 Bos. & Pull. 472, *sed qu.*; and see Sugd. V. & P. 224.

(l) Sugd. V. & P. 513, 514.

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of 5*l.* per cent., but in Equity the rate of interest is 4*l.* per cent. (m) And the same rate of interest seems payable whether the estate be sold by private agreement or by a Master under a decree of a Court of Equity. But it has been held that an agreement by a purchaser to pay a rent exceeding legal interest is not usurious. (n)

When Compensation to Purchaser.

Compensation, we have just seen, will not be granted in equity to a purchaser for any loss sustained by the bargain, in consequence of the vendor not being able to perfect a title, the remedy, if any, being at law; (o) and at law, in the absence of fraud, the general rule is, that only nominal damages shall be recoverable by a disappointed purchaser, together with his deposit and interest and expenses of investigating the title, and not actual considerable damages for not making out a perfect title. (p) But that doctrine has recently received qualification, and if a party expose to sale, knowing that he has no title, or that he has only an equitable or imperfect title, he may then at law have a verdict against him for considerable damages, at least to make remuneration for trouble and vexation, besides interest and expenses, if not for the loss of the bargain. (q)

Costs when and how recoverable.

The costs incident to a bill for specific performance of a contract vary as well according to the result of the suit as the degree of readiness to clear up the title or perform the contract on each side, but these will be considered in the next volume. (r)

Bill to compel an Account. (s)

Whenever an agent or other party has *expressly* or *impliedly agreed* to account for monies received for the use of another, after his refusal to do so, we have seen that he may by bill filed be compelled, this is in the nature of a bill for specific performance; (t) and if an agent do not render his account within a reasonable time, he must bear the costs of a suit instituted to have the account taken; and it will not be any excuse for him that he offered to pay on account a gross sum, which turns out would have covered all that was due from him, for the principal has a right to have all the particulars of the account with vouchers

(m) Sugd. V. & P. 516, note 7.

(n) *Spurrier v. Mayo*, 1 Ves. J. 527.

(o) *Ante*, 865; 1 Madd. Ch. Pr. 440.

(p) *Flureau v. Thornhill*, 2 Bla. Rep. 1078; and see *Johnson v. Johnson*, 3 Bos. & Pul. 167; *Brig's case*, Palm. 364; *Bratt v. Ellis* and *Jones v. Dyke*, Sug. V. & P. Appendix, No. 7 and 8; *ante*, 864, notes (h), (i).

(q) *Hopkins v. Greystock*, 6 Ear. and Cres. 31; 9 Dowl. & R. 22 S. C.; Sug. V. & P. 8 ed. 222, 223.

(r) 2 Madd. Ch. Pr. 560, 561, 562, 208.

(s) See several cases 3 Bla. Com. 426, c.; Chit. Eq. Dig. Account; and 1 Madd. Ch. Pr. 85.

(t) *Ante*, 439, note (g), 509.

for alleged payments. (u) It lies generally where there have been mutual demands, and principally against factors and agents, (x) and who must account, although the so doing might subject them to penalties. (y) So this bill is sustainable upon dealings between tradesmen and their customers, or landlords and tenants, and by an heir, who has not possession of title deeds, in relation to the produce of mines; or where timber has been cut; and the delivery of an account, even of legal waste, within six years, takes all prior items out of the statute of limitations. (z) It lies to account for the rents and profits of lands when under an elegit, or for arrears of a rent charge, or mesne profits, or shares in waterworks, and between partners, (a) but then in general a dissolution should also be prayed; (b) or in relation to tithes, waiving penalties; (c) and between mortgagor and mortgagee; (d) and in relation to a wife's separate estate or pin-money. (e) And although at law, on account of the rule *actio personalis moritur cum persona*, no action can be sustained against the executor of a tenant for life, for waste, unless perhaps when the latter or the executors have received the price of the trees cut down and sold, (f) yet a bill for an account of waste and trees cut by a tenant for life may be sustained by the remainder-man against such executors. (g)

We have seen that the adjustment of an account at law is frequently attended with difficulties, (h) and between partners it can only be effected in equity, unless a balance has been admitted, or there has been an express covenant; (i) and although between joint-tenants and tenants in common an action of account at law is sustainable, yet a Court of Equity has a more perfect jurisdiction, by compelling discovery on oath, and avoiding the difficulty and delay where the account comes before auditors in an action of account; (k) but after

(u) *Collyer v. Dudley*, 1 Turn. & R. 421.

(x) *Ante*, 439; *Green v. Weaver*, 1 Simon's R. 404, 424; 1 Madd. Ch. Pr. 88.

(y) *Green v. Weaver*, 1 Simon's R. 404, 424.

(z) *Hony v. Hony*, 1 Sim. & Stu. 568.

(a) 1 Madd. Ch. Pr. 87 to 93.

(b) *Semble, Loscombe v. Russell*, 1 Clark & Fin. 8; but when otherwise, *Harrison v. Armitage*, 4 Madd. 143; *Knowles v. Haughton*, 11 Ves. 168; *Const v. Harris*, 1 Turn. & R. 496 to 529; *ante*, 851.

(c) 1 Madd. Ch. Pr. 103.

(d) *Id. ibid.* 536.

(e) *Id. ibid.* 489, 490, 586.

(f) *Utterton v. Vernon*, 3 T. R. 549;

Hambly v. Trott, Cowp. 373, 374; *Burnett v. Kensington*, 7 T. R. 216; 1 Saund. 216, a.

(g) *Lansdown v. Lansdown*, 1 Madd. R. 146; 1 Jac. & W. 522, S. C.; *Marquis of Ormonde v. Kynersley*, 5 Madd. 369; 1 Chit. Eq. Dig. tit. Account, 395; *Id. tit. Waste*.

(h) *Ante*, 21, 22.

(i) *Smith v. Barrow*, 2 T. R. 478; *Fromont v. Coupland*, 2 Bing. 176; *Coffee v. Brian*, 3 Bl. g. 55; *Boville v. Hammond*, 6 Bar. & Cres. 149; *Rackstraw v. Imber*, Holt's C. N. P. 368.

(k) 1 Madd. Ch. Pr. 85; *Smith v. Smith*, 2 Chitty, R. 10; 3 Dowl. & R. 595, S. C.

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a decree to account, a party is not allowed to bring an action at law on the same subject. (*l*) On such a bill the *defendant* is to be allowed on his own oath all payments under 40*s.*, but then he must mention in his affidavit to whom, when, and for what he paid, (*m*) and the whole so allowed must not exceed 100*l.*, (*n*) and the plaintiff will not be allowed any thing upon his oath. (*o*) If an account be sought by bill, and a balance should be reported due to the *defendant*, he may enforce payment under the decree, (*p*) and both parties are so far considered actors, that either may revive. (*q*) If the *right* at law be doubtful, an issue is directed, and if the right be established the account follows; (*r*) and in general, where the party cannot recover at law, a bill for an account is not sustainable. (*s*) But the issue directed to be tried should be upon a question of right, and not to investigate the items of the account; and in one instance, where there had been several deaths and changes in the representatives of deceased parties, and an intricate account of several years' standing, an issue having been directed from the Rolls to the Court of Common Pleas to try how much had been paid and received, and how much remained due, the Chief Justice refused to try the cause, and the amount was afterwards taken in a Master's office.

Other Specific
Reliefs, as pay-
ments, sales, &c.

In aid of proceedings at law, a Court of Equity can also afford specific remedy, as *payment* of a judgment. Thus a judgment creditor may file a bill against the owner and receiver of an estate, and without making other incumbrancers parties, to have his debt satisfied out of the *surplus rents*. (*t*) So that a judgment creditor, although he may not be able by *elegit* to obtain direct and legal possession or receipt of a moiety of the rents of an estate, may by this means secure the due application of the surplus rents after satisfying prior incumbrancers, and to prevent the owner of the estate from receiving such surplus, and this without paying off the incumbrances, which was necessary according to the previous practice. (*u*)

Where *perishable* commodities, such as rents in poultry or produce of a farm, have been taken under a sequestration, the court will, on motion, of which notice must be given, order the

(*l*) *Bell v. O'Reilly*, 2 Schö. & Lef. 430.

(*m*) 1 Vern. 283.

(*n*) *Id.* *ibid.* 270; 2 Vern. 283.

(*o*) *Id.* *ibid.*

(*p*) *Bodkin v. Clancey*, 1 Ball & B. 217; 1 Mad. Ch. Pr. 86.

(*q*) *Done's case*, 1 P. W. 263; *Hollings-*

head's case, *Id.* 743; Pr. Ch. 197.

(*r*) *Milbourn v. Fisher*, 5 Ves. 685.

(*s*) *The Corporation of Carlisle v. Wilson*, 13 Ves. 278; 1 Madd. Ch. Pr. 86.

(*t*) *Lewis v. Lord Zouch*, 2 Simons, 388.

(*u*) *Id.* *ibid.*; see the proceedings before this decision, Tidd, 9th edit. 1036.

same to be sold. (x) And it should seem that such a power of sale ought to be extended to *liens*, at least upon *perishable* commodities. (y)

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There have been instances in which the Court of Chancery has decreed the *payment* of money to be levied by a *parish rate*; but in other cases the court has refused to entertain such a jurisdiction. (x)

As Courts of Equity will *enforce* specific performance of some contracts, so on the other they will *prevent the specific enforcement* of some contracts and rights at law, and compel the party who seeks to enforce the same to be content with the performance or delivery of the thing really intended to be performed, as in case of bonds in penalties conditioned for the performance of some other act. (b) But where the sum named is not a penalty but in the nature of *stipulated damages*, as 5*l.* per acre increased rent for ploughing ancient meadow, it will be otherwise, for then equity will not relieve against the payment; (c) and the same rule prevails at law, for such stipulations are then considered as really intended to be performed. (d) Courts of law, even in violence to the terms of a contract, will even frequently construe a sum expressly described as stipulated damages to be only a penalty. (e) We have seen what clauses of forfeiture in leases Courts of Equity will or not relieve against. (f) Other instances are also collected in a valuable work to which we have frequently had occasion to refer. (g) And in one case an order was made specifically to restore to a tenant farming stock on a farm, seized by the landlord under a distress and bill of sale, the landlord not distinctly stating whether the sum below which, by the terms of the contract, he was not to enforce his remedies by distress or seizure, was due. (h)

Suits to prevent
the specific en-
forcement of
penalties, or
forfeitures, or
legal rights. (a)

(x) *Mitchel v. Draper*, 9 Ves. 208; see *contra*, *Willocks v. Willocks*, Ambl. 421.

(y) *Sed quare*, see *ante*, 491 to 493.

(z) See cases referred to in note to *Ex parte Fowler*, 1 Jac. & Walk. 73, 74; see further; Chit. Eq. Dig. tit. Parish, 737; see *Mandamus rate*, *ante*, 803, 804.

(a) See in general, 3 Bla. C. 426, b., in notes.

(b) Newl. Contr. 307 to 313; 3 Chit. Bla. Com. 427, b., in notes.

(c) *Woodward v. Gyles*, 2 Vern. 119;

Rolfe v. Paterson, 2 Bro. P. C. 426; Newl. Contr. 313.

(d) *Farrant v. Olmius*, 8 Bar. & Ald. 692; Holt's C. N. P. 46.

(e) *Davies v. Penton*, 6 Bar. & Cres. 216.

(f) *Ante*, 288 to 291; see *Hill v. Barclay*, 16 Ves. 402; *Bracebridge v. Buckley*, 2 Price, 200; 3 Chit. Bla. C. 427, b., notes. See in general Chit. Eq. Dig. Covenant, VIII.

(g) Newl. Contr. 316 to 327.

(h) *Nutbrown v. Thornton*, 10 Ves. 159.

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Of the recovery
of Penalties or
Compensation
in Damages in
general.

We have thus endeavoured to collect the rules which should govern the conduct of parties in *Preventing or Removing Injuries*, or *Enforcing Specific Relief or Performance*, whether by their own acts, or by the assistance of legal officers, or by proceedings at Law or in Equity. We might, perhaps, here with propriety add a Chapter upon the subject of *Compensation in Damages*, and state when the payment of *Penalties* or *Stipulated Damages* may be enforced; but it may suffice to observe, that in general, since the statutes upon the subject, (*i*), *penalties*, whether at law or in equity, are merely nominal, and stand as a security only for what is justly due or recoverable; and in equity they are not even the limit of the sum to be paid, for interest may, under circumstances, be recoverable beyond the penalty. And at law the courts so strongly incline against penalties, that although a sum be named in a written contract (when not under seal) and be declared by the parties to be *stipulated damages* and to be paid as such, yet the courts will treat the same as a penalty, and prevent the party, who may have stipulated to receive the same, from recovering more than the real damages he has sustained by the breach of the contract. (*k*) In these cases, at law as well as in equity, the courts hold that all the parts of the instrument must be looked at, in order to ascertain whether it ought not to be held to have been the intention of the parties (contrary even to their *express* words) that the sum named should be a penalty or liquidated damages, and that where the sum which is to be a security for the performance of an agreement to do several acts, would, in case of breaches of the agreement, be in some instances too large and in others too small a compensation for the injury thereby occasioned, then that sum is to be considered *a penalty*. (*l*) But we will more fully consider penalties and damages in that chapter of the next volume which relates to the *Verdict of the Jury*. We have therefore now disposed of the rules relating to the substance of the Remedies, and in the next volume shall consider the *practical* modes of conducting the different remedies to enforce specific relief, or performance, or compensation.

(i) 8 & 9 Wm. 3, c. 11, s. 8, as to Penalties in general; 4 & 5 Anne, c. 16, as to bail bonds; 11 Geo. 2, c. 19, as to replevin bonds.

(k) *Davies v. Penton*, 6 Bar. & Cres. 216; *Kemble v. Farren*, 6 Bing. 141; Chit. jun. on Contracts, 336. See form of a penalty clause and stipulated damage clauses in 4 Chitty's Commercial Law and notes 2 and 3; and see 3 Id. 627; *Reilly v. Jones*, 8 Moore, 244; 1 Bing. 302,

S. C.; *Edwards v. Williams*, 5 Taunt. 247.

(l) In some of the cases at Nisi Prius it must be confessed that the judges have gone very far to reform and vary the apparent contract, and to decide as if the parties were incompetent to contract for themselves, and that therefore each judge ought to make a better contract for them, though certainly the rule at law and equity has always been stated to be otherwise, ante, 118 to 127.

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N. B. The Vice-Chancellor's decision in *King v. Turner*, referred to *ante*, 365, was, on 22d May 1833, overruled by the Chancellor, who agreed with K. B. in *Right v. Banks*, 3 Bar. & Adol. 664.

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